

BEHAVIOR AND STUDENTS WITH DISABILITIES

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WHAT IS A FUNCTIONAL BEHAVIORAL ASSESSMENT (“FBA”)?

- Not defined under federal law.
- Required if the IEPT determines the student’s behavior is a manifestation of his disability and a FBA has not already been conducted on the targeted behavior. 34 CFR §300.530.

WHEN SHOULD WE CONDUCT FBA?

- When needed for IEP development, “to determine behavioral antecedents, what happens after the problem behavior occurs, the effectiveness of strategies and reinforcers used over the past year, and the function of the problem behavior.”
 - *Northside ISD*, Dkt. No. 245-SE-0606 (TX SEA 2007)

WHEN IS A FBA NOT REQUIRED?

- K.L. v. New York City Dep't of Educ. 59 IDELR 190 (S.D.N.Y. 2012)
 - Failure to conduct a FBA not a denial of FAPE due to successful management of student's behaviors by providing 1:1 support, creating IEP goals to manage anxiety of autistic student.
 - IEP team did not conduct a FBA because it believed it had a "relatively solid understanding of the functions of K.L.'s behavior."
- Include a statement of functional present levels of performance in the IEP, regardless of FBA.

BEHAVIOR INTERVENTION PLAN (“BIP”)

- When developing the IEP, the “IEP team must in the case of a child whose behavior impedes the child’s learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies that address that behavior.”
 - 34 C.F.R. § 300.324.
- If conduct is a manifestation of the child’s disability, the IEP team must “implement a behavior intervention plan for the child.”
 - 34 C.F.R. § 300.530.

WHEN IS A BIP NOT REQUIRED?

- *Red Clay Cons. Sch. Dist. v. T.S.*, 59 IDELR 287 (D. Del. 2012)
 - Down Syndrome student who was easily distractible.
 - Teachers testified that the student was distracted at times, but that redirection and use of positive behavioral supports were effective in getting the student back on track.
 - Court gave deference to the school teachers and administrators, noting the behavior was not ignored, but a variety of informal behavioral techniques kept student on task.

WHEN IS A BIP REQUIRED?

- *R.K. v. New York City Dept. of Educ.*, 56 IDELR 212 (E.D. NY 2011)
 - Student with autism.
 - School psychologist argued that a BIP was not necessary because the student's behaviors were typical of students with autism.
 - Court rejected this argument and noted that proper inquiry is whether the behaviors interfere with learning.
- Tip: Beware of statements in IEP meetings that a BIP is not required because a behavior “is just part of a disability” or “we do that in the classroom anyway.”

WHAT ARE THE REQUIREMENTS OF A BIP?

- No substantive requirements.
- *Alex R. v. Forrestville Valley Comm. Unit Sch. Dist.* 375 F.3d 603, 615 (7th Cir. 2004)
 - “Although we may interpret a statute and its implementing regulations, we may not create out of whole cloth substantive provisions for the behavioral intervention plan....In short, the District’s behavioral intervention plan could not have fallen short of substantive requirements that do not exist, and so we conclude as a matter of law that it was not substantively invalid under the IDEA.”

WHAT ABOUT SEXUALIZED CONDUCT?

- *D.S. v. DOE, Hawaii*, 62 IDELR 112 (D.C. Ha. 2013)
 - Court ruled that a school district denied FAPE by failing to address serious sexualized behaviors that were impeding learning, despite having adequate notice of the behaviors.
 - “Although the PLEPs mention that there are some ‘newer behaviors,’ the IEP does not actually describe those behaviors nor does it provide any goal or objective to address these behaviors. In short, the DOE was on notice that Student was displaying some very troubling sexualized behaviors...It was not objectively reasonable to disregard this information.”

BIP AND SCOC

- The creation of a BIP does not mean that the Student Code of Conduct does not apply.
- *Garmany v. District of Columbia* 61 IDELR 15 (Dist. Ct. D.C. 2013)
 - Student's BIP provided that when student misbehaved, he must attend resource classroom, explain his infraction and note why restitution is important.
 - Parent argued that since the BIP didn't include ISS as a discipline consequence, it was forbidden.
 - Court ruled that ISS is not precluded simply because it was not listed as a consequence on the BIP.

USEFUL WORDS

- “This student is subject to the Student Code of Conduct. The BIP is designed to aid the student in complying with the Code of Conduct. Violations of the Code of Conduct may be addressed by teachers and administrators imposing consequences authorized by the Code of Conduct in the same manner as would be imposed on non-disabled students, provided that an IEP Team meeting must be held in connection with any change of placement.”

BIP TIPS

- Make sure your strategies match with specific behaviors.
- Keep the function of the behavior in mind when developing a BIP.
- Prioritize behaviors, instead of addressing every behavior at once.
- Consider whether an instructional component is needed to address the interfering behaviors.
- Remember to revise the BIP if behaviors continue.
- Ensure teachers are trained to implement the BIP.

WHAT ABOUT BEHAVIOR GOALS?

- “The IDEA does not require an IEP to have specific behavior goals.” Instead, the court noted the legal requirement to consider positive behavioral interventions, supports, and strategies.
 - *Clark v. Special Sch. Dist. of St. Louis*, 58 IDELR 126 (E.D. Mo. 2012)
- Practical Tip: The more severe the intervening behaviors, the more likely behavior goals will become important in measuring progress.

DOES THE CHILD'S BEHAVIOR IMPEDE LEARNING?

- If so, IEP Teams must consider behavioral interventions, supports and strategies to address the behavior.
 - Notice: does not matter if a manifestation of disability.
 - Notice: might be impeding the child's learning; might be impeding others.
 - Notice: "impeding": "retard, obstruct, hinder."

BEHAVIOR THAT IMPEDES LEARNING

- IEPTs should ask: does the behavior impede learning?
 - If YES, then IEPT MUST consider interventions, etc.
- Then ask: are these interventions “necessary to provide FAPE”?
 - If so, include them in the IEP.

ABOUT YOUR AUTHORITY....

- “The Department strongly supports child and school safety, and this letter is not intended to limit the appropriate use of disciplinary removals that are necessary to protect children.”
- But the letter seeks to help “educators actively prevent the need for short-term disciplinary removals....”

THIS IS NOT JUST FOR KIDS WITH AN EMOTIONAL DISTURBANCE

- “This requirement applies to all IEP Teams, regardless of the child’s specific disability....”
- So it’s not just about kids with an emotional disturbance, autism or ADHD.
- ALL kids with IEPs.

DOCUMENTATION

- “We are issuing this guidance to clarify that the failure to consider and provide for needed behavioral supports through the IEP process is likely to result in a child not receiving a meaningful educational benefit or FAPE.”
- Schools should be considering “evidence-based behavioral supports in IEPs.”
- Do IEPT documents reflect your “consideration”?

RESEARCH

- “Research shows that school-wide, small group, and individual behavioral supports that use proactive and preventative approaches, address the underlying cause of behavior, and reinforce positive behaviors are associated with increases in academic engagement, academic achievement, and fewer suspensions and dropouts.”

LET'S BREAK THIS DOWN

- Behavioral supports should be supported by evidence, and can come in three categories:
 - ❖ Special education and related services;
 - ❖ Supplementary aids and services;
 - ❖ Program modifications and supports for school personnel.

SPECIAL EDUCATION AND RELATED SERVICES: EXAMPLES

- Instruction and reinforcement of expectations;
- Violence prevention programs;
- Anger management groups;
- Counseling;
- Life skills training;
- Social skills training.

SUPPLEMENTARY AIDS AND SERVICES

- These are used to keep a student in the LRE.
- Therefore, prior to a proposed move to a MRE there should always be evidence of the consideration and use of “aids and services” designed to keep the student in the LRE.

PROGRAM MODIFICATIONS

- These are aimed at the educators, but for the benefit of the student.
- “School personnel may need training, coaching, and tools to appropriately address the behavioral needs of a particular child.”

GET THESE PUBLICATIONS

- <https://www.osepideastthatwork.org/evidencebasedclassroomstrategies>.
- <http://www.pbis.org/blueprint/implementation-blueprint>.
- <http://www2.ed.gov/policy/gen/guid/school-discipline/fedefforts.html#guidance>.
- All can be found at www.ed.gov/rethinkdiscipline and <http://ccrs.osepideastthatwork.org>.

WARNING SIGNS

- No evidence of “consideration.”
- Parent asked for IEP Team Meeting. No meeting. Or parent raised concerns during meeting. No follow up.
- No supports in the IEP when IEPT determines they are needed.
- Supports are in the IEP but are not working.
- Supports are in the IEP but not implemented.
- We implement inappropriate “supports” that are not in the IEP.

ABOUT SUSPENSIONS

- Research shows that suspensions don't work. They do not reduce or eliminate recurrence of the behavior. In fact, they produce “unintended and undesirable results.”
- Reminder: you have the authority to suspend; but use of this tool may indicate a need to consider behavioral interventions.

ABOUT THOSE FAPE-FREE DAYS

- DOE frowns on references to the 10-days as “free days.”
- “This characterization may discourage school personnel from considering whether behavioral supports are needed to address or improve patterns of behavior that impede learning before, during, or after short-term disciplinary removals...”
- So you have the 10 days: but don’t lose sight of the Big Picture. How is the student doing?

PRACTICES THAT ARE “EXCLUSIONARY”

- A pattern of office referrals, extended time excluded from instruction, or extended restrictions in privileges;
- Sending a student home on “administrative leave” or “a day off;”
- Repeatedly conditioning the child’s return to school on a risk assessment, or psych eval;
- Regularly shortening the day.

WHAT ABOUT YOUR SRO?

- “We have deliberately omitted from this list of examples any reference to law enforcement authorities due to our recommendation to schools, described in the Department’s *Guiding Principles: A Resource Guide for Improving School Climate and Discipline* that school resource officers not be involved in routine disciplinary matters.”

WHAT COMES THROUGH LOUD AND CLEAR

- Suspensions don't work. Use them for safety purposes only and only if necessary.
- Use “evidence based practices.”
- Have a school-wide approach.
- ALWAYS consider if behavior is impeding learning; and if it is, do something positive about it.

THE LETTER

- It's a "Dear Colleague" dated August 1, 2016.
- Should be considered "Significant Guidance."
- This means that the letter "is non-binding and does not create or impose new legal requirements."



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