FUNCTIONAL BEHAVIORAL ASSESSMENTS AND BEHAVIOR INTERVENTION PLANS - WHERE ARE WE?  REVIEW OF THE LAW AND RECENT CASES.

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“Sometimes the questions are complicated and the answers are simple.”

Dr. Seuss

INTRODUCTION

While it is the job of educators to call upon students to answer questions to facilitate their students’ academic and social and emotional growth and to gauge their grasp of the content presented to them, in the area of positive behavior support for students with disabilities, educators and other Individualized Education Program (IEP) team and Multidisciplinary Team (MDT) members are called upon to answer questions in order evaluate the degree behavioral problems influence each student’s ability to learn and to provide the necessary support for the student to develop more appropriate behavioral responses.¹ This question and answer process occurs within the intertwined mechanisms of functional behavior assessments (FBAs) and behavior intervention plans (BIPs). A study of recent cases and commentary reveals that FBAs and BIPs are intended to address a wide range of behaviors— from aggressive and externalizing behaviors to internalizing and/or isolating and/or school and task avoidance behaviors, etc. It is essential to address such a wide range of student behaviors because such challenges in school are “associated at least in part with lower academic achievement and reduced participation in positive post-school experiences such as employment, secondary education and independent living.”² As Cannon, Gregory and Waterstone affirm in an article which particularly highlights special education in urban schools:

. . . [E]vidence shows that these students are also more likely to be suspended or expelled than their classmates. A combination of lower achievement and frequent disciplinary removals sets the stage for these students to drop out of school at rates that are significantly higher than the general student population. Both during school and after they leave, these students are at increased risk for involvement with the juvenile justice system. For those students with the most severe social, emotional and behavioral problems, studies show that admission to inpatient psychiatric hospitals and other institutional settings is also alarmingly common. The picture painted by these poor outcomes is not a subtle one, but it is incomplete. While a look at the relevant social scientific studies is enough to

¹ 20 U.S.C. § 1414, 14(d)(2)(B) “...in the case of a child whose behavior impedes his or her learning or that of others, to consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior.”

² SPECIAL EDUCATION IN URBAN SCHOOLS: IDEAS FOR A CHANGING LANDSCAPE: ARTICLE: A SOLUTION HIDING IN PLAIN SIGHT: SPECIAL EDUCATION AND BETTER OUTCOMES FOR STUDENTS WITH SOCIAL, EMOTIONAL, AND BEHAVIORAL CHALLENGES , 41 Fordham Urb. L.J. 403, 407-408
establish that there is a problem, the much more difficult task is figuring out exactly how and why things are going awry for these particular students.³

Given the wide range of student behaviors that IEP teams face and the importance of addressing the student behavioral challenges, more tools and ongoing training opportunities should be made available to educators and school personnel to equip them to define and answer the very questions -- the “how and the why” -- that will lead to individualized strategies to reduce or eliminate conditions that encourage problem behaviors and to create conditions that encourage positive behaviors in hopes to further improved educational outcomes and ultimately future success for students.⁴

DEFINING FBAs and BIPs

A Functional Behavioral Assessment (FBA) is an established method to evaluate problem behaviors and ascertain the extent a behavior relates to the child's disability, why the child engages in the disruptive behavior, and how the behavior influences the child's ability to learn or impedes the learning of others. More specifically, an FBA “is a systematic process of identifying the purpose--and more specifically the function--of problem behaviors by investigating the preexisting environmental factors that have served the purpose of these behaviors”.⁵

Outcomes of an FBA provide professionals with information about the child's behavior to then design a behavioral intervention plan (BIP) to potentially encourage the child to acquire behaviors that are more appropriate; hence, facilitating the child’s ability to engage in the learning process. Based upon the “foundation provided by an FBA, a BIP is a concrete plan of action for reducing problem behaviors.”⁶ Completing an FBA can occur within the multi-factored evaluation at the time of an initial placement decision, or when misconduct occurs to determine whether a student's current program is appropriate, or when the IEP team determines that an FBA might otherwise be appropriate.⁷ Whenever completed, it is generally established in

³ Id.
⁵ Case Law for Functional Behavior Assessments and Behavior Intervention Plans: An Empirical Analysis, 35 Seattle U. L. Rev. 175, 175
⁶ Id.
educational circles and via some state level regulatory and administrative guidance that each BIP should be preceded by an FBA. Commentators have noted that “the positive behavior support focus on environmental conditions has led to nearly universal acceptance of the FBA process and the development of protocols for conducting FBAs.”

In the case of a disciplinary change of placement if the local educational agency did not conduct an FBA and implement a behavioral intervention plan for such child before the behavior resulted in the [disciplinary action]...the agency shall convene an IEP meeting to develop an assessment plan to address that behavior.” Completion of the FBA and BIP must occur no later than 10 days following disciplinary action. However, the Department of Education notes that an FBA may not be required if a child with a disability is removed from his or her placement for 10 school days or less and no further disciplinary action is contemplated. 

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8 For instance, New York state regulations go beyond this floor set by the IDEA; they require a school district to conduct a full functional behavioral assessment (FBA) for a student who exhibits behavior that impedes learning, and to develop a behavior intervention plan to address that behavior. Although the failure to conduct an adequate FBA is a serious procedural violation, it does not rise to the level of a denial of a free appropriate public education if the individualized education program adequately identifies the problem behavior and prescribes ways to manage it. See T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 150 (2d Cir. N.Y. 2014)


11 U.S.C. § 1415, 615 (k)(1)(A) A disciplinary change of placement occurs when a child is removed for more than 10 consecutive school days or when the child is subjected to a series of removals that constitute a pattern and cumulate to more than 10 days in a school year.

12 U.S.C. 1415, 615(k)(1)(B) An FBA and BIP will only be required within 10 business days when the child is first removed for more than 10 school days in a school year and whenever the child is subjected to disciplinary change of placement. If the child already has a FBA and BIP, the IEP team meets to review the plan and modify it, if necessary, to address the behavior.


If it is determined that the conduct was a manifestation of the child's disability, the IEP Team must follow several steps. First, the IEP team must conduct a functional behavioral assessment (FBA) of the child and implement a behavioral intervention plan (BIP). An FBA focuses on "identifying the function or purpose behind a child's behavior" and "involves looking closely at a wide range of child-specific factors" including social, affective, and environmental factors. The
It is prudent for LEAs to take a proactive approach and review the circumstances that led to the child’s removal, consider adjustments that can be made within the classroom or program, and determine if the IEP team needs to meet and consider a functional behavioral assessment and behavioral intervention plan.

However, although the most recent amendments to IDEA and the subsequent regulations provide general, procedural guidelines that guide the development of FBAs and BIPs, and decisions rendered by hearing officers and courts tend to support the premise that FBAs are important to the provision of FAPE, specific details are left to individual states and school districts. Moreover, as Zirkel points out, “absent definitions for FBAs and BIPs in the IDEA, and absent specific standards for FBAs and BIPs in most state laws, the basis for the hearing/review officer's or court's rulings, to the extent specified in the decisions, were most often evidentiary.”

Moreover, as Cannon, Gregory and Waterstone reveal:

Despite the robust protections offered under the IDEA, many children are not granted a proper manifestation determination review, do not have behavioral

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14 See SPECIAL EDUCATION IN URBAN SCHOOLS: IDEAS FOR A CHANGING LANDSCAPE: ARTICLE: A SOLUTION HIDING IN PLAIN SIGHT: SPECIAL EDUCATION AND BETTER OUTCOMES FOR STUDENTS WITH SOCIAL, EMOTIONAL, AND BEHAVIORAL CHALLENGES, 41 Fordham Urb. L.J. 403, 470 stating: “While there is no clear definition of the essential components of an FBA under the federal statute or regulations, many state laws provide detailed definitions and guidance on its purpose and application”.

15 Zirkel from Case Law for Functional Behavior Assessments and Behavior Intervention Plans: An Empirical Analysis, 35 Seattle U. L. Rev. 175, 175.
supports included in their IEPs, have never received a FBA—and if they do, the assessments we have seen are typically not very thorough and do not yield useful information—or do not have an appropriate behavior intervention plan. Instead, the frequent responses of school administrators to problematic behavior are to suspend repeatedly without a manifestation determination review, informally suspend a student without documenting this action in the student's file, conduct an inadequate manifestation determination review, or involve the police or the school resource officer (SRO). Regardless of whether the student's behavior can be ameliorated by behavioral interventions at school, these approaches circumvent the IDEA'S requisite protections, denying the classroom time needed to make effective academic progress. Calling the police or SRO can lead the student to unnecessary court involvement and the undesired outcome of being labeled a juvenile delinquent.\textsuperscript{16}

Since the amendments to IDEA passed there still does not appear to be clarity or consistency among states and school districts. Some cases demonstrate that the courts do not see the omission of conducting an FBA as a procedural violation. Other cases note that the omission of an FBA or development of an inadequate BIP is a procedural violation. Other cases highlight that failure to conduct an effective FBA may necessitate the LEA to fund an independent FBA. The intent of this presentation will be to review the statutory, regulatory and case law as it pertains to FBAs and BIPs, in order to give recommendations for schools particularly in the conducting of FBAs and the creation of BIPs. This presentation is also intended to make the case for more clarity for educators and additional tools to assist educators and IEP/MDT teams in the areas of FBAs and BIPs.

**STATUTORY AND REGULATORY FRAMEWORK SURROUNDING FBAs and BIPs**

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C.S. §§ 1400-1482, requires a school district to consider the use of positive behavioral interventions and supports, and other strategies to address behavior by a disabled child that impedes the child's learning or that of others. 20 U.S.C.S. § 1414(d)(3)(B)(i).\textsuperscript{17}

\textsuperscript{16} SPECIAL EDUCATION IN URBAN SCHOOLS: IDEAS FOR A CHANGING LANDSCAPE: ARTICLE: A SOLUTION HIDING IN PLAIN SIGHT: SPECIAL EDUCATION AND BETTER OUTCOMES FOR STUDENTS WITH SOCIAL, EMOTIONAL, AND BEHAVIORAL CHALLENGES, 41 Fordham Urb. L.J. 403, 474-475.

\textsuperscript{17} T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 150 (2d Cir. N.Y. 2014)
The IDEA did not address school obligations with regard to FBAs or BIPs prior to the 1997 and 2004 amendments. The 1997 amendments expressly required an FBA and a BIP in connection with disciplinary changes in placement. Upon a disciplinary change in placement, including a removal to an interim educational setting for enumerated specified serious behavior violations, the development or modification of an FBA and a BIP were required in tandem with a determination of whether the student's violation of the school's conduct code was a manifestation of the student's disability. The 2004 amendments limited the FBA component to undefined appropriate circumstances, and used more generic options than exclusively prescribing the BIP component. Overall, the legislation expressly required an FBA or a BIP only in connection with disciplinary changes in placement.

The 2004 amendments also inserted language requiring the IEP team to consider "the use of positive behavioral intervention and supports, and other strategies" to address behavior that impedes learning. The 2006 regulations mirrored the 2004 amendments in relevant parts.

Neither the statute nor the legislation include a definition, much less criteria, for either an FBA or a BIP. Further, the various non-binding but often-cited OSERS and OSEP interpretations, do not per se expand the statutory scope of access, appropriateness, and implementation of FBAs and BIPs. Analysis for FBAs and BIPs then is largely driven by educational best practice and interpretations of case law without much clear guidance as set forth by federal laws or regulations.

18 See ARTICLE: Case Law for Functional Behavior Assessments and Behavior Intervention Plans: An Empirical Analysis, 35 Seattle U. L. Rev. 175, 185
19 Id.
20 Id.
21 Id.
22 ARTICLE: Case Law for Functional Behavior Assessments and Behavior Intervention Plans: An Empirical Analysis, 35 Seattle U. L. Rev. 175, 187
23 For instance, the IDEA does not specify who is qualified to conduct FBAs. OSERS stated that there is no requirement that a board-certified behavior analyst, or any other specific individual, conduct an FBA unless state law requires it. Letter to Janssen, (OSERS 2008). However, some courts have held that IDEA requires that districts must ensure that those who do conduct them are adequately trained. See H.D. v. Central Bucks Sch. Dist., (E.D. Pa. 2012) (finding that an FBA was appropriate, in part, because the FBA was conducted by a qualified, board-certified associate behavioral analyst).
24 Id.
25 IDEA 2004 emphasizes the use of instruction based on scientifically based research per the Department of Education and they indicated that districts should use research-based supports and interventions, including positive behavioral interventions and supports. 71 Fed. Reg. 46,683 (2006).
Likewise under Section 504, there is no clear mandate for BIPS. However, OCR has interpreted Section 504 of the Rehabilitation Act as requiring districts to develop an individualized BIP for a student with a disability when that student's behavioral difficulties significantly interfere with his ability to benefit from his education. *Elk Grove (CA) Unified Sch. Dist.*, (OCR 1996). Courts have also interpreted Section 504 as requiring BIPS. The 6th U.S. Circuit Court of Appeals ruled in *Morgan v. Chris L.*, (6th Cir. 1997), that Section 504 requires a district to accommodate the behavioral difficulties of a student with a disability by developing a BIP. OCR investigations further cite to failure to comply with the development of BIPS.\(^{27}\)

**CASE ANALYSIS**

In *Sheils v. Pennsby Sch. Dist.*, 2015 U.S. Dist. LEXIS 8330, *16-17* (E.D. Pa. Jan. 26, 2015), a father requested that the court stay an FBA pursuant to 20 U.S.C. § 1415(j) and its implementing regulation, 34 C.F.R. § 300.518. The District countered that the father’s request did not comport with the language of the stay-put provision, which only refers to changes in educational placements, not assessments like an FBA. The Court agreed with the District reasoning: School districts must "consider the use of positive behavioral interventions and supports, and other strategies, to address" the behavioral needs of a child whose behavior impedes their learning. 34 C.F.R. § 300.324(a)(2)(i). The IDEA only requires an FBA "when a child has been identified with a disability and has an IEP in place, yet still displays behavioral problems." *D.K. v. Abington Sch. Dist.*, No. 08-cv-4914, 2010 U.S. Dist. LEXIS 29216, 2010 WL 1223596, at *9 (E.D. Pa. Mar. 25, 2010) (citing 20 U.S.C. § 1415(k)(1)(D)). An FBA is considered an educational evaluation under the IDEA. *See, e.g., H.D. v. Cent. Bucks Sch. Dist.*, 902 F. Supp. 2d 614, 627 (E.D. Pa. 2012) (finding that a school-conducted FBA satisfied the requirements of an educational evaluation pursuant to 20 U.S.C. § 1414(b)). An FBA would not constitute part of a student’s pendent placement, as it is an evaluation used to assess the child's behavioral needs and determine the appropriate measures to address those needs. The stay-put provision only applies "to attempts to alter a student's current educational placement 'during the pendency of any proceedings conducted pursuant to this section.'" *Michael C.*, 202 F.3d at 653 (quoting 20 U.S.C. § 1415(j)). Accordingly, § 1415(j) does not govern FBAs per the court.

In *M.W. ex rel v. New York City Dept. of Educ.*, 725 F. 3d 131 (2d Cir. 2013), the parents of a child with autism rejected the districts IEP, continued enrollment in a non-public school and argued among other things that the district failed to conduct a Functional Behavioral Assessment

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\(^{27}\) For instance, BIPs were added to all IEPs and were rarely tailored to the needs of the individual students in one matter and OCR noted that although placing a student on a BIP can be of great benefit when warranted, it is not appropriate when it serves to unnecessarily stigmatize the student. FAPE requirements of Section 504 and the equal treatment requirements of Section 504, Title II, and their supporting regulations were cited. *Long Beach (CA) Unified Sch. Dist.*, (OCR 2009).
(FBA) as the basis for developing the Behavior Intervention Plan (BIP) included in the IEP. The Circuit Court in its decision held that the omission of the FBA did not automatically render the IEP inadequate. The BIP accurately described the behaviors that were interfering with the student’s learning and specified strategies to be used by the staff who would be working with the student.

In C.F. ex re R.F. v New York City Dep’t of Education, 746 F. 3d 68 (2d Cir. 2014) the plaintiff’s son had attended nonpublic school during the 2006-2007 and 2007-2008 school years. In July, 2007 the parents moved to a new school district and rejected the placement established by the school district and the Committee on Special Education (CSE). The CSE did not conduct a Functional Behavioral Assessment nor did they develop a Behavior Intervention Plan based on the information provided by the private school. The parents rejected the plan and continued with the private placement and initiated an impartial hearing seeking reimbursement. The hearing officer awarded the reimbursement but the state review officer reversed, upheld by the district court and reversed by the circuit court. In term of violation the parents noted the failure to develop and conduct a FBA and the failure to develop a BIP. The court found that omission of the FBA is not by itself grounds for finding the IEP inadequate but the failure to provide an appropriate BIP was inadequate and therefore a procedural violation.

Per T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 169 (2d Cir. N.Y. 2014), the IDEA requires a school district to "consider the use of positive behavioral interventions and supports, and other strategies" to address behavior by a disabled child that "impedes the child's learning or that of others." 20 U.S.C. § 1414(d)(3)(B)(i). New York state regulations go beyond this floor set by the IDEA; they require a school district to conduct a full FBA for a student who exhibits behavior that impedes learning, and to develop a BIP to address that behavior. See M.W., 725 F.3d at 139-40; R.E., 694 F.3d at 190; see also N.Y. Comp. Codes R. & Regs. tit. 8, §§ 200.4(b)(1)(v), 200.22(b). Although the failure to conduct an adequate FBA is a "serious procedural violation," it "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." R.E., 694 F.3d at 190; see also M.W., 725 F.3d at 140.

Here, the IHO found that the district was required to conduct an FBA and develop a BIP in order to address T.M.'s "interfering and inappropriate behaviors," including "distractibility, inattentiveness and difficulty remaining on-task, noncontextual vocalizations, finger twirling, etc." J.A. 1073. The SRO disagreed, finding that "any behaviors exhibited by [T.M.] were not of such a frequency or degree so as to impede his learning or that of others," and that his IEPs correctly identified his problematic behavior and "adequately planned to meet [his] behavioral needs." J.A. 1170, 1172. The SRO therefore concluded that Cornwall did not deny T.M. a FAPE by failing to conduct an FBA or develop a BIP.

The SRO's decision turned on her evaluation of whether T.M.’s behavior would interfere with his learning, and whether Cornwall had taken adequate steps to address that behavior. These
fact-specific educational questions are "precisely the type of issue upon which the IDEA requires deference to the expertise of the administrative officers." A.C. ex rel. M.C. v. Bd. of Educ., 553 F.3d 165, 172 (2d Cir. 2009) (quoting Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 382, 74 Fed. Appx. 137 (2d Cir. 2003)). Here, the court held that the SRO's decision is well-reasoned and supported by the record, and so the district court was correct to defer to her considered judgment. The court affirmed the district court's holding that Cornwall did not deny T.M. a FAPE by failing to conduct an FBA or prepare a BIP.

In Endrew F. v. Douglas Cnty. Sch. Dist. Re-1, 2015 U.S. App. LEXIS 15020, *12-15 (10th Cir. Colo. 2015), the parents made a procedural argument that the District's handling of a student’s behavioral needs amounted to a substantive denial of a FAPE. Specifically, they criticize (1) the District's failure to conduct a functional behavior assessment (FBA) before implementing a behavior plan for Student, and (2) even absent the FBA, the District's failure to put in place an appropriate behavioral intervention plan (BIP) to address Student’s increasing behavioral issues.

Student exhibited multiple behaviors that inhibited his ability to access learning in the classroom. In the past, he has climbed over furniture and other students, hit things, screamed, ran away from school, and twice removed his clothing and gone to the bathroom on the floor of the classroom. Student’s second and fourth grade IEPs contained behavior plans (although they are somewhat ambiguously marked "draft"). These plans identified some of Student’s problem behaviors and possible ways to manage and reduce those behaviors. The school was also in regular contact with the parents regarding Student’s behavior.

Despite the school's prior attempts to manage his behavior, during Student’s fourth-grade year his behaviors increased to such a degree that the school decided to go back to the drawing board and rework their approach. Student’s special education teacher kept notes on, and anecdotal data of, Student’s behavior in an effort to pinpoint Drew's triggers. The District also scheduled an autism specialist and a behavioral specialist to come in and meet with Student’s IEP team to put a new behavioral plan in place. The parents did not attend the meeting as they pulled the Student from the District before its scheduled date.

Student’s mother testified that the escalation of Student’s behavior left them with what they felt was one choice—to place Student in a different learning environment. But as a matter of procedure, the District did not violate any provision of the IDEA or its implementing regulations. The Act provides that in developing and revising a student's 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, to address that behavior." 20 U.S.C. § 1414(d)(3)(B)(i); see also 34 C.F.R. § 300.324(a)(2)(i). The requirement is merely to "consider the use" of the listed behavioral interventions. See Perry A. Zirkel, Case Law for Functional Behavior Assessments and Behavior Intervention Plans: An Empirical Analysis, 35 Seattle L.R. 175, 186 (2011) (noting the operant verb is "to consider," and not "to develop or
The statute only requires school districts (and even then, only "as appropriate") to conduct an FBA or to implement a behavioral plan if there is a disciplinary change in placement of the student. See 20 U.S.C. § 1415(k)(1)(D)(ii) ("A child with a disability who is removed from the child's current placement . . . shall . . . receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur."); see also Park Hill Sch. Dist. v. Dass, 655 F.3d 762, 766 (8th Cir. 2011) ("The IDEA only requires that an IEP include . . . a 'behavioral intervention plan' in limited circumstances not present in this case."); Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 25 (1st Cir. 2008) ("The IDEA only requires a behavioral plan when certain disciplinary actions are taken against a disabled child."); Alex R. ex rel. Beth R. v. Forrestville Valley Cnty. Unit Sch. Dist. #221, 375 F.3d 603, 614 (7th Cir. 2004); Susan C. Bon & Allan G. Osborne, Jr., Does the Failure to Conduct an FBA or Develop a BIP Result in a Denial of a FAPE Under the IDEA?, 307 Educ. L. Rep. 581, 581 (2014). And even where an FBA or BIP is required, the IDEA does not impose any substantive requirements as to what they must include. Bon & Osborne, supra, at 583.

Student was never subject to a disciplinary change in placement. Thus, even though the record establishes that Student is "a child whose behavior impedes the child's learning or that of others" all that was required by the Act was for the District to "consider" behavioral intervention. 20 U.S.C. § 1414(d)(3)(B)(i). The record is filled with examples of the District's consideration of Student's behavioral issues. Thus, the District complied with federal law. See R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist., 703 F.3d 801, 813 (5th Cir. 2012) (finding the school district complied with federal law where the district considered behavioral interventions and the child had not been removed from her placement due to disciplinary infractions); Lessard, 518 F.3d at 26 (same). In sum, the court found no procedural defect that amounted to a denial of a FAPE.

In Coleman v. Pottstown Sch. Dist., 983 F. Supp. 2d 543, 565 (E.D. Pa. 2013), the court held that in designing an IEP for a student whose educational progress may be impeded by behavioral issues, school districts must "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 34 C.F.R. § 300.324 (a)(2)(i). While an FBA may be appropriate as a matter of good practice in some instances where a student shows behavioral problems, "the IDEA only requires such analysis where a [student] has been identified with a disability and has an IEP in place, yet still displays behavioral problems." D.K v. Abington Sch. Dist., 2010 U.S. Dist. LEXIS 29216, 2010 WL 1223596, at *9 (E.D. Pa., Mar. 25, 2010), aff'd 696 F.3d 233 (3d Cir. 2012) (finding that a school district did not violate the IDEA when a student showed problematic behavior where the district "responded proactively" to the student's behavioral problems, where the student continued to make substantial progress, and where he was not previously identified as a special needs student).

The court further noted that the IDEA has also been held to impose an affirmative requirement to conduct an FBA, though that obligation only arises in situations where a "disabled student is subjected to certain types of discipline." Alex R. ex rel. Beth R. v.
Forrestville Valley Cmty Unit Sch. Dist., 375 F.3d 603, 614 (7th Cir. 2004) (citing 20 U.S.C. § 1415(k)(1)); see also Sch. Bd. of the City of Norfolk v. Brown, 769 F. Supp. 2d 928, 943 (E.D. Va. 2010) (suggesting that a school district failed its IDEA obligations when it failed to conduct an FBA for a student who experienced several behavioral incidents, including a suspension).

The court further reminded us that creating an adequate IEP under the IDEA requires that a school district consider "positive behavioral interventions" under 20 U.S.C. § 1414 (d)(3)(B)(i) where a student’s behavior impedes his learning; however, other courts have interpreted that this requirement does not require an FBA, at least not where "the IEP sets forth other means to address the student's problematic behaviors." M.H. v. New York City Dept. of Educ., 712 F. Supp. 2d 125, 158 (S.D.N.Y. 2010); see also A.C. ex rel. M.C. v. Bd. of Educ. of the Chappaqua Central Sch. Dist., 553 F.3d 165, 172 (2d Cir. 2009) (finding an IEP lacking an FBA adequate where other behavior management strategies were included). The Second Circuit noted that "the sufficiency of [chosen] strategies for dealing with [problematic] behavior 'is precisely the type of issue upon which the IDEA requires deference to the expertise of the administrative officers.'" (citing Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 382, 74 Fed. Appx. 137 (2d Cir. 2003)). The court also opined that a school district must take into account problematic behaviors when developing an IEP, including conducting a FBA in certain instances. The case law does not support a finding that the District failed to meet its statutory obligations because the District took proactive steps to address Student’s behavior, and his behavior did not arise to a level triggering disciplinary measures that impeded his attendance. See Alex R., 375 F.3d at 614 ("[A] duty arises to conduct a[n] [FBA], and then implement a behavioral intervention plan, when the school imposes certain disciplinary sanctions on a disabled child." (internal quotations omitted)).

The present case is distinguishable from Lauren P. ex rel. David and Annamarie P. v. Wissahickon Sch. Dist., 310 Fed. Appx 552 (3d Cir. 2009) (non-precedential), where the Third Circuit upheld an administrative finding that a FAPE was denied to a student diagnosed with Attention Deficit Hyperactivity Disorder and other disabilities because of the school district’s "failure to address [the student's] behavioral problems in a systemic and consistent way." Id. at 554-55. In Lauren P., the school district provided "piecemeal" accommodations to address the student's behavioral problems that were compromising her education, such as requiring the student to use an assignment logbook, or not penalizing her in some classes for late assignments. Id. at 554. In the present case Defendant Pottstown's behavioral accommodations were more extensive and were applied more consistently with R.J.’s overall special education program than those in Lauren P.

For these reasons, the Court found that the district’s management of Student’s behavioral issues during the 2006-07 and 2007-08 years was adequate to provide a FAPE. While Student’s behavior did appear to decline over the course of the two year period such that the school district may have been required to take further steps—like conducting an FBA—when creating a new IEP for the 2008-09 academic year, this issue was moot in light of the Student’s departure from the district at the beginning of the 2008-09 year.
In *Ruffin v. Houston Indep. Sch. Dist.*, 459 Fed. Appx. 358, 361 (5th Cir. Tex. 2012), Student argued that the district failed to develop and implement an appropriate IEP for the 2006-2007 and 2007-2008 school years. Parent alleged in part that the school failed to undertake a Functional Behavior Assessment in formulating the 2006-2007 IEP and that the IEP was not adequately implemented beginning in January 2007, and that Student did not make behavioral or academic progress. Student’s 2006-2007 IEP was developed in October 2006. Methods were identified to address certain behavioral problems exhibited by Student. Parent alleged that the school failed to conduct a Functional Behavioral Assessment, but the ARD Committee Report contains a supplement entitled Functional Behavior Assessment/Behavior Implementation Plan. It detailed two problematic behaviors exhibited by Student and the effectiveness of methods of intervention. As part of the supplement, the committee noted the situations in which these behaviors were exhibited, the consequences of the behaviors, and the most likely purpose or function of each behavior. The 2006-2007 IEP contained accommodations to address Student’s specific behavioral problems. The program included a behavioral support plan and educational goals tailored to Student's needs. The IEP included classroom modifications, placement in the BSC room, and counseling each week. These modifications were instituted based on information from Student and school personnel. Based on a committee recommendation, Student was reevaluated. After the results of the reevaluation became available in January 2007, the IEP was adjusted to allow Student to complete assignments orally or to receive more time to finish them if her disability interfered with timely completion. In February 2007, the committee considered the Extended School Year services for Student. Such services are appropriate if the ARD committee has determined that a student is reasonably expected to exhibit "severe or substantial regression that cannot be recouped within a reasonable period of time." After consideration, the committee decided that the Extended School Year services were not necessary because regression had not been noted. Student failed to demonstrate that Student was entitled to such services for the summer of 2007. The 2007-2008 IEP was also individualized to meet Student’s particular needs. The ARD committee first met in May 2007 to discuss promotion to middle school and to develop an IEP. Because Student disagreed with objectives related to the academic area of the plan, the committee developed a plan only for social skills. The ARD committee developed goals and objectives for Student in this area focusing on communicating with others and demonstrating self-control. When the Student committee reconvened in October 2007, the revised IEP provided classroom modifications including extended time, a peer tutor, and preferential seating. The IEP was also modified to increase counseling from 30 minutes each week to 60 minutes each week. The court concluded that the 2006-2007 and 2007-2008 IEPs were individualized on the basis of Student’s performance.

In *K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 809-811 (8th Cir. Minn. 2011), Student contended that the District failed to provide her with a FAPE because she did not make "adequate progress" academically during the relevant time period. Student also maintained that the District denied her a FAPE because it failed adequately to address her behavioral disabilities. Under the IDEA, an IEP team must, "in the case of a child whose behavior impedes the child's
learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 20 U.S.C. § 1414(d)(3)(B)(i). And when a team fails to take this sort of action, that failure can amount to a substantive denial of the child's FAPE. See *Neosho R-V Sch. Dist.*, 315 F.3d at 1028-29. The court concluded that a substantive violation occurred in *Neosho* after the district court conducted an independent review and found that the IEP team failed to adopt or implement anything that would be "sufficient to amount to a cohesive behavioral management plan," and the record showed that the child made only "slight" or "de minimis academic and social progress" and that any educational benefit that the child did receive was then "lost due to [the] behavior problems that went unchecked." However, the court found that those circumstances were not present in this case. For example, the District did create a "cohesive behavioral management plan" for Student when it conducted a functional behavioral assessment and, based on that assessment, developed the BIP. The District then adopted and implemented that plan when it incorporated the BIP into Student's IEPs. It is true that experts for both Student and the District testified at the administrative hearing that the assessment and BIP were deficient in some respects; but given that Student enjoyed more than what we would consider "slight" or "de minimis" academic progress, the court could not conclude that those deficiencies denied Student the benefit of her educational programming. Rather, the court agreed with the district court that "[d]espite the severity of her mental illness and the changes in her medical treatment, Student made progress with respect to reading, spelling, and math, received passing grades in her classes, advanced from grade to grade, and demonstrated growth on standardized tests" during the time period when the ALJ had concluded that she was denied a FAPE. And for those reasons, the court rejected Student's assertion that her behavioral problems were not sufficiently controlled and prohibited her from receiving a FAPE.

In *Ector County Indep. Sch. Dist. v. VB*, 420 Fed. Appx. 338, 343 (5th Cir. Tex. 2011), the Court held that Student was a prevailing party because Student obtained a remedy from the SEHO that altered the legal relationship between the parties and fostered the IDEA's purposes. ECISD was to reimburse the cost of a private evaluation of VB; obtain a complete functional behavior assessment of VB from a licensed specialist in school psychology, and from that specialist obtain recommendations for appropriate eligibilities and services; convene an ARDC meeting within ten days of the assessment to schedule appropriate services for VB; conduct an evaluation of VB's eligibility for services for the learning disabled and recommend curriculum content and modifications, and report back to the ARDC within thirty days of receiving the behavior assessment results. With his decision, the SEHO obligated ECISD to take specific actions, including a functional behavior assessment that ECISD had previously determined was unnecessary, within certain deadlines. This remedy furthered the IDEA's purposes because it required ECISD to take specific steps to ensure that VB would receive a free, appropriate public education that the SEHO found VB had been denied. This was the requisite "judicial imprimatur" for a party to be considered a prevailing party.
In *Lathrop R-II Sch. Dist. v. Gray*, 611 F.3d 419, 426 (8th Cir. Mo. 2010), the Court cited to a prior decision in which the Court concluded that even if "more positive behavior interventions could have been employed, that fact is largely irrelevant" where the school district made a "good faith effort" to help the student achieve the educational goals outlined in his IEP. *Id.; see also* 34 C.F.R. § 300.350(a)(2). In Lathrop, the Court determined that the District's good faith effort to enable Student’s progress by stemming disruptive behaviors was evidenced by staff autism training and by Student’s one on one daily speech language therapy, occupational therapy, one on one full time paraprofessional, and a variety of tailored positive behavioral interventions in a sensory diet and detailed behavior plan. The District also hired an autism specialist to conduct an FBA of D.G.’s sexual behaviors and a psychologist to evaluate his cognitive and adaptive behavioral abilities. The Court held that the IDEA does not mandate the inclusion in an IEP of a behavior plan, let alone behavioral improvements. Nonetheless, while there was conflicting testimony on this issue, both challenged IEPs indicated Student had behavioral progress in some areas. The present level section of Student’s 2002 IEP noted that Student had "decreased the number of disruptive outbursts during speech" and was "able to maintain an adequate distance during therapy session[.]" Two primary concerns of Student’s parents had been his verbal communication and social skills. His 2003 IEP noted that Student had "made good progress in the area of speech and language." He was able to provide basic information in a personal introduction and "exchange pleasantries with minimal prompting[.]"

In *P. v. Newington Bd. of Educ.*, 546 F.3d 111, 122-123 (2d Cir. Conn. 2008), Student argued on appeal that the compensatory-education remedy mandated by the hearing officer for deficiencies in the 2004-2005 IEP was insufficient. Those deficiencies, which the Board did not contest in the district court, were that the school district had not properly addressed P.’s behavioral problems and had failed to give sufficient consideration to mainstreaming the student for more than 60% of the time. In response to the inadequacies of that IEP, the hearing officer ordered that the school hire a professional consultant on issues of inclusion, and that that consultant participate in the completion of an FBA. P. argued that the remedy was illusory because the school had already hired an inclusion consultant, Dr. Majure. The court affirmed the remedy awarded by the hearing officer. The IDEA allows a hearing officer to fashion an appropriate remedy. The remedy's mandates in this case -- that an inclusion consultant be retained for a year, requiring the school to keep Dr. Majure on for at least that long, and completion of an FBA -- appropriately addressed the problems with the IEP, especially when considered in light of the fact that P. is now included in at least 80% of regular-classroom activities, in part due to Dr. Majure's recommendations. *See Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1497 (9th Cir. 1994) ("Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA."). The court saw no infirmity in the hearing officer's chosen remedy.

In *Cobb County Sch. Dist. v. D.B. by G.S.B. and K.B.* a U.S. District Court, Northern District of Georgia held that an evaluator's failure to collect sufficient data on the consequences
of a 5-year-old boy's aggressive behaviors undermined her conclusion that the child was tantruming to avoid the academic demands of kindergarten. Finding that the FBA lacked adequate support, the District Court affirmed an administrative order at that required the district to reimburse the parents for an independent behavioral assessment. The court noted that evaluators conducting FBAs typically collect data in three key areas: antecedents, or the events leading up to the behavior; behavior topographies, or how the behavior looks; and consequences, or the immediate aftermath of the behavior. The court observed that the evaluator here documented the events leading up to the child's behavioral outbursts, as well as the specific behaviors in which he engaged. However, the court pointed out that the evaluator collected relatively little data about the consequences of the child's aggression. U.S. District Judge Richard W. Story explained that the IEP team needed information about the aftermath of the child's tantrums to identify the function of his behaviors. "Without this information, the district cannot determine [the child's] educational needs or develop an effective IEP," Judge Story wrote. The court cited additional flaws in the evaluator's data collection efforts, including her failure to record the child's removals from the general education setting and her reliance on interviews and personal observations. It deferred to the ALJ's conclusion that the district's FBA failed to identify the child's needs.

In *G.K. by C.B. and T.K. v. Montgomery County Intermediate Unit*, the U.S. District Court, Eastern District of Pennsylvania held that an IU's efforts to provide ABA services to a preschooler with autism despite his parents' contentious relationship with its contracted providers substantially reduced its obligation to pay for private Lovaas therapy. The District Court affirmed a decision at that the IU only had to pay for services the parents obtained when it did not have a provider available. The court observed that the parents' objection to the IEU's providers appeared to stem from their preference for the Lovaas services their son received under Part C of the IDEA. However, the evidence showed that the providers had the education and training necessary to deliver ABA services, and that the child made progress using a slightly different ABA method. The court also pointed out that the IU attempted to ease the parents' concerns, giving them a choice of providers despite having no legal obligation to do so. In addition, the child's March and October 2012 IEPs indicated that he made progress in the IU's program. As such, the parents failed to prove that the IU denied the child FAPE. The court ruled that the parents could recover the cost of private ABA services they obtained during the four months that the district did not have a provider available for the child.

The failure to develop a BIP when a child needs one can result in a denial of FAPE. See *R.K. v. New York City Dep't of Educ.* (E.D.N.Y. 2011). If a district has information that a child's behaviors impede her learning or the learning of others, it should conduct an FBA and develop a BIP to address those behaviors. An IEP team cannot avoid its responsibility to address the child's behavior by allowing a classroom teacher to develop a BIP, or by including behavior-centered goals and objectives in the child's IEP. Because every one of the child's evaluators in this case
found that her self-stimulatory, inattentive, and impulsive behaviors made her unavailable for learning, the IEP team should have conducted an FBA and developed a BIP.

However, a district does not have to develop a BIP for every student who misbehaves. A BIP is required only when the student's behavior impedes his own learning or the learning of others, or when he has been removed from his placement for a behavior or disciplinary offense. While state law may require a BIP in other circumstances, neither state nor federal law required the district here to develop a BIP for a student who was arrested for stealing. *Rodriguez v. San Mateo Union High Sch. Dist* (9th Cir. 2009).

The failure to properly or consistently implement the behavioral interventions identified in a student's BIP can amount to a denial of FAPE. *See Guntersville City Bd. of Educ.* (SEA AL 2006) (district failed to implement a teenager's BIP by taking disciplinary action in response to certain incidents of misconduct while allowing other outbursts and disruptions to be ignored).

In *Garmany v. District of Columbia*, (D.D.C. 2013) (parent failed to show that the BIP disallowed in-school suspensions or that the district materially failed to implement the IEP by subjecting the student to a single out-of-school suspension).

In *Crook County Sch. Dist.*, (SEA OR 10/30/13) (staff members acted consistently with the BIP and utilized restraint only when the student wouldn't stop hitting).

A district also may deny a child FAPE by developing an inappropriate BIP. *See C.F. v. New York City Dep't of Educ.*, (2d Cir. 2014) (the lack of an FBA led to the development of an inappropriate BIP and caused the district to offer an inappropriate placement); and *Pencader Charter Sch.*, (SEA DE 05/10/13).

A BIP does not need to be in writing, although a written BIP is preferable. *School Bd. of Indep. Sch. Dist. No. 11 v. Renollett* (8th Cir. 2006) (finding that while the BIP was not perfectly executed, the procedural inadequacies did not amount to a denial of FAPE).

A BIP need not be labeled a BIP to meet the requirements of the IDEA. In *E.H. v. Board of Education of Shenendehowa Central School District*, (2d Cir. 2009, unpublished), *cert. denied*, 130 S. Ct. 2064 (2010), the 2d U.S. Circuit Court of Appeals noted that the IEP addressed behavioral issues and that a lack of a formal BIP did not render the plan deficient.

While the IDEA is silent on the specific contents of BIPs, many courts and hearing officers require that a BIP be written with sufficient specificity and address the student's behaviors and possible consequences with consideration of the student's individual needs. *See C.F. v. New York City Dep’t of Educ.*, (2d Cir. 2014) (the lack of an FBA led to the development of an inappropriate BIP and caused the district to offer an inappropriate placement); *Kingsport City Sch. Sys. v. J.R.*, (E.D. Tenn. 2008) (finding a denial of FAPE where the BIP was not appropriate for the behavior management needs of the student); and *New York City Dep’t of Educ.*, (SEA NY
2008) (holding that without appropriate behavior interventions in place, the child could not receive a meaningful educational benefit in a district program).

CONCLUSION

Regardless of whether IDEA demands FBAs and BIPs in certain situations and regardless of whether courts might ultimately decide in favor of a district that can demonstrate appropriate behavioral planning for a student with a disability, FBAs and BIPs can be quite helpful to educators, students, parents and society as a whole when they are appropriately tailored to meet students’ needs and when they provide information and data to drive successful student outcomes. Monitoring of students’ behaviors and progress on elements contained within any BIP is likewise important to assist teams in this process. Given varying court interpretations on the effectiveness of schools’ behavioral interventions and strategies, research-based tools, trainings, and other supports for educators and teams in the development and implementation of appropriate FBAs and BIPs serve a proactive and preventative function in that they can help answer the “why and how” of positive and appropriate behavioral intervention, leading to ongoing meaningful educational benefits for students.