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Functional Behavioral Assessments and Behavioral Intervention Plans: Review of the Law and Recent Cases

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I. INTRODUCTION

"The ability to ask the right question is more than half the battle of finding the answer."

—Thomas J. Watson (Former Chairman and CEO, IBM)[1]

Educators call upon students to ask questions as a means to evaluate academic, social and emotional growth. Student answers provide educators with data associated with each student's development. Data provides educators with a means to ask new questions to gather additional data that further contributes to an understanding of student progress.[2] This question and answer process occurs within the intertwined mechanisms of a Functional Behavior Assessment ("FBA") and Behavior Intervention Plan ("BIP") beginning with the 1997 reauthorization of the Individuals with Disabilities Education Act ("IDEA"), which mandated an FBA and BIP as part of the multidisciplinary evaluation and Individualized Education Program ("IEP").[3]

Early legal studies of FBAs and BIPs investigated the

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[1] JOEL WEISS, THE QUOTABLE MANAGER: INSPIRATION FOR BUSINESS AND LIFE 81 (2006).

[2] 20 U.S.C. § 1414(d)(3)(B)(i) (2012) ("[I]n 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.").

[3] 20 U.S.C. § 1414(d)(1)(A).

extent to which school leaders were familiar with FBAs and BIPs,[4] identified implementation strategies based on limited case law,[5] advocated for a mandate to aid students with complex mental health needs,[6] and provided a general legal overview.[7] In response to some of those earlier studies, more recent studies now empirically analyze state special education laws,[8] advocate the use of FBAs to support students in urban settings to avoid juvenile detention,[9] provide a legal rationale for using FBAs and BIPs as a framework to determine non-positive interventions,[10] and use both mechanisms to dismantle the school-to-prison pipeline.[11] This is because the intent of BIPs and FBAs is to address and correct student misconduct and discipline before either escalates in severity or necessitates a serious disciplinary response (i.e. expulsion, etc.).[12] Many schools have punitive-focused disciplinary policies and procedures that can have negative impacts on students with special needs.[13] However, the added procedural safeguards provided through FBAs and BIPs could potentially have a meaningful impact on fighting the school-to-prison pipeline.[14] Additionally, FBAs have undergone a rather dramatic evolution considering they were initially required in "limited situations of 45-day placements for weapons and/or illegal

[4] *See* Cynthia A. Dieterich & Christine J. Villani, *Functional Behavioral Assessment: Process Without Procedure*, 2 BYU EDUC. & L.J. 216 (2000).

[5] *See* Cynthia D. Dieterich, Christine J. Villani & P. Tyson Bennett, *Functional Behavioral Assessments: Beyond Student Behavior*, 34 J.L. & EDUC. 357 (2003).

[6] Ellen A. Callegary, *The IDEA's Promise Unfulfilled: A Second Look at Special Education & Related Services for Children with Mental Health Needs After Garret F.*, 5 J. HEALTH CARE L. & POL'Y 164 (2002).

[7] *See* H. Rutherford Turnbull et al., *IDEA, Positive Behavioral Supports, and School Safety*, 30 J.L. & EDUC. 445 (2001).

[8] *See* Perry A. Zirkel, *State Special Education Laws for Functional Behavioral Assessment and Behavior Intervention Plans*, 36 BEHAV. DISORDERS, Aug. 2011, at 262.

[9] *See* Yael Cannon, Michael Gregory & Julie Waterstone, *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 (2013).

[10] *See* Elizabeth A. Shaver, *Should States Ban the Use of Non-Positive Interventions in Special Education? Reexamining Positive Behavior Supports Under IDEA*, 44 STETSON L. REV. 147 (2014).

[11] *See* Stephanie M. Poucher, *The Road to Prison is Paved with Bad Evaluations: The Case for Functional Assessments and Behavior Intervention Plans*, 65 AM. U. L. REV. 471 (2015).

[12] *Id.*

[13] *Id.*

[14] *Id.*

drugs."[15] However, recent cases and commentary reveal that FBAs and BIPs address a wide range of behaviors—from aggressive and externalizing behaviors to internalizing, isolating, or school- and task-avoidance behaviors.[16] Addressing a broad spectrum of behaviors rather than exclusively evaluating students with violent or illegal activity affords school leaders the opportunity to meet the needs of all children with behavior problems. In addition, implementing FBAs and BIPs across a wider range of behavior problems than was originally intended by the law aligns with the intent of FBA and BIP practices within social sciences—that is, to systematically identify the underlying cause of problematic behaviors and to create positive behavioral interventions to develop socially appropriate responses.[17] An increase in prosocial responses minimizes behaviors that are often 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."[18]

Cannon, Gregory, and Waterstone affirm the problem of children with behavior problems:

> [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,

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[15] Sharon Lohrmann-O'Rourke & Perry Zirkel, *The Murky IDEA Alphabet Soup of "FBAs" and "BIPs"*, 34 ELA NOTES 3, 3 (1999).

[16] *See* Cynthia D. Dieterich, Christine J. Villani & P. Tyson Bennett, *Functional Behavioral Assessments: Beyond Student Behavior*, 34 J.L. & EDUC. 357 (2003) (This reflects positions of early studies that suggested school leaders consider a wider application and include FBAs as part of the evaluation process when determining eligibility for all students).

[17] *See* Tracy Gershwin Mueller, Diane S. Bassett & Robin D. Brewers, *Planning for the Future: A Model for Using the Principles of Transition to Guide the Development of Behavior Intervention Plans*, 48 INTERVENTION SCH. & CLINIC 38 (2012).

[18] Cannon, *supra* note 9, at 407.

> but it is incomplete. While a look at the relevant social scientific studies is enough to 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.[19]

Given the wide range of student behaviors that IEP teams face and the importance of addressing student behavioral challenges, more tools and ongoing training opportunities are needed for educators and school personnel. This will equip educators and personnel with the ability 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. This will also allow educators and personnel to create conditions that encourage positive behaviors that can further improve educational outcomes and ultimately future success for students.[20] This begins with generating a sound FBA to determine *why* a student engages in disruptive behavior followed with a BIP to identify *how* to move toward the development of prosocial skills.[21]

However, the IDEA lacks specificity on FBA and BIP best practices. Consequently, school leaders with limited resources juggle the challenge of complying with the FBA and BIP mandate to meet the needs of all children with disabilities. An analysis of current litigation and court findings may help provide school leaders with "precedent set forth in education-related cases, thus minimizing the potential for future litigation associated with designing and implementing" an appropriate FBA and BIP policy—one that facilitates the prosocial development of students with behavioral challenges. This Article will provide the following: (1) an overview of FBA and BIP as established under IDEA; (2) statutory regulations of FBAs and BIPs; (3) an overview of case law related to FBAs and BIPs; and (4) recommendations for school leaders based on existing case law.

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[19] *Id*. at 407–08.

[20] Cobb Cty. Sch. Dist. v. D.B., 2015 U.S. Dist. LEXIS 129855, at *3 (N.D. Ga. Sept. 28, 2015).

[21] Cannon, *supra* note 9, at 407.

II. DEFINING FBA AND BIP[22]

An FBA is an established method to evaluate problem behaviors and ascertain the extent to which 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. It "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"[23] with the understanding that even though "behaviors may look or sound alike, the causes of behaviors vary."[24] In addition, school leaders must recognize that data needs to be gathered directly and indirectly "to determine which events in the child's environment are likely to increase or decrease the occurrence of the undesirable behaviors."[25]

Outcomes of an FBA provide professionals with information about the child's behavior that allows them to design a BIP that encourages the child to acquire behaviors that are more appropriate and thus facilitates 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."[26] Completing an FBA can occur (1) within the multi-factored evaluation at the time of an initial placement decision, (2) when misconduct occurs to determine whether a student's current program is appropriate, or (3) when the IEP team determines that an FBA might otherwise be appropriate.[27] Whenever completed, it is generally established in educational circles and via some state-level regulatory[28] and

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[22] Dieterich, *supra* note 4, at 211 (providing a discussion on the FBA/BIP process, noting that "[a]n FBA is a specific approach identifying behavior problems. This is not a vague term, but a distinctive process").

[23] Perry A. Zirkel, *Case Law for Functional Behavior Assessments and Behavior Intervention Plans: An Empirical Analysis*, 35 SEATTLE U. L. REV. 175, 175 (2011).

[24] Dieterich, *supra* note 4, at 211.

[25] *Id*. at 212.

[26] Zirkel, *supra* note 23.

[27] Dieterich, *supra* note 4, at 216.

[28] T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 150 (2d Cir. 2014). For instance, 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 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

administrative guidance that each BIP should be preceded by an FBA.[29] As a matter of school district policy, "the . . . focus on environmental conditions has led to nearly universal acceptance of the FBA process and the development of protocols for conducting FBAs."[30]

Although the most recent IDEA amendments and subsequent regulations provide general procedural guidelines for 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 Free Appropriate Public Education ("FAPE")—specific details are left to individual states and school districts.[31] Moreover, as Perry A. 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."[32] Additionally, some cases demonstrate that the courts do not see the omission of conducting an FBA as a procedural violation.[33] Other cases note that the omission of an FBA or development of an inadequate BIP is a procedural violation.[34]

III. IDEA AND STATUTORY FRAMEWORK

The Individuals with Disabilities Education Act ("IDEA")[35] 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

prescribes ways to manage it. *Id*.

[29] Turnbull et al., *supra* note 7, at 220; T. Steuart Watson et al., *Teacher-Implemented Functional Analysis and Treatment: A Method for Linking Assessment to Intervention*, 28 SCH. PSYCHOL. REV. 292, 293–94 (1999). *See e.g.*, Zirkel, *supra* note 23 (commenting that "special education experts regard an FBA as inseparable from an effective, relevant, and efficient BIP"). *See also* George Sugai et al., *Applying Positive Behavior Support and Functional Behavioral Assessments in Schools*, 23 J. POSITIVE BEHAV. INTERVENTIONS 131 (2000).

[30] Shaver, *supra* note 10, at 166.

[31] Cannon, *supra* note 9, at 470. ("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.").

[32] Zirkel, *supra* note 23.

[33] R.E. v. New York City Dep't of Educ., 694 F.3d 167, 195 (2d Cir. 2012).

[34] C.F. by R.F. & G.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 (2d Cir. 2014).

[35] 20 U.S.C. §§ 1400–1482.

learning or that of others.[36] The IDEA did not address school obligations with regard to FBAs or BIPs prior to the 1997 and 2004 amendments.[37] The 1997 amendments expressly required an FBA and a BIP only in connection with disciplinary changes in placement. Only upon a disciplinary change in placement, including a removal to an interim educational setting for enumerated specified serious behavior violations, was a school required to develop or modify an FBA and a BIP and simultaneously determine if the conduct code violation was a manifestation of the student's disability.[38] Thereafter, the 2004 amendments limited the FBA component to undefined appropriate circumstances and used more generic options than exclusively prescribing the BIP component.[39] Hence, an FBA or a BIP was only required under the IDEA in instances when there was a disciplinary change in placement.[40]

Specifically, in the case of a disciplinary change of placement,[41] the amendments to the IDEA stated that "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." [42] Completion of the FBA and BIP must occur no later than ten days following disciplinary action.[43] It is prudent for local educational agencies 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.[44]

The 2004 amendments also inserted language requiring the

[36] 20 U.S.C. § 1414(d)(3)(B)(i); T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 150 (2d Cir. 2014).

[37] Zirkel, *supra* note 8, at 185.

[38] *Id*. at 186.

[39] *Id*.

[40] *Id*. at 187.

[41] 20 U.S.C. § 1415(k)(1)(A).

[42] 20 U.S.C. § 1415(k)(1)(B)(i)–(ii); *see also* 34 C.F.R. 300.530(d)–(f) (An FBA and BIP will only be required within ten business days when the child is first removed for more than ten school days in a school year and whenever the child is subjected to disciplinary change of placement. If the child already has an FBA and BIP, the IEP team meets to review the plan and modify it, if necessary, to address the behavior.).

[43] 20 U.S.C. 1415(k)(1)(D).

[44] 20 U.S.C. 1415(k)(1)(F).

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.[45] Additionally, neither the statute nor the legislation includes a definition, much less criteria, for either an FBA or a BIP. In the absence of guidance under federal legislation, school leaders must then consider the interpretation of IDEA through case law when designing a sound FBA and BIP for their school district.

IV. ISSUES AND TRENDS IN CASE ANALYSIS

As noted above, FBAs and BIPs are no longer used exclusively as disciplinary action in instances where a student has demonstrated a behavior problem. Rather, they are used as an approach to assess the problems of children with a range of challenging behaviors and to design an intervention that encourages the development of socially appropriate skills. However, FBAs and BIPs are used across a broader range of behavior problems and not exclusively in cases following disciplinary action.[46] This is particularly true since the terms FBA and BIP are not substantively defined under IDEA. How then can school leaders determine the degree of appropriateness of either an FBA or a BIP? Below is a discussion of recent cases that provide a framework for school leaders to use in collaboration with teachers, parents, and attorneys to create system-wide policies to meet the needs of students with difficult behaviors.[47]

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[45] Zirkel, *supra* note 8, at 187.

[46] The original goal of the IDEA was to have FBA and BIP as a systematic process to continue services for students with disabilities who have been disciplined. IDEA requires an FBA if a child with a disability is removed from a current placement to "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." 20 U.S.C. § 1415(k)(1)(D)(ii); 34 C.F.R. § 300.530(f)(1). Additionally, local education agencies are required to "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 in placement." 20 U.S.C. § 1415(k)(1)(F)(i); 34 C.F.R. § 300.530(c)–(d)(ii).

[47] Given the number of cases that have emerged across the circuit courts, this discussion will address appellate decisions since they carry more weight compared to district courts or hearing officer decisions and allow school districts a broader lens as to what would be expected of their particular jurisdiction.

A. FBA and BIP Required for Disciplinary Action

Although the mandate under the IDEA for an FBA and a BIP were promulgated to address disciplinary actions, few cases challenge their use (or lack thereof) when school leaders take disciplinary measures. In *Alex R. v. Forrestville Valley Community Unit School District,*[48] school leaders proactively provided a BIP in an IEP for a student with a rare genetic disorder[49] prior to any disciplinary removal. Parents approved the IEP and only challenged the BIP after the student was suspended for seventeen days,[50] claiming that the BIP was substantively inappropriate. They did not, however, raise any procedural claims. Nonetheless, it was the opinion of the Seventh Circuit that the school district followed the necessary procedural requirements. In the matter of an insufficient BIP, the court noted that "the specific components of the [behavioral intervention plan] are not identified either in the federal statute or the regulations."[51] The court further reasoned that neither the IDEA nor regulations "created any specific substantive requirements,"[52] declined to manufacture "substantive provisions for the behavioral intervention plan,"[53] and therefore held that the BIP was not substantively invalid under IDEA.

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[48] Alex R. *ex rel.* Beth R. v. Forrestville Valley Cmty. Unit Sch. Dist., 375 F.3d 603 (7th Cir. 2004).

[49] Interestingly, early cases involved students with various disabilities (e.g., microcephaly, mental retardation, Down syndrome, and autism); however, cases in the last three years are almost exclusively from parents who have a child identified on the autism spectrum.

[50] *Alex R. ex rel. Beth R.*, 375 F.3d at 608–09. (In which student demonstrated violent behaviors across three separate incidents. He (1) charged "his teacher, ramming her into the classroom door, clawing her, and, as a photo taken by the [School] District reveals, leaving scratch marks on her chest;" (2) "pulled papers from the wall and tore them [and] . . . rifled through other students' desks, taking pencils and biting them in half [and] . . . kicked a bucket of Legos across the room"; and (3) managed to leave school although a teacher attempted to stop his exit. He "led a procession of his pursuers through the playground, down a sidewalk, and to the edge of a cornfield." He "turned to his aide, said 'so long, suckers,' and disappeared into the cornfield. After a three-hour search involving both fixed-wing and rotary aircraft, as well as searchers on the ground, rescuers found Alex stuck in the muddy banks of the Leaf River." Suspensions occurred for two, five, and ten days respectively).

[51] *Id.* at 615 (quoting Mason City Community Sch. Dist., 36 IDELR 193 (2001).

[52] *Id.*

[53] *Id.*

B. Functional Behavior Assessment Omitted

If there is an absence of litigation with origins in disciplinary actions, it is offset by claims brought by parents that their child did not receive a FAPE when educators failed to conduct an FBA.[54] Overwhelmingly, school districts prevail and students are found to have a sufficient IEP and found not to have been denied a FAPE in instances when the omission of an FBA did not appear to alter the child's program.[55] Courts give deference to function over form, even though, in some instances, the omission of an FBA is considered a major procedural error. Nonetheless, courts consider context to determine if a child's education was in any way inadequate.[56]

A number of cases decided by the Second Circuit, which may be a result of recent New York State regulations, evidence this trend. New York requires an FBA "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."[57] This goes beyond the IDEA mandate to conduct an FBA for placement in an alternative educational setting.[58] Although the New York regulation is altruistic and demonstrates the wider spectrum use of FBA as noted earlier in this discussion, it does open the doors to litigation—particularly since the bar for conducting an FBA is determined by "behavior that impedes [the student's] learning or that of

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[54] In the last few years there is no longer a lack of FBA and BIP litigation compared to earlier studies. A larger representation of court decisions thus provides a better framework for school leaders to determine the appropriateness of FBAs and BIPs. Susan C. Bon & Allan G. Osborne, *Does the Failure to Conduct an FBA or Develop a BIP result in a Denial of FAPE Under the IDEA?*, 307 EDUC. L. REP. 581 (2014) ("[T]here is not an overabundance of litigation surrounding FBAs and BIPs.").

[55] *See, e.g.,* Coleman v. Pottstown Sch. Dist., 581 F. App'x 141 (3d Cir. 2014); D.K. v. Abington Sch. Dist., 696 F.3d 233, 251(3d Cir. 2012); R.P. v. Alamo Heights Indep. Sch. Dist., 703 F.3d 801 (5th Cir. 2012); A.C. *ex rel.* M.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 (2d Cir. 2009).

[56] *See, e.g.,* E.H. *ex rel.* M.K. v. New York City Dep't of Educ., 611 F. App'x 728 (2d Cir. 2015); E.M. v. New York City Dep't of Educ., 758 F.3d 442 (2d Cir. 2014); M.W. *ex rel.* v. New York City Dep't of Educ., 725 F. 3d 131 (2d Cir. 2013); K.L. by M.L. & B.L. v. New York City Dep't of Educ., 530 F. App'x 81 (2d Cir. 2013); R.E. v. New York City Dep't of Educ., 694 F.3d 167 (2d Cir. 2012); A.C. *ex rel.* M.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 (2d Cir. 2009); P. v. Newington Bd. of Educ., 546 F.3d 111 (2d Cir. 2008).

[57] N.Y. COMP. CODES R. & REGS. tit. 8 § 200.4(b)(1)(v) (2017).

[58] 20 U.S.C. § 1415(k).

others,"[59] which can be highly subjective. This is evident in *R.E. v. New York City Department of Education,*[60] in which parents of autistic children declined a public school placement and sought tuition reimbursement, claiming that omission of an FBA was a denial of a FAPE.[61]

With respect to *R.E.*, the circuit court ruled that failing "to conduct an FBA will not always rise to the level of a denial of a FAPE, but when an FBA is not conducted, the court must take particular care to ensure that the IEP adequately addresses the child's problem behaviors."[62] It was the court's determination that the school district did provide an appropriate IEP in *R.E.* when it implemented appropriate behavior interventions, including (1) providing a personal aide to keep the child focused and (2) psychiatric and psychological services to address the child's fantasy speech. However, even though the court held for the school district, it concluded by stating that this does not provide a blanket approval "of routinely omitting an FBA. New York regulations do not permit this shortcut."[63] Similarly, a lack of an FBA was not considered a procedural violation for E.Z., whose behavior was not found to seriously interfere with instruction; hence, not having an FBA was an appropriate response, and E.Z.'s IEP was found to be appropriate.[64] On the other hand, in *R.K.*, a child exhibited severe behavior problems and the court held that lacking an FBA is a serious procedural violation for a student who demonstrates "significant interfering behaviors"[65] whereby "the failure to create an FBA compounded the IEP's substantive deficiency, resulting in the denial of a FAPE."[66]

In related cases, the Second Circuit remained consistent in its decisions when parents sought relief because the school district was remiss in conducting an FBA. As noted above, even though lacking an FBA is a procedural violation, the court held that any procedural violations of the IDEA were harmless when there was evidence of a clear and present strategy that

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[59] N.Y. COMP. CODES R. & REGS. tit. 8 § 200.4(b)(1)(v) (2017).

[60] R.E. v. New York City Dep't of Educ., 694 F.3d 167 (2d Cir. 2012).

[61] *Id.*

[62] *Id.* at 190.

[63] *Id.* at 191.

[64] *Id.* at 190–91, 195.

[65] *Id.* at 194 (student "exhibited self-stimulatory behaviors which interfere with her ability to attend to tasks and to socially interact with others").

[66] *Id.*

addressed the child's behavior problem.[67] This was particularly true when the district demonstrated that it had developed a behavior plan, identified the underlying behavior problem, implemented specific intervention techniques, and developed appropriate behavioral supports.

On the other hand, the same court was equally consistent if an FBA was omitted and the court found deficiencies identifying the child's problematic behaviors and implementing an intervention plan. In *C.F. ex rel R.F. v. New York City Department of Education*,[68] the court found the school district's lack of responsiveness in not providing an FBA or BIP for the student so inadequate that the parents were awarded private school tuition reimbursement. *C.F.* made clear that the court would not tolerate a school district's refusal to provide a student with problematic behaviors an appropriate plan. The lack of the FBA, on its face, was not the rationale for awarding parents relief, particularly since the same court in *R.E.* and *M.W.* ruled that omission of an FBA "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."[69] In *C.F.*, the second prong of this standard was violated when the district failed to provide an appropriate behavioral plan and consider a 1:1 class ratio for a child's "significant interfering behaviors including maladaptive and self-stimulatory behaviors."[70]

Other circuit courts have reached similar decisions when a school district did not conduct an FBA. For example, in *D.K. v. Abington School District*, a young child with a suspected disability was tested using various measures, specifically absent an FBA,[71] and was found not to qualify under an IDEA

[67] *See, e.g.,* E.H. *ex rel.* M.K. v. New York City Dep't of Educ., 611 F. App'x 728 (2d Cir. 2015); E.M. v. New York City Dep't of Educ., 758 F.3d 442 (2d Cir. 2014); M.W. *ex rel.* v. New York City Dep't of Educ., 725 F. 3d 131 (2d Cir. 2013); K.L. by M.L. & B.L. v. New York City Dep't of Educ., 530 F. App'x 81 (2d Cir. 2013); A.C. *ex rel.* M.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165 (2d Cir. 2009); P. v. Newington Bd. of Educ., 546 F.3d 111 (2d Cir. 2008).

[68] C.F. by R.F. & G.F. v. New York City Dep't of Educ., 746 F.3d 68 (2d Cir. 2014).

[69] R.E. v. New York City Dep't of Educ., 694 F.3d 167, 190 (2d Cir. 2012); s*ee also* M.W. *ex rel.* v. New York City Dep't of Educ., 725 F. 3d 131 (2d Cir. 2013).

[70] C.F. by R.F. & G.F. v. New York City Dep't of Educ., 746 F.3d 68, 73 (2d Cir. 2014).

[71] *See* D.K. v. Abington Sch. Dist., 696 F.3d 233, 251 (3d Cir. 2012) (holding that the IDEA and its implementing regulations do not require that a school use a

category. Nonetheless, the classroom teacher designed an individualized behavior plan, created a social skills group, and provided extra assistance with academics even though the child did not qualify as having a disability. As a result, the student showed improvement in grades and in class behavior, although problematic behaviors occurred on the playground and bus. The court concluded that these individualized interventions were moderately successful and that the school provided a FAPE. This is the same rationale used in the second prong of the Second Circuit Court decisions; that is, the school district has not denied a student a FAPE "if the IEP adequately identifies the problem behavior and prescribes ways to manage it"[72] or, in this case, teachers preemptively addresses the issue with strategies to meet the student's needs prior to eligibility and design of an IEP.[73]

Finally, in a case out of the Fifth Circuit, *R.P. v. Alamo Heights Independent School District*,[74] parents claimed that the school district incorrectly omitted an FBA before instituting a behavior intervention, thereby failing to create a FAPE. However, the court clarified that because the child was a "model student" and there was no evidence that she was removed from her educational placement due to disciplinary actions, the school district complied under both federal and state law in its decision not to complete an FBA. In addition, the school district provided the student with a behavior intervention plan based on observations, review of records, and data analysis, which included "an antecedent list and replacement behaviors."[75] This provides further evidence that the district did not violate provisions of IDEA in delivering a FAPE. This is consistent with similar decisions rendered by the Second Circuit that recognized a school district does not deny a student a FAPE if the school district has clearly provided a

functional behavioral assessment when initially testing students for suspected disabilities).

[72] *R.E.*, 694 F.3d at 190; s*ee also* M.W. *ex rel.* v. New York City Dept. of Educ., 725 F.3d 131 (2d Cir. 2013).

[73] *See also* Coleman v. Pottstown Sch. Dist., 581 F. App'x 141 (3d Cir. 2014) (providing—in an unpublished decision—a similar interpretation of the intent of an FBA; that is, the student's IEP was sufficiently designed to provide a basic floor of opportunity and that there lacked sufficient evidence to suggest that the district should take additional steps—e.g., conduct an FBA—to provide the student with a FAPE).

[74] R.P. v. Alamo Heights Indep. Sch. Dist., 703 F.3d 801 (5th Cir. 2012).

[75] *Id.* at 813.

method to address problem behaviors.

C. Behavior Intervention Plan Omitted

Outcomes of cases when parents seek relief under IDEA for a lack of a BIP mirror those found in cases when a school district omits an FBA; that is, if the school district procedurally omitted a BIP, but there was sufficient evidence to show that the district, in good faith, afforded an appropriate intervention to meet the child's needs, then the school district was found to provide a FAPE. Exemplars of meeting this standard include *School Board of Independent School District No. 11 v. Renollett*,[76] and *E.H. and K.H. v. Board of Education of the Shenendehowa Central School District*.[77] In both instances, the circuit courts noted that even though there was not a specifically identified document labeled a BIP nor was the BIP perfectly executed, neither of these procedural errors amounted to a denial a FAPE. In each case, the school district responded to behavioral problems, provided a meaningful intervention that met the student's needs, and afforded the student the opportunity to make progress.

In other cases, a BIP is reviewed under the lens of how it was originally intended under IDEA or state laws. For example, in *Lessard v. Wilton-Lyndeborough Cooperative School District*,[78] the parents of a child with cognitive disabilities and seizure disorder claimed that the school district denied their child an appropriate program by omitting a BIP to address behavior problems. In its decision, the circuit court asserted that there was no evidence that the school took disciplinary measures and that "an . . . egregious misunderstanding of the IDEA's requirements undermines the claim of procedural error based on a missing behavioral plan.

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[76] Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett, 440 F.3d 1007 (8th Cir. 2006).

[77] E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist., 361 F. App'x 156 (2d Cir. 2009).

[78] 518 F.3d 18 (1st Cir. 2008); *see also* Rodriguez v. San Mateo Union High Sch. Dist., 357 F. App'x 752 (9th Cir. 2009). In *Rodriguez*, a school district was not required to conduct a BIP because the student's behavior was not serious enough to warrant a BIP. Even though the student was arrested for stealing beer from a supermarket, the behavior did not cause harm or a serious threat of harm to persons or property, as outlined in California regulations. Therefore, the student was not entitled to a BIP under state law. Nor did the parent provide evidence of other circumstances warranting a BIP under the IDEA. While the student's truancy interfered with his learning, the district adequately addressed that issue in the student's IEP. *Id*.

The IDEA only requires a behavioral plan when certain disciplinary actions are taken against a disabled child."[79] Furthermore, the court reminded the appellants the IDEA does not "*require* [an] IEP to encompass a behavioral plan, merely to *consider* formulating one."[80] Here, the IEP team mulled the matter and determined that a behavioral plan was *not* necessary in order to afford . . . a FAPE. "No more was exigible."[81]

D. Both FBA and BIP Omitted

Again, courts appear to give deference to school districts when determining the appropriateness of an IEP rather than getting into the weeds of procedural details of the FBA and BIP labels.[82] Courts provide school districts latitude when omitting both an FBA and a BIP if the district takes necessary measures to provide an appropriate evaluation and a sound individualized education program.[83] Although the preponderance of cases are heard in the Second Circuit,[84] there are also decisions across other courts that generated the same assertion as seen in the Tenth Circuit in *Endrew F. v. Douglas County School District*[85] that draws on the similar legal

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[79] *Id.* at 25.

[80] *Id.* at 26.

[81] *Id.*; *see also* Perry Zirkel, *Education Law: Court Rulings*, EDUC. LAW, http://usedulaw.com/175-behavioral-intervention-plan.html (last visited July 5, 2016) ("Thus, although professional norms strongly favor early and careful development of BIPs, along with FBAs and positive behavioral strategies, neither Congress nor the courts have adopted these norms as IDEA requirements."); Perry A. Zirkel, *Case Law for Functional Behavior Assessments and Behavior Intervention Plans: An Empirical Analysis*, 35 SEATTLE L. REV. 175, 186 (2011) (noting the operant verb is "to consider," and not "to develop or implement").

[82] *See, e.g.*, E.H. *ex rel.* M.K. v. New York City Dep't of Educ., 611 F. App'x 728 (2d Cir. 2015); M.W. *ex rel.* v. New York City Dep't of Educ., 725 F. 3d 131 (2d Cir. 2013); K.L. by M.L. & B.L. v. New York City Dep't of Educ., 530 F. App'x 81 (2d Cir. 2013); Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett, 440 F.3d 1007 (8th Cir. 2006).

[83] *See, e.g.*, C. v. New York City Dep't of Educ., 643 F. App'x 31 (2d Cir. 2016); Endrew F. v. Douglas Cnty. Sch. Dist., 798 F.3d 1329 (10th Cir. 2015); T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 150 (2d Cir. 2014); A.G. v. Paso Robles Joint Unified Sch. Dist., 561 F. App'x 642 (9th Cir. 2014); Park Hill v. Dass, 655 F.3d 762 (8th Cir. 2011).

[84] T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 169 (2d Cir. 2014); J.C. v. New York City Dep't of Educ., 643 F. App'x 31 (2d Cir. 2016); Cabouli v. Chappaqua Cent. Sch. Dist., 202 F. App'x 519 (2d Cir. 2006). In each of these cases, the court held that the omission of the FBA and BIP, although a procedural violation, did not rise to the denial of a FAPE when the school district adequately met the student's behavioral needs.

[85] Endrew F. v. Douglas Cnty. Sch. Dist., 798 F.3d 1329 (10th Cir. 2015); *see also*

rationale established in *R.P. v. Alamo*. Specifically, the school district considered Endrew's behavioral issues, identified behavioral triggers, consulted with an autism and behavioral specialist to create a behavioral plan, demonstrated that he made academic progress despite his behavioral problems, and showed evidence that he was not removed from his placement due to a disciplinary action. Therefore, the court ruled that the district complied with federal law and that even absent specific documents identified as an FBA or BIP that "no procedural defect . . . amounted to a denial of a FAPE."[86]

An additional test used by the court to determine the appropriateness of omitting an FBA and BIP is found in *A. G. v. Paso Robles Joint Unified School District*.[87] In an unpublished opinion, the court found that the school district did not deny a child with autism a FAPE when it failed to conduct a functional analysis assessment ("FAA")[88] and BIP because both requirements "apply only to students with severe behavior problems."[89] Taking into consideration this criteria, the court concluded that the school district did not deny the student a FAPE by not conducting an FAA or BIP because the student showed no evidence of a serious behavior problem because he did "not seriously damage property, and, more importantly, he [did] not pose a threat to himself or the safety of others."[90] Furthermore, the court concluded that the school district provided an appropriate program, particularly since the student made progress toward his annual goals.

Conversely, the court was less tolerant when a school district went beyond a few procedural mishaps and showed evidence of collective violations for a student with severe

Park Hill v. Dass, 655 F.3d 762 (8th Cir. 2011) (concluding that twin boys who attended a public school for only fifteen days were denied reimbursement for private school even though the district did not complete an FBA or BIP; it was clear that the school district considered methods and strategies to address the behaviors of both students; however, the students were not in school long enough to test the efficacy of the team's plan which if found ineffective would have conducted an FBA and developed a BIP).

[86] *Id.* at 1338.

[87] A.G. v. Paso Robles Joint Unified Sch. Dist., 561 F. App'x 642 (9th Cir. 2014).

[88] California Code of Regulations required an FAA rather than an FBA. In addition, the requirement to complete an FAA and BIP were repealed on July 1, 2013; however, this case took place prior to the repeal and the FAA and BIP remained in effect.

[89] *A.G.*, 561 F. App'x 642.

[90] *Id.* at 644.

behavior problems.[91] This standard was advanced in *L.O. ex rel. K.T. v. New York City Department of Education*,[92] where the parents of a student with multiple disabilities including autism, OCD, intellectual disability, and a mood disorder asserted that their child was denied a FAPE because of a pattern of procedural violations. The court concurred that the school district not only failed to conduct an FBA and BIP, but failed in each of the following: to consider evaluation data to complete the IEP, to provide goals associated with the child's behavior problem, to identify the root cause of the behavior, and to provide an appropriate intervention. Taken in total, the court ruled that the multiple procedural violations denied the child a FAPE. This contrasts with the court's general leniency when a school district provides clear and present strategies for identifying and providing instructions for problematic behaviors even if they are not explicitly written with the tags FBA and/or BIP.

Parents also prevailed when a school district omitted an FBA and BIP in *A.G. by Grundemann v. Paradise Valley Unified School District. No. 69*[93] for a seventh-grade middle school student with autism who was enrolled in a gifted program. In this case, a behavioral psychologist indicated that the student's behavioral outbursts demonstrated a need for an FBA and a BIP which was confirmed by the classroom teacher who also suggested additional behavioral supports were necessary to meet the student's individual needs.[94] Both believed that the current level of supports were inadequate and the court concurred, finding that the district's behavior could suggest it was deliberately indifferent to the student's need for accommodations.[95] The court deferred to experts who provided direct services to students with behavior problems; the court considered that the experts did their due diligence based on professional training and were more qualified to determine

[91] R.E. v. New York City Dep't of Educ., 694 F.3d 167, 194 (2d Cir. 2012) ("[F]ailure to conduct an FBA is a particularly serious procedural violation for a student who has significant interfering behaviors.").

[92] L.O. *ex rel.* K.T. v. New York City Dep't of Educ., 822 F.3d 95 (2d Cir. 2016).

[93] A.G. v. Paradise Valley Unified Sch. Dist. No. 69, 815 F.3d 1195 (9th Cir. 2016).

[94] *Id.*

[95] *Id.* (instructing the District Court to consider on remand whether the student's need for behavioral accommodations was obvious, and whether the district made reasonable accommodations available).

appropriate suggestions for a student's program.[96]

E. FBA or BIP Deficient

Thus far, cases reviewed demonstrate a decisive pattern; even if a district neglects to complete an FBA and/or a BIP, schools have experienced a high rate of success if they demonstrate a good faith effort to gather behavioral data, determine the nature of the child's behavior problem, and provide an intervention that shows some gains. What are the repercussions if a school district completes an FBA and/or a BIP that is found deficient? Are educators given the same deference when either of these procedures are flawed as compared to omitted?

In evaluating whether a deficiency is equal to an omission, the Eighth Circuit ruled on two separate cases with two varied decisions. In *Neosho R v. School District v. Clark*,[97] an early FBA/BIP case, the court rendered a decision for the parent where the district constructed a BIP that only included short-term goals rather than developing a plan to include "consequences and reinforcements appropriate to [the student's] disability."[98] In addition, there was no evidence that the school gathered data to identify the cause of the student's behaviors or any indication that they created a plan to provide instruction to teach the student replacement strategies in an attempt to reduce inappropriate behaviors. In making its determination, the court concluded that even though the student had passing grades, the school district failed to provide the student an educational benefit particularly since his problematic behaviors—which prevented him from being included in classes with his peers—increased. An expert witness testified that attending a regular classroom was "the main goal of his IEPs."[99]

Conversely, when using the standard set in *Neosho* to determine the level of harm of a deficient FBA or BIP, the Eighth Circuit ruled for the school district in *K.E. v. Independent School District No. 15*.[100] Parents claimed that

[96] *Id.*

[97] Neosho R v. Sch. Dist. v. Clark, 315 F.3d 1022 (8th Cir. 2003).

[98] *Id.* at 1025.

[99] *Id.* at 1029.

[100] K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795 (8th Cir. 2011).

their child was denied a FAPE because the district failed to adequately address behavior problems; however, the court noted there was clear evidence that the district completed an FBA, created a "cohesive" BIP based on the assessment, and did not prohibit the child from receiving a FAPE. Even in spite of expert testimony that the FBA and BIP "were deficient in some respects,"[101] the court provided a multiple-prong rationale to support its judgment in favor of the school district: (1) the student "enjoyed more than what we would consider 'slight' or '*de minimis*' academic progress";[102] (2) there was no evidence that the "deficiencies denied Student the benefit of her educational programming";[103] and (3) "[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."[104]

V. CONCLUSION

There have been a number of recent cases testing the when, where, how, and why of both the FBA and BIP procedures. After a review of cases across various courts, there are answers to each that can provide educators with guidelines to create a meaningful school-wide FBA and BIP policy. Although there are situational facts in each case, courts have demonstrated consistency with respect to the design and implementation of the FBA and BIP as part of a child's individualized program. Of particular note, school districts enjoy a good deal of success across all instances when parents seek relief under the IDEA for a claim that their child was denied a FAPE due to an omitted or deficient FBA and/or BIP.[105] Additionally, as noted at the onset of this discussion, no longer are these procedures used exclusively in cases of a disciplinary action, but also for

[101] *Id.* at 810.

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] Zirkel, *supra* note 23, at 198. This trend of school districts prevailing supports findings of a study conducted during the first decade of the 2000s which found that "outcomes have gradually shifted from a majority clearly favoring the plaintiff-parents to a majority clearly favoring the defendant-school districts, with the dividing point approximately marked by the 2004 amendments to the IDEA." *Id.*

students with problems across a wide spectrum of behaviors.

Although the IDEA and regulations lack specificity on the "how to" of FBAs and BIPs, there seems to be a bright line to suggest that school districts can prevail in delivering a FAPE even absent documents specified as an FBA or a BIP. Across cases, courts have ruled that the school district can prevail if a school district engages in the following: (1) identifies the student's problem behaviors, (2) understands the source of the problematic behaviors, (3) creates an intervention plan that specifically addresses the behaviors, and (4) demonstrates that the student is successful in the academic setting. However, questions remain relative to the specificity of each criterion. For example, how are educators expected to know when the level of a student's success is acceptable? This is not an FBA or BIP specific dilemma, but one that arose in the historical special education case to reach the Supreme Court. In *Rowley v. Board,* the Court determined that each student must have the basic floor of education opportunity and an IEP that is "reasonably calculated to enable the child to receive educational benefits."[106] What is sufficient progress? Clearly, progress must be more than *de minimis* and evidence of how the student has progressed according to annual goals is important.

An additional question arises when courts use the standard that a school district was exempt when an FBA or BIP was omitted because the student's behavior was not "severe."[107] How do districts determine how severe is severe? Admission to in-patient psychiatric hospitalization programs, repeated removals from school due to behavioral issues, and other threats to the health and safety of students and the school community are examples of behaviors that can be determined as severe. However, effective FBA and BIP planning, upon a pattern or emergence of less severe behaviors, may benefit students and schools in addressing behaviors effectively before they evolve into behaviors so severe as to necessitate not only FBAs and BIPs, but also crisis/de-escalation plans and other

[106] Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206–07 (1982).

[107] *See, e.g.,* Coleman v. Pottstown Sch. Dist., 581 F. App'x 141 (3d Cir. 2014); A.G. v. Paso Robles Joint Unified Sch. Dist., 561 F. App'x 642 (9th Cir. 2014); R.E. v. New York City Dep't of Educ., 694 F.3d 167 (2d Cir. 2012); Rodriguez v. San Mateo Union High Sch. Dist., 357 F. App'x 752 (9th Cir. 2009).

more restrictive interventions, such as restraint used in conjunction with a BIP and/or removal to an alternative setting.

An issue that districts also need to consider is the use of baseline data. As a matter of best practices, teachers need to identify where a student is—the baseline—before determining where they want the student to go with respect to developing socially appropriate behavior. Understanding a student's starting point provides the framework to develop a behavior plan for the student's individual behavioral needs and to measure growth. If the school district does not provide data and evidence of growth, districts are less likely to prevail. Although collecting baseline data is an appropriate educational practice, courts remind us that the IDEA does not require baseline data.[108] That said, baseline data can assist schools in defending their decisions and showing meaningful progress on behavior goals and can further assist schools in justifying their decisions with regard to behavior support for students.

"Although school district administrators are in the business of managing a school, they also are in the business of leading educators to provide programs that meet the needs of their students. They must therefore consider solutions to minimize litigation."[109] Suggestions include ample documentation (if not doing a formal FBA) and ongoing assessment to monitor the student's progress toward success to provide evidence of compliance. Although schools may prevail without an active FBA or BIP, because they met procedural requirements, they unnecessarily exhausted time and financial resources to resolve issues that could have been avoided. Hence, school districts would be well suited to follow procedures to conduct an appropriate FBA and BIP with trained staff. Otherwise schools are risking that parents will seek relief on the basis of procedural violations.

Regardless of whether the 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,

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[108] A.G. v. Paso Robles Joint Unified Sch. Dist., 561 F. App'x 642 (9th Cir. 2014); Lathrop R-II Sch. Dist. v. Gray, 611 F.3d 419, 426 (8th Cir. 2010).

[109] Cynthia A. Dieterich, Nicole DiRado Snyder & Christine J. Villani, *Bullying Issues Impacting Students with Disabilities: Highlights of Sections 1983, Title IX, Section 504, and IDEA Cases*, 12 BYU EDUC. & L.J. 107, 126 (2015).

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. These strategies, trainings, and supports can lead to ongoing meaningful educational benefits for students and result in successful outcomes for students, parents, and schools alike. More specifically, an FBA can help answer the "why and how" of the most challenging behavior and, when paired with appropriate behavioral interventions (BIP), ALL students can develop prosocial behaviors that productively contribute to society as a whole.

In the end, case law is a tangible tool school leaders can consider when designing FBA and BIP policies to address social, emotional and behavioral challenges. In addition, one intangible consideration is nurturing the relationship between school leaders and parents. Courts recognize, at times, there is a fine line between school leaders protecting all students in the school district and parents advocating for an individual child. Sensitive to this sometimes-tenuous relationship, the court provided a judicious opinion noting:

> [m]any judges are parents too, and/or can rightly admire the determination with which parents pursue the best possible education for profoundly disabled children; [however], determination must be tempered by an understanding that school districts, like parents and children, have legal rights with respect to special education. In demanding more than the IDEA requires, parents can at times frustrate the operation of a collaborative process and put the School District in an untenable position. [110]

Finally, when school leaders, parents, and attorneys work

[110] Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 30 (1st Cir. 2008).

collaboratively to support students who have behavioral needs in a reasonable and timely fashion, the student's needs are addressed earlier, parents can become active participants in the child's program, and school leaders can minimize the risk of using valuable resources in court costs and attorney fees.