

Special Education Legal Decisions Involving Behavior: Lessons Learned



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STUDENT BEHAVIOR

According to the [2018 National Association of Elementary School Principals PreK-8 Administrators Report](https://www.naesp.org/sites/default/files/NAESP%2010-YEAR%20REPORT_2018.pdf), the top-ranked concern for 2018 for the responding principals was addressing the increase of students with emotional problems. Among those issues identified of significant concern were the management of student behavior, student mental health issues, absenteeism, lack of effective adult supervision at home, and student poverty. In contrast, none of the student-related issues were identified as a major concern in 2008.

https://www.naesp.org/sites/default/files/NAESP%2010-YEAR%20REPORT_2018.pdf

POSITIVE BEHAVIORAL SUPPORTS

Under the IDEA, in the development of an IEP, the IEP team is required to consider positive behavioral supports and other strategies to address student behavior that impedes the student's learning or the learning of others, 34 CFR 300.324 (a)(2)(i).

A student's need for behavioral interventions and supports must be decided on an individual basis by the student's IEP team. *Analysis of Comments and Changes to 2006 IDEA Part B Regulations*, 71 Fed. Reg. 46,683 (2006).

POSITIVE BEHAVIORAL SUPPORTS

"[W]hile 34 CFR 300.324 (a)(2)(i) requires the IEP Team to consider the use of positive behavioral interventions and supports, and other strategies, it does not specify the particular interventions, supports, or strategies that must be used." Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46,683 (2006).

Most commonly implemented via a behavioral intervention plan (BIP) which is also sometimes referred to as a behavior management plan or behavioral support plan.

POSITIVE BEHAVIORAL SUPPORTS

The IDEA does not require a school district to “eliminate interfering behaviors.”

The IDEA requires only that the school district “consider the use” of positive behavioral interventions and supports to address the behavior.

The school met this responsibility by including and implementing a behavioral component to the IEP.

J.W. v. Unified Sch. Dist. of Johnson County, State of Kansas,

58 IDELR 124 (D. Kan. 2012)

Spring Branch Indep. Sch. Dist., 72 IDELR 11 (S.D. Tex. 2018)

In addition to a failure to timely evaluate a fifth-grade ED/ODD student, the District denied FAPE by failing to implement the positive behavioral supports outlined in the student's IEP.

In response to multiple behavior issues including verbal and physical aggression (throwing objects, hitting, kicking, destroying school property), in the IEP teachers were supposed to provide encouragement for classroom participation, positive reinforcement, frequent breaks, private discussions about behavior, and access to cooling-off areas.

Additionally, teachers were supposed to use a calm interaction style, minimize verbal interactions, direct the student to the cooling-off area, provide more physical space, and avoid "power struggles." Instead, the staff repeatedly used timeouts, used physical restraints at least eight times, and automatic isolations sixteen times. Additionally, campus police were summoned on at least four occasions to deal with the student's outbursts and the student's school day was shortened for the last twenty days of the school year.

Spring Branch Indep. Sch. Dist., 72 IDELR 11 (S.D. Tex. 2018)

The Court stated that lack of implementation denies a child a FAPE if it amounted to a substantial failure to provide the IEP services. *HISD v. Bobby R.*, 200 F.3d 341, 348-349 (5th Cir. 2000). A material failure is one that is more than a minor discrepancy between the services provided and the services required by an IEP. *Van Duyn ex rel. Van Duyn v. Baker School Dist.* 5J, 502 F.3d 811 (9th Cir. 2007). The failure to implement those parts of a child's IEP designed to assist a child with behavioral issues can be a material failure. See *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003). The Court found a material failure in this case.

In addition, the Court noted that “[t]he IEP does not state that time-outs or restraints would be used as a tactic to address any of the above conduct.” The Court also noted that the frequency of behavioral emergencies indicated that either the IEP itself was inappropriate or that staff members' failure to implement the IEP caused the student's behaviors to escalate.

BEHAVIOR INTERVENTION PLANS (BIPs)

BEHAVIOR INTERVENTION PLANS (BIPs)

A behavior intervention plan (BIP) is a set of positive behavioral interventions and supports, along with other strategies, designed to assist a student whose behavior impedes his own learning or the learning of others. 34 CFR §300.324.

The IDEA identifies two circumstances in which a district should consider a student's need for a BIP:

- (1) When the student's behavior impedes his own learning or the learning of others (34 CFR §300.324(a)(2)(i)); and
- (2) When a student has been removed from his current educational placement for a behavioral or disciplinary offense (34 CFR §300.530(d)(1)(ii)).

BEHAVIOR INTERVENTION PLANS (BIPs)

IEP teams must include behavioral interventions in the IEP when a student requires them to receive FAPE. *Dear Colleague Letter*, 116 LRP 33108 (OSERS/OSEP August 1, 2016).

A district's failure to develop a BIP can amount to a denial of FAPE. See e.g. *Rialto Unified Sch. Dist.*, 48 IDELR 296 (SEA CA 2007)

The failure to properly or consistently implement the behavioral interventions identified in a student's BIP can amount to a denial of FAPE. *Guntersville City Bd. of Educ.*, 47 IDELR 83 (SEA AL 2006)

***Andrew F. v. Douglas Co. Sch. Dist.* RE 1, 71 IDELR
144 (D. Colo. 2018).**

On remand from the 10th Circuit, Court found that the IEP proposed by the school district at the time the parents withdrew their child with autism from public school and placed him in a private school for students with autism was not reasonably calculated to enable him to make progress in light of his circumstances. Among other things, the District used the same annual goals for multiple school years with only minor changes in the short-term objectives even though the student made very minimal and insufficient educational progress. The Court ruled that the District had not conducted a functional behavioral assessment or developed a formal BIP for the student to properly address the student's behaviors and as such denied the student FAPE.

BEHAVIOR INTERVENTION PLANS (BIPs)

BIPs must be written with sufficient specificity and address the student's behaviors and possible consequences with consideration of the student's individual needs. *Lake Travis Indep. Sch. Dist.*, 45 IDELR 204 (SEA TX 2005); *C.F. v. New York City Dep't of Educ.*, 62 IDELR 281 (2d Cir. 2014).

Districts must exercise special care when a student's BIP permits or requires the use of aversive behavioral interventions, such as seclusion and restraint. A district's excessive or poorly documented use of such interventions can qualify as an IDEA violation. *Waukee Community Sch. Dist. V. Douglas and Eva L. ex rel. Isabel L.*, 51 IDELR 15 (S.D. Iowa 2008)

BEHAVIOR INTERVENTION PLANS (BIPs)

IEP behavioral component appropriate when:

The evidence demonstrated that the District:

- Reviewed the BIP with the student's teachers;
- Trained the teachers on the BIP; and
- Implemented the BIP.

The student showed progress in that she was learning to use self-control.

C.P. v. Krum Indep. Sch. Dist., 64 IDELR 78 (E.D. Tex. 2014)

Canyon ISD

Docket No. 028-SE-0914(SEA TX Feb. 2015) (Lockwood)

OHI/VI/SI student with a history of maladaptive behavior exhibits multiple inappropriate behaviors, such as inappropriate language, pinching of an aide, yelling, refusal to comply resulting in the aide dragging the student to nearby washroom and implementing an improper restraint.

The IHO found that the school district denied FAPE, failed to create a BIP, and did not collect adequate behavioral data. This meant teaching staff and related service personnel did not have the information they needed to determine which behavioral interventions are effective and which were not. There is no baseline behavioral data to work from. Without collecting antecedent and consequence data there is no clear understanding of how to shape and guide Student's behavior. The evidence demonstrates that Student's behavior has an impact on Student's ability to learn and access the educational environment. The evidence also showed student would benefit from a Behavior Intervention Plan designed on the basis of a sound and comprehensive behavioral data collection system.

Killeen ISD

Docket No. 243-SE-0415 (SEA TX Sept. 2015) (Wickov)

Parents of an AU/SI student with a history of oppositional behavior and trouble working independently along with self-stimulatory “stimming” behavior, brought a due process hearing against the District claiming denial of FAPE.

Issue: Did the District fail to provide FAPE to Student?

Held: For the Parent/Student on the behavioral issue, the District did not provide an individualized program on the basis of Student’s assessments and performance, or in a coordinated, collaborative manner by key stakeholders, which resulted in positive academic and non-academic benefits for Student. Under the circumstances, the District should have provided an FBA and designed a BIP in a collaborative manner, so that the underlying behavior issues could be addressed. The failure to do so denied the Student FAPE.

Parrish v. Bentonville Sch. Dist., 118 LRP 30734 (8th Cir. July 2018)

Parents claims against an Arkansas district's use of physical restraint in response to aggressive behavior when removing two unrelated elementary school students with autism from their respective classrooms did not show that the district violated the IDEA and denied FAPE. Each child had an IEP and a behavioral intervention plan that included detailed strategies to address their behavioral problems. Those strategies included removing the child to another room when all other interventions proved unsuccessful and allowed appropriate restraint. The behavioral issues ranged from throwing chairs and running around to kicking, punching, scratching, and head-butting staff members.

Parrish v. Bentonville Sch. Dist., 118 LRP 30734 (8th Cir. July 2018)

Court found that: (1) the District took reasonable steps to train its teachers; (2) the District did not use physical force and seclusion in a way that denied FAPE; (3) the District held programming conferences and informal meetings to propose, implement, modify, and communicate interventions regarding misbehavior and academic progress as well as goals and objectives; (4) the District's implementation and collection of data arising from behavior intervention plans complied with the IDEA; (5) the strategies used by the District, even if not perfect, complied with the IDEA; (6) the parents did not raise a genuine issue for trial on whether the District failed to educate their children in the least restrictive environment; and (7) the parents were given a meaningful opportunity to participate in the modification of students' IEP and behavior plans.

The District's IEPs and behavior intervention plans included detailed strategies to address the children's behavioral problems and contained evidence that the children were progressing academically.

Pottsgrove Sch. Dist. v. D.H., 118 LRP 37748 (E.D. Penn. Sept. 2018)

Autistic student attended an elementary school in the Pottsgrove School District from kindergarten to second grade. During that time, student maintained grade level performance in academics but failed to make progress as a result of severe behavioral issues, including toileting accidents and violent outbursts requiring physical restraints. During his three years at the school, school personnel physically restrained D.H. over 25 times, including one incident in which personnel called the police. In addition, D.H. had at least 43 toileting accidents.

Court found denial of FAPE including noting that “[even accepting the school district's argument that its use of restraints was always reasonable, the persistent use of such a measure is a red flag. A tool meant as a "last resort", deployed dozens of times over three years, is strong evidence that the behavior plan was not working.” In addition, Court found that the "reactive, crisis-oriented nature" of the child's behavior plan lack appropriate preventive strategies and positive behavioral supports. Moreover the

Pottsgrove Sch. Dist. v. D.H., 118 LRP 37748 (E.D. Penn. Sept. 2018)

Court also found that the "reactive, crisis-oriented nature" of the child's behavior plan lack appropriate preventive strategies and positive behavioral supports and primarily focused on responding to D.H's misbehavior *after* it occurred. The Court determined that the behavior component of the IEP included only procedures for when D.H. acted out, not prevention strategies.

Court also determined that school failed to include a goal or behavior plan for toileting. The closest that the IEPs came to a toileting plan was a "specifically designed instruction" requiring "shaping" that is, rewarding good behavior "for aversive tasks such as toileting. In April of the school year, a goal of no toileting accidents for four weeks was added, but with no mention of how the goal would be reached. Court ruled that inadequate and a denial of FAPE

Finally, the Court did disagree with a requirement that a board certified behavior analyst *must* be part of on the child's IEP team.

Paris Sch. Dist. v. A.H., 17 LRP 12828 (W.D. Ark, April 2017)

Fourth-grader with Asperger syndrome BIP did not inform her teachers how to handle her verbal disruptions, physical aggression, and property destruction, and as such, the plan was deemed inadequate particularly in light of its failure to explain how the student's behaviors related to her disability.

If a district does not understand why a student engages in certain behaviors, it cannot offer service providers effective strategies to address them. Although a BIP from the student's previous LEA identified her problem behaviors as verbal disruptions, physical aggression, property destruction, and elopement, the BIP at issue here focused solely on

“noncompliance.”

Change of Placement in Response to Violent and Aggressive Behavior

- Student who engages in significantly disruptive behavior which interferes with the education of classmates supports a change of educational placement to a more appropriate least restrictive environment. See *Renollett v. Independent Sch. Dist. No. 11, Anoka-Hennepin*, 45 IDELR 117 (8th Cir. 2006); *DeVries v. Fairfax County Sch. Bd.*, 882 F.2d 876 (4th Cir. 1989).
- Following a ED student's threat to kill a teacher and additional extensive outbursts, defiance, and disruptiveness, the IEP team appropriately implemented a change of placement for the student from his small self-contained class to a more structured program for student which included: intensive instruction by teachers who were also counselors, one-to-one assistance, and individual and group counseling. *In re: Student with a Disability*, 110 LRP 68414 (SEA Va. 2010).

District's Right to Seek Removal of Violent and Aggressive Students

- The IDEA provides that a district that believes that maintaining the current placement of the child is “substantially likely to result in injury to the child or others” may file for due process. 34 C.F.R. §300.532(a).
- Under this provision, the hearing officer/administrative law judge has authority to order a change of placement of a child with a disability to an appropriate interim educational setting “for not more than 45 days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.” 34 C.F.R. §300.532(b)(2)(ii).
- A hearing filed under this provision is heard on an expedited basis. 34 C.F.R. §300.532(c).

San Leandro Unified School District
114 LRP 550 (SEA CA Dec. 16, 2013)

For a period of several months, Student engaged in repeated acts of violence including hitting, throwing objects, scratching, and kicking, injuring both students and staff. Despite various efforts to control Student's behavior, the district was unsuccessful. Consequently, the IEP team met to discuss Student's continuing behaviors and a change in placement. The district offered the student placement in a program at a different school. The mother refused to consent to the placement. As a result, the district requested a due process hearing, pursuant to 34 C.F.R. § 300.532(a), seeking an order authorizing the change of placement because the district believed that maintaining the current placement of the child was substantially likely to result in injury to the child or others.

Based on the evidence presented, the IHO determined the child's behavior was substantially likely to result in injury and ordered Student's placement be changed for 45 days.

White Bear Lake Area Schools
113 LRP 28309 (SEA MN May 13, 2013)

Student engaged in behaviors including punching staff members in the face with a closed fist, punching himself in the face, biting staff members, head-butting others, climbing on book shelves and then jumping off head first, and kicking a second floor window with the stated intent of breaking it and jumping out. In light of these behaviors, the district advised the parent that it was recommending moving Student to a therapeutic program. The parent objected. When the district pointed out that the child's doctors made the same recommendation, the parent reportedly stated: "It doesn't matter. I'm his Mom and I know what he needs." The district requested an expedited due process hearing, seeking permission to place the student in a highly structured therapeutic program.

The ALJ found that, despite its best efforts, the district was unable to address the behaviors. The district had established that the student was substantially likely to harm himself or others. The ALJ ruled that a controlled therapeutic environment to address his behaviors.

Steps to take to remove a dangerous student through an expedited hearing*

- **Step 1: Consider if the student legitimately poses a danger.** In determining whether the student poses such a risk, educators should closely review the evaluative data and speak with experts. They also may consider conducting a threat assessment.
- **Step 2: Check for other options.** Consider other options to maintain safety before filing for an expedited hearing request, such as increasing supervision of the student. Also, if the student's conduct involved weapons, serious bodily injury, or drugs, the district may be able to unilaterally place the student in an alternative setting under the "special circumstances" provision of the IDEA.
- **Step 3: Request a fast-track hearing.** To request an "expedited" hearing, the district files a due process complaint (or files a petition in a local court).
- ***Credit for the listed steps information goes to LRP Publications**

Steps to take to remove a dangerous student through an expedited hearing

- **Step 4: Prepare documentation.** Attach to the complaint documentation, such as records of the student's previous aggressive behavior and resulting injuries showing the behavior has become more frequent, more intense, and harder to deescalate.
- **Step 5: Select an alternative setting.** Before the hearing, convene the IEP team and select an appropriate alternative setting that will better address the behavior and address the student's other disability-related needs.
- **Step 6: Attend the expedited hearing.** The hearing takes place within 20 school days after filing the hearing request. In most cases, the district's attorney attends the hearing along with educators, and possibly witnesses, who can attest that the change of placement is necessary. The parent and the parent's attorney also may attend.

Steps to take to remove a dangerous student through an expedited hearing

- **Step 7: Implement the order.** The hearing officer decides within 10 school days after the hearing whether to order the removal (the state may have additional rules). If she does order the removal, she may order the district to place the student in an alternative setting for up to 45 school days.
- **Step 8: Consider requesting an extension.** Once a student has completed his placement in an alternative setting, the district can renew its request for a removal order if it still believes restoring the student's placement is very likely to lead to injury. Meanwhile, the IEP team should be thinking about other long-term options for addressing the behavior.

Court Removal to IAES

District also apply to a court to obtain a “Honig injunction” to temporarily remove student exhibiting dangerous behaviors from his or her current placement to an Interim Alternative Educational Setting (IAES).

Similar to Hearing Office/Administrative Law Judge removals under 34 C.F.R. §300.532(b)(2)(ii), a district must demonstrate to the court that maintaining student in his or her current placement is substantially likely to result in injury to the student or to others.

Honig v. Doe, 559 IDELR 231 (U.S. 1988); *Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents of Children with Disabilities*, 52 IDELR 266 (OSERS 2009))

Court Removal to IAES: Olu-Cole v. E.L. Haynes Pub. Charter Sch., 71 IDELR 194, (D.D.C. 2018)

Court found that because a student with a history of violent altercations and unreasonably dangerous behaviors continued to present those unreasonably dangerous behaviors, the district was entitled to a *Honig* injunction maintaining the student on homebound placement until a hearing officer approved the student's transfer to a more restrictive placement.

The Court ruled that, while the student had a presumptive right to remain in the then-current educational placement during the pendency of the hearing process, a school district could overcome that presumption if that placement was inappropriate and the school district was able to support a preliminary injunction.

B.B. v. Catahoula Parish School Dist.
113 LRP 40423 (W.D. La. October 2, 2013)

Student engaged in behavioral problems on the bus including slapping, hitting, spitting, not staying seated, disrobing, and throwing his shoes out of the window. Because of the behaviors, the district removed the student from the regular bus and provided him transportation on the special education bus. The parents requested that the student be allowed to ride the regular bus with a “bus buddy.” The district denied the request.

The district court held that the district failed to comply with LRE by not allowing the 7-year-old to be transported on the regular bus with a “bus buddy.” The court concluded that there was adequate evidence to support the ALJ's determination that the student with Down syndrome would have been capable of riding the regular bus at that time with the support of a nondisabled partner.

***Reyes v. Manor Independent Sch. Dist.*, 67 IDELR 33
(W.D.Tex. 2016)**

19-year old student with severe ID and autism transferred into the district. He had a history of serious behaviors, including self-injurious behaviors, charging and assaulting adults, throwing things, and highly unpredictable aggressive behaviors. Behaviors continued. District adopted the behavior intervention plan (BIP) from the previous district, hired a Board Certified Behavior Analyst (BCBA) for consultation, conducted an FBA and revised IEP-Behaviors continued including assaults on staff. Ultimately changed placement to place him alone with the BCBA and two aides with him at all times, to separate him from other students. They documented his behavior every 5-15 minutes. Student made limited progress.

***Reyes v. Manor Independent Sch. Dist.*, 67 IDELR 33
(W.D.Tex. 2016)**

Parents sued District for denial of FAPE. The Court noted “no school can guarantee the success of an IEP,” and found that the IEP was properly individualized to the student’s needs. The Court stated that the record revealed that the District took steps to address Plaintiff’s maladaptive behaviors and implement positive behavioral interventions to address them. Student made some progress despite his unpredictable, aggressive behavior, as such, the “Court finds Plaintiff has failed to prove he was denied positive academic and nonacademic benefits.”

Top Ten Things to Do When Dealing with “Behaviorally Challenged” Students

1. Ensure that you have current assessment, but most of all have good behavioral data and/or a good FBA to design positive behavioral supports and other strategies to address student behavior that impedes the student’s learning or the learning of others.
2. Documentation and analysis of behavior issues and information are KEY
3. Seek assistance from behavior “experts”
4. Consider aids (aides), interventions, and services as needed
5. Consider input from parents and their “experts”

6. Consistently implement the behavioral supports outlined in the IEP
7. Consider whether the BIP is working and that meaningful behavioral progress toward FAPE is being achieved; if it isn't, timely go back to the IEP team to revise it accordingly
8. Consider a more restrictive placement when appropriate to address behaviors
9. Consider formal action regarding students dangerous to themselves or others
10. When in doubt, call your school attorney!

THANK YOU!!

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