

## *SPECIAL EDUCATION—*

# IDEA, POSITIVE BEHAVIORAL SUPPORTS, AND SCHOOL SAFETY

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In recent years, incidents of student violence have been at the center of debates over education standards and school safety.<sup>1</sup> Congress has responded by enacting laws

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1. See Safe and Drug-Free Schools and Communities Act of 1994, Pub. L. No. 103-382 (codified as amended in scattered sections of 20 U.S.C.); HARVARD UNIVERSITY, REPORT BY THE ADVANCEMENT PROJECT AND THE CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES (2000) (unpublished Ph.D. dissertation, University of Kansas). See generally U.S. Dept. of Education, *Keeping Schools and Communities Safe*, Retrieved October 30, 2000 from the World Wide Web: <http://ed.gov/offices/OESE/SDFS/safeschools.html>; Joe Davidson, *Don't Kick Troubled Kids Out of School*, MSNBC.Com, Retrieved Sept. 9, 1999 from the World Wide Web: <http://www.msnbc.com/news/303654.asp>; Ellen Goodman, *'Zero tolerance' Slight Children*, BOSTON GLOBE, Jan. 2, 2000; Vincent Schiraldi, *Kids, Guns and Justice*, MSNBC.Com, Retrieved March 3, 2000 from the World Wide Web: <http://www.msnbc.com/news/377050.asp>; Joe Davidson, *The Tragedy of Trying A Child As An Adult*, MSNBC.Com, Retrieved June 1, 2000 from the World Wide Web: <http://www.msnbc.com/news/414697.asp>.

addressing school safety and student behavior.<sup>2</sup> Among those students about whom Congress has been concerned are those with disabilities, particularly those who benefit from the Individuals with Disabilities Education Act (IDEA).<sup>3</sup> When it reauthorized IDEA in 1997,<sup>4</sup> Congress specifically addressed those students' behaviors, the procedures by which their behaviors may be addressed and by which the students may be disciplined, the utilization of a relatively new behavioral intervention technique, "positive behavioral interventions, supports, and strategies"<sup>5</sup> ("PBS"), and the nature of the sanctions that schools may impose on them.

In Part I, this article analyzes IDEA's 1997 framework, the six principles governing the rights of students and duties of schools, and the relationship of PBS to IDEA. In part II, it sets out IDEA's provisions related to student behavior and school discipline. In Part III, it defines, explains, and justifies PBS. In Part IV, it sets out guidelines that state and local educational agencies may follow if they want to implement the state of art related to PBS. Finally, in Part V, it argues, contrary to the position of those who believe that IDEA has not struck the right "balance" between the rights of students with disabilities to a free appropriate public education and the equally legitimate rights of students (including those with and without disabilities) and school faculty and staff to have safe schools in which to learn and teach,<sup>6</sup> that, if schools will use PBS and follow the guidelines set out in Part IV, it is not necessary and indeed it is counterproductive to federal policy to strike such a "balance." Whenever we set out a guideline for schools or professionals, we italicize the text.

## I. IDEA's Framework: The Six Principles of IDEA and their Relation to PBS

In this section we (a) describe the six major principles underlying IDEA,<sup>7</sup> (b) define and explain PBS, (c) define functional behavioral assessment (FBA), a key element of PBS, and (d) examine the relation between IDEA's six principles and PBS and FBA.

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<sup>2</sup> See, e.g., Safe and Drug-Free Schools and Communities Act of 1994, *supra*.

<sup>3</sup> 20 U.S.C. §§ 1400-1487 (1999); HOUSE COMM. ON EDUCATION AND THE WORKFORCE, IDEA AMENDMENTS OF 1997, H.R. Rep. No. 95, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1997).

<sup>4</sup> Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17.

<sup>5</sup> 20 U.S.C. § 1414 (d)(3)(B) (1999).

<sup>6</sup> See generally Anne P. Dupre, *A Study in Double Standards, Discipline, and the Disabled Student*, 75 Wash. L. Rev. 1 (2000); Kurt M. Graham, *An Idea on How to Amend the Individuals with Disabilities Act in Order to Protect Students and Promote Equality*, 45 Wayne L. Rev. 1599 (1999); Kelly S. Thompson, *Limits On the Ability to Discipline Disabled School Children: do the 1997 Amendments to the IDEA Go Far Enough?*, 32 Ind. L. Rev. 565 (1999).

<sup>7</sup> 42 U.S.C. §§ 1400-1487 (1999); 34 C.F.R. Parts 300 and 303 (1999); 64 Fed. Reg. 12,406-12,672 (1999); further information about IDEA is available from the Office of Special Education Programs, U.S. Department of Education, 330 C Street, S.W., Mary E. Switzer Building, Washington, D.C. 20202; On the World Wide Web: <http://www.ideapractices.org>, <http://www.ed.gov/offices/OSERS/OSEP>.

## **A. The Six Principles of IDEA**

Ever since Congress enacted the Individuals with Disabilities Education Act (IDEA),<sup>8</sup> the Act has set forth six principles that govern the education of students with disabilities.<sup>9</sup> These six principles form a conceptual framework within which the students' rights and schools' duties are set out. These six principles are the following:

### ***1. Zero Reject***

The first of the six principles is "zero reject." "Zero Reject" is a rule of Providing a free appropriate public education to all students with disabilities and of prohibiting cessation of any such student's right to education. That is, it is a rule against exclusion. Among other things, it provides that, although a student may be disciplined, the student may not be subjected to any cessation of educational services.<sup>10</sup> For example, even if a student is properly expelled from a school, the school district must continue to educate the student, although in another setting.

### ***2. Nondiscriminatory Evaluation***

The second principle is "nondiscriminatory evaluation," a rule of fair evaluation of the student in order to determine whether the student has a disability and, if so, what special education and related services are required for the student.<sup>11</sup> To carry out a fair evaluation, the school must assess the student, inter-disciplinarily, across a variety of domains (cognitive, behavioral, developmental, and physical) and in those specific areas in which the student may have (or is already known to have) a disability.<sup>12</sup> Among other things, this principle also provides that the student's parents are members of the team that evaluates the student<sup>13</sup> and that they have the right to secure (sometimes at the cost of the school) and to have the school consider any evaluations conducted by qualified individuals who are not employees or contractors of the school.<sup>14</sup>

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<sup>8</sup> Originally enacted as P.L. 94-142 (1975), the Education for All Handicapped Children Act.

<sup>9</sup> H. Rutherford Turnbull III et al., *Free Appropriate Public Education: The Law and Children with Disabilities* (6<sup>th</sup> ed. 2000).

<sup>10</sup> 20 U.S.C. §§ 1412 (a)(1), 1415 (k) (1999).

<sup>11</sup> 20 U.S.C. § 1414 (a)-(c) (1999).

<sup>12</sup> 20 U.S.C. § 1414 (b) (1999).

<sup>13</sup> 20 U.S.C. § 1414 (b)(4), (d)(1)(B)(i) (1999).

<sup>14</sup> 20 U.S.C. §§ ©(1), 1415 (b)(1) (1999); 34 C.F.R. § 300.502 (1999).

### **3. *Appropriate Education***

The third principle is “appropriate education,” a rule of providing individualized special education, including related services, to the student, as set out in the student’s Individualized Education Program (IEP).<sup>15</sup> Just as the student’s parents are members of the nondiscriminatory evaluation team,<sup>16</sup> so they also are members of the student’s Individualized Education Program team (the IEP team).<sup>17</sup> This team is required to base the student’s IEP and related services on the student’s evaluation.<sup>18</sup> The purpose of appropriate education is to assure specified outcomes for the student, namely equal opportunity, full participation, independent living, and economic self-sufficiency<sup>19</sup> and, while in school, access to the general curriculum and, where appropriate, advanced placement courses or a vocational educational program.<sup>20</sup> The linchpin of an appropriate education is the student’s Individualized Education Program (IEP),<sup>21</sup> and the standards for determining whether a student has an appropriate education are that the school follows the applicable IDEA procedures and offers an opportunity for the student to benefit from special education and any other services provided.<sup>22</sup> An appropriate education includes, among other things, provisions regarding Functional Behavioral Assessments (FBAs),<sup>23</sup> Behavioral Intervention Plans (BIPs),<sup>24</sup> and PBS, as we explain more fully below.

### **4. *Least Restrictive Environment: Access to the General Curriculum***

The fourth principle is “least restrictive environment” (LRE), a rule of educating the student with other students who do not have disabilities (that is, in the general curriculum) to the maximum extent appropriate for the student with a disability. LRE is a rule of access to and progress through the general curriculum (defined as the academic, extra-curricular, and other school activities that make up the curriculum offered to non-disabled students).<sup>25</sup> In order to have that access and opportunity to benefit, the student with a disability is entitled to receive those supplementary aids and services that are set out in student’s IEP.<sup>26</sup>

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<sup>15</sup> 20 U.S.C. § 1414 (d) (1999).

<sup>16</sup> 20 U.S.C. § 1414 (d)(4) (1999).

<sup>17</sup> 20 U.S.C. § 1414 (d)(1)(B)(i) (1999); 34 C.F.R. §§ 300.344, 300.345 (1999).

<sup>18</sup> 20 U.S.C. § 1414 (d)(1999); 34 C.F.R. §§ 300.346, 200.347, 300.522 (1999).

<sup>19</sup> 20 U.S.C. § 1400 (c)(1), (c)(5)(E)(ii) (1999).

<sup>20</sup> 20 U.S.C. § 1414 (d)(1)(A)(vii) (1999).

<sup>21</sup> 20 U.S.C. § 1414 (d) (1999).

<sup>22</sup> Board of Education v. Rowley, 458 U.S. 156 (1982).

<sup>23</sup> 34 C.F.R. § 300.520 (b)(1) (1999).

<sup>24</sup> 34 C.F.R. § 300.520 (b), (c)(1) (1999).

<sup>25</sup> See 34 C.F.R. §§ 300.347, 300.553 (1999).

<sup>26</sup> 20 U.S.C. §§ 1401 (29), 1412 (a)(5) (1999).

Significantly, Congress regards special education to be a service, not a place to which students are sent.<sup>27</sup> Accordingly, the legal presumption is that the student will be educated, to the maximum amount appropriate for the student, with students who do not have disabilities.<sup>28</sup> This presumption may be set aside only if the “nature of severity of the [student’s] disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”<sup>29</sup> Even in those cases, however, the local educational agency (LEA) must provide a proper continuum of available services to ensure that the student is taught in the most inclusive setting possible.<sup>30</sup> The student’s IEP team, supplemented by general educators and school administrators, determines the student’s placement and is required to justify why access to the general curriculum, with supports, should not be available to the student.<sup>31</sup>

### ***5. Procedural Due Process***

The fifth principle is “procedural due process,” commonly known as the safeguards. These safeguards create checks and balances. They are ways for assuring that the student benefits from being in school and that the school is providing the services and placements required by the other principles.<sup>32</sup> They also assure shared decision-making concerning the student’s education.<sup>33</sup>

### ***6. Parent and Student Participation***

The sixth principle is parent and student participation, a rule of shared decision-making between the school and the student’s parent(s) and, as appropriate, the student. It, too, is part of IDEA’s checks and balances, created to help ensure shared decision-making regarding a student’s education and the provision of legally required services.

## **B. Definition, Application, and Components of Positive Behavioral Interventions and Supports (PBS)**

To understand PBS, one must define it. Therein lies a major problem. IDEA refers to “positive behavioral interventions, strategies, and support”<sup>34</sup> but the Act does not define the term; nor do the implementing regulations issued by the U.S. Department of education,<sup>35</sup> nor the Department’s comments on the regulations.<sup>36</sup> Sometimes the

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<sup>27</sup> 20 U.S.C. § 1400 (c)(5)(C) (1999).

<sup>28</sup> 20 U.S.C. § 1412 (a)(5) (1999).

<sup>29</sup> 34 C.F.R. § 300.550 (1999).

<sup>30</sup> 34 C.F.R. § 300.551 (1999).

<sup>31</sup> 34 C.F.R. § 300.347 (1999).

<sup>32</sup> See *Board of Education v. Rowley*, 458 U.S. 176 (1982); 34 C.F.R. §§ 300.500-300.589 (1999).

<sup>33</sup> 20 U.S.C. § 1414 (d)(1)(B)(i) (1999); 34 C.F.R. §§ 300.344 (a)(1), 300.345 (1999).

<sup>34</sup> 20 U.S.C. § 1414 (d)(3)(B)(i) (1999).

<sup>35</sup> 34 C.F.R. Part 300 (1999).

published literature refers simply to “positive behavioral supports” (PBS).<sup>37</sup> The intervention, by any other name, is still the same: “the application of positive behavioral interventions and systems to achieve socially important behavior change.”<sup>38</sup> As we explain in Part II below, PBS is appropriate to be considered as an intervention whenever a student’s behavior impedes the student’s learning or the learning of other students or whenever the student is subjected to certain types of discipline. Having said this much, it is now worth considering two different but complementary aspects of PBS: (1) its application at four different levels of students’ education, and (2) its four essential components.

### *1. Four Applications of PBS*

PBS “has been applied successfully with a wide range of students in a wide range of contexts” and may be used as an intervention for an entire school, as well as for individual students.<sup>39</sup> There are essentially four levels at which PBS may be applied:

(1) School-wide rules

PBS can be used to teach all students what is expected of them behaviorally (school rules) and to teach them the skills they need to meet those expectations.

(2) School-wide behavior

PBS can also be used as the intervention of choice for addressing specific behavioral issues created by individual students throughout the school, including both students with and without disabilities.

(3) IEP students

For students with disabilities, PBS is an effective and, as we argue below, the preferred form of behavioral intervention for students with IEPs.

(4) Comprehensive, community-based (school linked) services

“Increasingly, partnerships that include schools, community agencies, businesses, and family members offer new pathways for using PBS to change systems.”<sup>40</sup> Those partnerships, created to implement PBS across different service-delivery systems and settings, increase the effectiveness of interventions within the school settings and outside those settings as well.<sup>41</sup>

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<sup>36</sup> 64 Fed. Reg. 12,588 and 12,620 (1999).

<sup>37</sup> George Sugai et al., *Applying Positive Behavior Support and Functional Behavioral Assessment in Schools*, 2 JOURNAL OF POSITIVE BEHAVIORAL INTERVENTIONS 131, 133 (2000).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 133.

<sup>40</sup> *Id.* at 140.

<sup>41</sup> For more information about the need for and usefulness of having a continuum of behavioral interventions and supports from school-wide to individual students and across settings, see U.S. Dep’t of Education, *Safeguarding our Children: An Action Guided* (2000); Kevin P. Dwyer et al., U.S. Dep’t of Education, *Early Warning, Timely Response: A Guide to Safe Schools* (1998).

## 2. *Four Components of PBS*

Whether applied at level 1, 2, 3, or 4, PBS consists of four components. The four interrelated components of PBS are: (1) systems change activities, (2) environmental alteration activities, (3) skill instruction activities, and (4) behavioral consequence activities. These combine to form a behaviorally-based systems approach [which is applied] to enhance the capacity of schools, families, and communities to design effective environments that improve the fit or link between research-validated practices and the environments in which teaching and learning occurs. Attention is focused on creating and sustaining school environments that improve lifestyle results (personal, health, social, family, work, recreation, etc.) for all children and youth by making problem behavior less effective, efficient, and relevant and making desired behavior more functional. [In addition, the] use of culturally appropriate interventions . . . is emphasized. . . . At the core, PBS is the integration of (a) behavioral science, (b) practical interventions, (c) social values, and (d) a systems perspective.<sup>42</sup>

The specific components of PBS-based interventions are dictated by the particular needs of the student who exhibits challenging behaviors—those that IDEA calls “impeding” behaviors<sup>43</sup>—but it is advisable for persons who apply PBS at any one or more of the four levels should incorporate each in order to ensure that the delivery of PBS is as effective as it can be.

In asserting that there are four components of PBS, we rely in part on the comments that the United States Department of Education made in promulgating regulations under IDEA. In response to the issue of whether a student’s in-school and out-of-school behavior should be evaluated as part of the functional behavioral assessment, the Department said: “It might be helpful to all parties for the IEP to identify the circumstances or behavior of others that may result in inappropriate behaviors by the child.”<sup>44</sup> This language (“it might be helpful . . . .”) seems to us to encourage the nondiscriminatory evaluation and IEP team (or other team that conducts a functional behavioral assessment) to take into account the “circumstances or behavior of others”—that is, the “context” and environments and the “systems change activities” and “environmental alterations activities” that we believe are two of the four components of positive behavioral interventions and supports.

*a. Systems Change*<sup>45</sup>—A student’s behavior is affected by the philosophies, policies, procedures, practices, personnel, organization, and funding of educational

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<sup>42</sup> Sugai, *supra* note 37, at 133-134.

<sup>43</sup> See H. Rutherford Turnbull, III et al., *IDEA Requirements For Use of PBS: Guidelines for Responsible Agencies*, 3 *Journal of Positive Behavioral Interventions* 11-18 (2001).

<sup>44</sup> 64 Fed. Reg. 12,588 (1999).

<sup>45</sup> We assert that PBS is of particular importance for schools given the emphasis on behavioral ‘systems’ as well as individual children. A systems perspective provides support for the adoption and sustained use of effective school practices. Without attention to a systems approach, identification of practices is limited, adoptions are incomplete, and attention to school initiatives to address discipline is episodic and short term. Accordingly, PBS implementations consider multiple contexts: community, family district,

agencies (general and special education programs) and other human service agencies that are involved in the student's education. In order to develop or implement a student's positive behavioral interventions and supports plan, it usually is necessary to engage in a process of systems-change, namely, the process of considering, modifying, or substantially changing the agencies' philosophies, policies, procedures, practices, personnel, organization, and funding. Also, many students can profit substantially from integration of services from more than one provider agency.

b. *Environmental Alterations*—A student's behavior also is affected by the environments in which the student receives general and special education and related services. In order to develop or implement a student's positive behavior interventions and supports plan, a functional behavioral assessment may indicate the need to address life arrangements, quality of physical environment, personal accommodations, and instructional accommodations. Accordingly, PBS justifies

(1) making different life arrangements for the student, including building on the student's strengths and preferences, visually depicting for the IEP team the student's preferred daily and weekly activities, identifying priorities for change in those activities and collaborating with various professionals and family members and friends to implement those priorities, working with individuals in the student's school or with local educational or other agencies in the community to connect the student with those activities that the student prefers, facilitating the development of friendships between the student and peers (with and without disabilities), a promoting the student's health and wellness;

(2) increasing the quality of the student's physical environment, such as by enhancing the predictability of events, modifying the student's schedule, and minimizing noise and other environmental irritants;

(3) making personal accommodations for the student, such as by providing the student with an increased range of choices and accommodating for atypical neurophysiological and other physiological conditions; and

(4) making instructional accommodations for the student, such as by interspersing easy tasks when the student is working on more difficult ones, making modifications in the curriculum, offering choices in tasks and methods, increasing access to engaging activities, and decreasing the number of instructions given to the student.

c. *Skill Instruction*—A student's behaviors can become more appropriate if the student receives appropriate skill-building instruction. In addition, a student's behaviors can become more appropriate if individuals involved with the student (such as family members, educators, related service providers, local education agency

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school, classroom, nonclassroom (e.g., cafeteria, hallways, bus, playground, parking lot), and individual. Indeed, four change elements characterize PBS: (a) change of systems (policies, structures, routines), (b) change of environments, (c) change of student and adult (parent, teacher, staff) behavior and interaction, and (d) change in appreciation of appropriate behavior in all involved individuals (student, staff, family, etc.).



administrators, and peers with and without disabilities) also receive instruction in how to interact with the student. Accordingly,

(1) the student and others should receive appropriate academic, social skill, self-management, independent living-skill, or other instruction that is designed to enhance the likelihood that the student will achieve the results of independence, productivity, and inclusion:

(2) skill instruction should consist of teaching the student alternative behaviors that consider the factors that occasion and maintain the impeding behaviors (e.g., teaching the student to make requests using socially acceptable and desirable behavior, teaching the student to participate with alternative communication modes, teaching the student acceptable and desirable strategies for managing anger or resolving conflicts, or providing the student with physically stimulating activities);

(3) skill instruction also should consist of teaching the student adaptive behaviors (e.g., problem-solving, anger management, choice-making, self-management, or relaxation techniques) that reduce or ameliorate the impeding behaviors.

(4) Consistent with the results of the functional behavioral assessment of the student, individuals involved with the student, including members of the student's IEP team and present or potential members of the student's social networks (including peers in general and special education), should receive instruction in communicating with the student, preventing impeding behaviors, and developing appropriate responses to the student's impeding behaviors.

d. *Behavioral Consequences*—A student's learning-impeding behaviors often can be eliminated or reduced if the student is able to acquire appropriate behaviors. Accordingly, the student should receive behavioral consequences aimed at eliminating or minimizing impeding behaviors and establishing and increasing appropriate behaviors. The functional behavioral assessment that undergirds the student's positive behavioral interventions and supports plan and the plan itself should address these factors.

e. *The characteristics of positive behavioral interventions and supports include the following, without limitation:*

(1) Rather than viewing the student alone and the student's behavior as the problem to be addressed, positive behavioral interventions and supports view the systems and environments in which the student receives education or related services and the student's and others' skill deficiencies as interrelated aspects that influence occurrences of the impeding behaviors.

(2) Rather than remediating only the student's behavior, positive behavioral interventions and supports attempt to make adjustments to and accommodations in the systems and environments and to intervene by promoting appropriate skills in the student and complementary skills of others in those systems and settings.

(3) Rather than simply attempting to extinguish the student's impeding behavior, positive behavioral interventions and supports create new contacts, experiences, relationships, and skills for the student.

(4) *Rather than being a short-term intervention, positive behavioral interventions and supports acknowledges that it can take significant investments of effort, over a long period of time, to achieve systems change, make environmental alterations, develop and deliver skill instruction, and develop and deliver behavioral consequences.*

(5) *Rather than being implemented only by an individual, usually a behavioral specialist, often in atypical settings or by inflexible systems of service delivery, positive behavioral interventions and supports are developed, implemented, and evaluated by a team of professionals, family members, the student, and members of the student's and family's social network through a flexible person-centered planning process, in typical environments, including the general curriculum.*

(6) *Rather than being used as technologies that shape a student's behaviors according to criteria of acceptability that are determined solely by the professionals delivering services to the student, positive behavioral interventions and supports are techniques for (a) identifying the type of lifestyle that the student and, as appropriate, the student's family desire, (b) determining the social validity of the education and interventions that the student receives, and (c) assessing the quality of life that the student may attain through positive behavioral interventions and support plans, taking into account, as appropriate for the student and family, such quality of life measures as the student's inclusion into and progress through the general curriculum, employment, or volunteer opportunities, inclusion into and acceptance by members of the student's and the family's community, independent living opportunities, social and friendship connections, and similar measures related to independence, productivity, and inclusion.*

(7) *Rather than being technologies that are so specialized that they can be designed and implemented effectively only by special educators or other highly trained personnel (such as school psychologists or school social workers) and then only in one of the non-general education environments included in the continuum of special education settings approved by Individuals with Disabilities Education Act, positive behavioral interventions and supports can and should be designed and implemented to the greatest extent possible in the general curriculum and in all other educational settings and other life-settings of the student and by individuals who have received some (but not necessarily exhaustive, comprehensive, in-depth) training in their use and evaluation.*

f. *The purpose of a positive behavioral interventions and supports plan and its systematic implementation is to develop and implement a set of procedures uniquely appropriate to the student so that the student may achieve a life characterized by independence productivity, and inclusion and to enhance the student's capacity for learning and socialization.*

g. *To this end, positive behavioral interventions and supports seek to understand what factors maintain the occurrence of impeding behaviors (and their function, if any). Accordingly, positive behavioral interventions and supports use functional behavioral assessment procedures to define the conditions or factors that reliably predict when the behaviors occur, the events that maintain those behaviors, and strategies for replacing*

*those behaviors with behaviors that advance the student's independence, productivity, and inclusion.*

### **3. Specific Application of PBS to a Student: The PBS Plan**

*As noted above, there are four different applications of PBS. One of them is to the individual student (the third-listed application). Here, PBS interacts with the appropriate education principle and a student's right to an IEP. Fundamentally (and as we will explain below), a student's IEP should incorporate a plan for applying PBS. We call that the PBS plan and we set out below a definition and the components of the plan.*

*a. The term "positive behavioral interventions and supports plan" refers to a plan for systematic implementation of positive behavioral interventions and supports to address the student's impeding behaviors.*

*b. The plan is based on the functional behavioral assessment of the student's behavior and therefore is developed after the functional behavioral assessment has been completed. If it is determined that the plan is not effective in achieving its purposes, the plan should be revised.*

*c. The term "positive behavior interventions and supports plan" specifically excludes aversive interventions.*

## **C. Definition of Functional Behavioral Assessment; Distinction between FBA and Functional Analysis**

It is important that we now define a key element of PBS, the Functional Behavioral Assessment (FBA) and its related components, including the distinction between it and functional analysis.

### **1. Definition of Functional Behavioral Assessment**

*a. The term "functional behavioral assessment" means a process of identifying the student's impeding behaviors (behavior that impedes the child's learning or the learning of others) and the events that (1) reliably predict occurrences and non-occurrence of those behaviors and (2) maintain the behaviors across time.<sup>46</sup>*

*b. The purpose of gathering this information is to improve the effectiveness, relevance, and efficiency of behavior support plans, including positive behavioral interventions and supports plans.<sup>47</sup>*

*c. At a minimum, a functional behavioral assessment should conclude with three main results, including (1) hypothesis statements consisting of three features: (a) operational definitions of the behaviors, (b) descriptions of the antecedent events that*

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<sup>46</sup> Sugai, *supra* note 37, at 137.

<sup>47</sup> *Id.*

reliably predict occurrence and non-occurrence of the behavior, and (c) descriptions of the consequence events that maintain the behaviors, (2) direct observation data supporting these hypotheses, and (3) a plan for positive behavioral interventions and supports.<sup>48</sup>

d. A functional behavioral assessment is not a set of forms or static products. It is a process of understanding behavior in the context in which it is observed and of guiding the development of positive behavioral interventions and supports that are relevant, effective, and efficient.<sup>49</sup>

e. A functional behavioral assessment is a best and preferred practice for addressing impeding behaviors, not just for behaviors that result in disciplinary actions or changes of placement.<sup>50</sup>

f. Functional behavioral assessment may be accomplished as part of the nondiscriminatory evaluation of the student (required by IDEA<sup>51</sup>).

g. Functional behavioral assessment results in findings that are designed to be incorporated into the student's positive behavioral interventions and supports plan, Individualized Education Program (required by IDEA<sup>52</sup>), or other educational plan (such as a "504" plan developed in compliance with Section 504 of the Rehabilitation Act Amendments of 1975<sup>53</sup>).

## **2. Definition of Functional Analysis (FA) and Distinction Between FBA and FA**

The term "functional analysis" means manipulation of contextual variables within an experimental design with direct observation of the student's impeding behaviors.<sup>54</sup> The term "functional analysis" is (a) subsumed into the term "functional behavioral assessment, and (c) conducted only with the consent of all concerned individuals, by appropriately trained personnel, and with continuous data collection and monitoring.

## **3. Characteristics of FBA**

Although it is desirable for some students that a functional behavioral assessment should include all of the elements set out below, we recognize that, for other students, particularly those with high-incidence disabilities, a sufficient functional behavioral assessment can be developed with less information than is specified below, so long as the plan conforms to the general standards set out above. Accordingly:

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> 20 U.S.C. § 1414 (a)-(c) (1999).

<sup>52</sup> 20 U.S.C. § 1414 (d) (1999).

<sup>53</sup> 29 U.S.C. § 794 (2000).

<sup>54</sup> Kathleen L. Lane, et al., *Functional Assessment Research on Students with or at Risk for EBD: 1990 to the Present*, 1 JOURNAL OF POSITIVE BEHAVIOR INTERVENTIONS 101-111, 101 (1999).

*a. A functional behavioral assessment meets the standards set out above, and should include all of the following: (1) systematic observation, documentation, and analysis of the occurrence of the impeding behaviors and a measurable and objectively stated description of the frequency, duration, nature, and intensity of the impeding behaviors, (2) systematic observation, documentation, and analysis of the immediate antecedent events associated with display of the behaviors and of the events or conditions within the student that may lead to or be associated with the immediate antecedent events associated with the display of the behaviors, (3) systematic observation, description, documentation, and analysis of the consequences following the display of the behaviors to determine the function (if any) that the behaviors serve for the student (i.e., to identify the specific environmental or physiological outcomes produced by the behavior), (4) if appropriate, a description of the rate of alternative behaviors, their antecedents and consequences, (5) data describing not only the time that the student spends acting in appropriate ways but also the time and frequency of the student's adaptive behavior (that is, evidence that the student is learning more desirable and alternative patterns of behavior), (6) a description of the events, systems, biobehavioral states, and environments that reliably predict both occurrence and non-occurrence of the behaviors, which description shall consist of but not be limited to an ecological analysis of the settings and interactions in which the behaviors occur most and least frequently, including, as appropriate for the student, (a) the student's school, home, social, and community settings, (b) the activities and the nature of instruction or others' interactions with the student, scheduling of activities in the student's life, the quality of any communication between the student, professionals, other agency personnel and other students, the degree of the student's independence, the degree of the student's participation in various school and other settings; the amount and quality of the student's social interaction, the degree of the student's choice, and the variety of the student's activities, (7) a review of the history of the student's behaviors, including without limitation the effectiveness of previously used interventions, (8) a description of the data (including any available baseline data, but no positive behavioral interventions and support plan should be denied or delayed on account of the fact that baseline data related to targeted behaviors are not available at the time the functional behavioral assessment is conducted) related to the behaviors, and, if readily available and if not apt to provoke other or more severe impeding behaviors in the student, and if needed, a functional analysis of the behaviors and their function and consequences across those settings in which they occur, (9) a review of the evaluations of the student that have been conducted pursuant to 20 U.S.C. § 1414(a) through (c) (1999), (10) an interview of various individuals, including as appropriate the student's parents and other family members, physician(s), general and special educators, and related service providers, and (11) descriptions of the extent, if any, that system-change, environmental alteration, skill instruction, and behavioral consequence activities should be undertaken so as to prevent the student's impeding behaviors from occurring and to contribute to the student's acquisition and use of appropriate behaviors.*

*b. A functional behavioral assessment benefits a student under the following circumstances:*

*(1) Whenever positive behavioral interventions and supports are proposed for the student, the student's IEP team (a) should be augmented by individuals trained to conduct a functional behavioral assessment of the student's impeding behaviors and individuals trained to deliver positive behavioral interventions and supports, and (b) should base the student's positive behavioral interventions and supports plan on the functional behavioral assessment.*

*(2) Before conducting the functional behavioral assessment, the persons responsible for it should comply with 20 U.S.C. § 1414(a) through (c) (1999) relating to consent for evaluation.*

#### **D. Relation of the Six Principles to PBS**

Now that we have described the six principles of IDEA and defined positive behavioral support, functional behavioral assessment, functional analysis, and their components, we examine the relation between IDEA's principles and positive behavioral support, showing how IDEA embeds positive behavioral support, functional behavioral assessment, and functional analysis.

##### **1. Zero Reject**

PBS is important in reaching requirements of the zero reject principle. PBS first addresses zero reject by providing a proactive method of behavioral intervention that minimizes the opportunity for recurrence and escalation of undesired behaviors that can lead to suspensions and expulsions. Indeed, where PBS has provided children who have behavioral challenges with the supports and interventions they need to succeed, the number of children facing suspension and expulsion has been reduced.<sup>55</sup>

Even in cases in which a child is expelled or removed from the current placement for an extended period, PBS remains an important resource for dealing with the child's behavior. Arguably, its importance could be most crucial for these students, since they

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<sup>55</sup> See Jared S. Warren et al., *School-wide Application of Positive Behavioral Supports: Implementation and Preliminary Evaluation of PBS in an Urban Middle School*, *JOURNAL OF EDUCATIONAL PSYCHOLOGY* (submitted). For additional information, see Peter E. Leone et al., who have identified PBS as a promising approach for addressing school violence and developing related school-wide initiatives (*School Violence and Disruption: Rhetoric, Reality, and Reasonable Balance*, 33 *FOCUS ON EXCEPTIONAL CHILDREN* 1 (September 2000)). They explain that schools should consider three fundamental principles when planning violence prevention initiatives: a) evidence strongly supports the effectiveness of school-wide violence prevention initiatives that organize prevention efforts such that schools can systematically address the needs of all students, b) approaches that emphasize punishment, control, and containment have been demonstrated to be ineffective in preventing or intervening in disruption and violence and may actually exacerbate school disorder, and c) effective school-wide prevention initiatives are comprehensive, have several components, and involve a broad range of services and supports provided over a sufficient period.

face the most severe behavioral challenges. For students who have been removed from their current placement for an extended period but who may at some point return from suspension to their original placement, PBS is even more important because it can help to change the behaviors that could again become problematic when the student returns to his/her original school placement.

## ***2. Nondiscriminatory Evaluation***

PBS and the methods by which it is applied (i.e., via functional behavioral assessment and, as appropriate, functional analysis) are helpful in meeting the nondiscriminatory evaluation requirements because they seek to evaluate the functionality of behavior and then the relevance of that evaluation to the student's right to special education and related services. Further, functional behavioral assessment and PBS methods are flexible enough to be applied cross-culturally, across all settings affecting the child's behavior, and to all four domains that IDEA requires to be assessed: cognitive, behavioral, developmental, and physical.

## ***3. Appropriate Education***

PBS is a vital resource in meeting appropriate education goals and standards, because it allows for individualization and enables the child to benefit from the provided education by altering behavior that impedes learning.

## ***4. Least Restrictive Environment***

As a proactive, rather than reactive, response to behavioral challenges, PBS can be used to promote desired behavior and thereby diminish undesired behavior that can lead to restrictive placements. Further, PBS techniques are, generally speaking, less restrictive and less drastic than other forms of behavioral intervention.<sup>56</sup> As such, they are preferable in light of IDEA's requirements for access to the general curriculum and to the least drastic means of intervention.

## ***5. Procedural Due Process***

As we describe below, there are procedural requirements related to the use of PBS. IEP teams are encouraged to use PBS in all cases involving students with behavioral challenges and are required to consider the use of PBS in certain disciplinary situations.

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<sup>56</sup> We discuss aversive interventions further below.

## **6. Parent and Student Participation**

Since PBS can and should be applied across settings under the four-levels-of-application approach, parents are certainly involved in decisions about providing and implementing PBS at school and home. The student is also an active participant in learning desired behaviors and methods for avoiding undesired behaviors.<sup>57</sup>

## **II. IDEA's Provisions Regarding Student Behavior and Student Discipline**

### **A. General Provisions**

Having analyzed IDEA's framework (the six principles), defined PBS and functional behavioral assessment, and connected the six principles to these two techniques, we now analyze IDEA's provisions related to PBS and functional behavioral assessment. IDEA includes four provisions related to positive behavioral interventions and supports (PBS).

1. 20 U.S.C. § 1412(a)(22) (1999) requires the state educational agency (SEA) to "[examine] data to determine if significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities [among local educational agencies (LEAs) or compared to such rate for nondisabled children with the LEAs]." Further, "If such discrepancies are occurring, the [SEA] reviews and, if appropriate, revises (or requires the affected State or local educational agency to revise) its policies, procedures, and practices relating to the development and implementation of IEPs, the use of behavioral interventions, and procedural safeguards, to ensure that such policies, procedures and practices comply with [IDEA]." These data-collection, data-analysis, and policy-and-practice review or revision provisions address the first of the four components of PBS, namely, systems change activities.

2. 20 U.S.C. § 1413(j) (1999) provides that a "State may require that a [LEA] include in the records of a child with a disability a statement of any current or previous disciplinary action that has been taken against the child and transmit such statement to the same extent that such disciplinary information is included in, and transmitted with, the student records of nondisabled children . . . . If the State adopts such a policy, and the child transfers from one school to another, the transmission of any of the child's records must include both the child's current [IEP] and any such statement of current or

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<sup>57</sup> For information about the importance of including students and parents in PBS-related decision-making, see G. Roy Mayer & Beth Sulzer-Azaroff, *Interventions for Vandalism*, in *Interventions for Academic and Behavior Problems* 571, 559-80 (Gary Stoner et al. eds., 1991); Hill M. Walker et al., *Integrated Approaches to Preventing Antisocial Behavior Patterns Among School-age Children and Youth*, 4 *Journal of Emotional and Behavioral Disorders* 4, 202, 194-209 (1996); Stephen D. Kroeger et al., *Creating a Sense of Ownership in the IEP Process*, 32 *Teaching Exceptional Children* 1, 4, 4-9 (1999).



previous disciplinary action that has been taken against the child.” These provisions also address the first component, but at the system level.

3. 20 U.S.C. § 1414(d)(3)(B)(i) (1999) explains that “in the case of a child whose behavior impedes his or her learning or that of others,” a student’s IEP team is required to “consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior.”<sup>58</sup> This provision addresses the second, third, and fourth components, namely, environmental alternations, skill instruction, and behavioral change.

4. 34 C.F.R. § 300.520 (b) (1999)<sup>59</sup> states:

(1) Either before or not later than 10 business days after either first removing the child for more than 10 school days in a school year or commencing a removal that constitutes a change of placement under § 300.519, including [removals for weapon or drug violations]—

(i) If the LEA did not conduct a functional behavioral assessment and implement a behavioral intervention plan for the child before the behavior that resulted in the removal . . . the agency shall convene an IEP meeting to develop an assessment plan.

(ii) If the child already has a behavioral intervention plan, the IEP team shall meet to review the plan and its implementation, and, modify the plan and its implementation as necessary, to address the behavior.

(2) As soon as practicable after developing the [assessment plan] and completing the assessments required by the plan, the LEA shall convene an IEP meeting to develop appropriate behavioral interventions to address that behavior and shall implement those interventions.

Like the “impeding behavior” provision, these also address the second, third, and fourth components.

## **B. IDEA and PBS As a Rebuttable Presumption**

Before analyzing these latter two provisions in detail, it is worth describing the nature of the PBS requirements. They are presumptions in favor of certain LEA behavior. Basically, IDEA creates a reputable presumption in favor of positive behavioral interventions and supports. It does this by acknowledging them to be techniques that the IEP team members must consider in one instance and that they may consider in another.

At law, one technique for regulating the behavior of people affected by the law is to create a presumption in favor of or against an identified result. For example, a presumption exists in favor of keeping children with their own families or reuniting them with their own families, and against removing them to the foster-care or adoption system, in cases of their abuse and neglect.<sup>60</sup> Likewise, a presumption exists that the

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<sup>58</sup> See also 34 C.F.R. §§ 300.346, 300.121 (1999); 64 Fed. Reg. 12,618-12,626 (1999).

<sup>59</sup> See also 20 U.S.C. § 1415 (k)(1)(B) (1999) and 34 C.F.R. § 300.520 (c) (1999).

<sup>60</sup> Adoption and Safe Families Act of 1997, Pub. L. 105-89, 111 Stat. 2115 (1997).

child's parents have a right to control and raise their children.<sup>61</sup> These presumptions, however, may be set aside – they may be rebutted in order to preserve and protect the child from parental harm.<sup>62</sup> Thus, the law of families and children presumes in favor of family unity, but the presumption is rebuttable. Accordingly, courts may not separate children from their families, except in limited cases; the law thus governs courts<sup>63</sup> and state agencies.<sup>64</sup> With this explanation of a rebuttable presumption in mind, IDEA's PBS provisions are properly identified as rebuttable presumptions, for reasons that follow below.

### ***1. Consideration of Positive Behavioral Interventions and Supports for "Impeding" Behavior in IEP Development***

20 U.S.C. § 1414(d)(3)(B) (1999) requires the student's IEP team to consider "special factors" when it develops the IEP. As mentioned above, 20 U.S.C. § 1414(d)(3)(B)(i) (1999) provides that, "in the case of a child whose behavior impedes his or her learning or that of others," the IEP team shall ". . . consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior."<sup>65</sup> The IEP team must take this action, but the membership on the IEP team is fundamentally the same as that of the team that completes the student's nondiscriminatory evaluation. The consequence of the overlapping membership is that the evaluation data are known to the IEP team and must and easily can be taken into account when the team decides whether to consider positive behavioral interventions and supports.<sup>66</sup>

The word "consider" is important. In our judgment, the team members must think about whether to use positive behavioral interventions and supports. Indeed, proper "consideration" requires the team members to understand what is meant by the terms "positive behavioral interventions and supports."<sup>67</sup>

The team should also document their decision-making process by minutes that reflect what they considered, how much time they spent in consideration, who was on the team, how often did the team members meet, etc. The reason for documentation is straight-forward: If an attack is made, in a lawsuit or due process hearing, on the process for the team's decision-making, on the grounds that a flawed process cannot

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<sup>61</sup> Troxel *et vir* v. Granville, No. 99-138, slip op. (U.S. June 5, 2000).

<sup>62</sup> Adoption and Safe Families Act of 1997, *supra* and Troxel, *supra*.

<sup>63</sup> Toxel, *supra*.

<sup>64</sup> Adoption and Safe Families Act of 1997, *supra*.

<sup>65</sup> We further define "impeding behavior" below.

<sup>66</sup> 20 U.S.C. § 1414(d)(1)(B) (1999).

<sup>67</sup> See H. Rutherford Turnbull, III et al., *Discipline and Positive Behavioral Supports Under the Individuals with Disabilities Education Act: Guidelines for School Psychologists and Counselors*, Journal of Educational Psychology (forthcoming); H. Rutherford Turnbull, III et al., *IDEA Requirements for Use of PBS: Guidelines for Responsible Agencies*, 3 Journal of Positive Behavior Interventions 1, 11-18 (2001); Brennan L. Wilcox et al., *Behavioral Issues and IDEA: PBS and the FBA In The Disciplinary Context*, 8 Exceptionalities 3, 173-187 (2000).

lead to an acceptable result, then documentation of the process can be evidence of a defensible process. Under the Supreme Court's decision in *Board of Education v. Rowley*,<sup>68</sup> it is clear that a fair decision making process is one defense to a claim that a school has not provided a student with a free appropriate public education. By extension of the "process definition" of a free appropriate public education (FAPE),<sup>69</sup> it seems that a similar standard should apply to the "consider" requirements related to PBS: If the team considers PBS, then at least one element of the appropriate education standard is met.

The team must consider positive behavioral interventions and supports "when appropriate," namely, when the student's behavior impedes learning. Given that IDEA creates a rebuttable presumption in favor of PBS, the question that a team may be asked, in a challenge to its decision-making process and the results of that process, is this: When is PBS not appropriate not appropriate to be considered? What factors rule out PBS in the team's consideration? In our judgment, it is advisable for the team to document its decision-making process and results, with written rationale, for a decision making process and the decision itself may be flawed<sup>70</sup> and certainly invites an attack in a due process hearing or in court.

The team members are not required to use positive behavioral interventions and supports, only to consider whether to use them or other interventions or no interventions at all. IDEA's language does not prohibit, and thus allows, the IEP team to "consider" whether to use other strategies than, or in addition to, positive behavioral interventions and supports, or to use no interventions at all. Accordingly, a team may consider such interventions as a therapeutic drug regimen (relying on medical advice), the use of non-positive interventions (which are hard to justify under the rebuttable presumption given to PBS), or the continuation, discontinuation, or modification of present (positive or other) interventions. Note, however, that in every case, the IEP team is required to consider positive behavioral interventions and supports, even if they are also considering other strategies.

The strategies (whether they may be) must "address" the student's impeding behavior. This language means that the strategies must be targeted at preventing, reducing, replacing, or otherwise appropriately addressing the impeding behavior (or behaviors). Again, the basis for this judgment is the *Rowley*<sup>71</sup> decision. There, the Supreme court interpreted IDEA's requirement of an "appropriate education" to mean that the student must be given such services as will enable the student to "benefit" from special education. The "benefit" standard suggests that any strategy to "address" a student's behavior must be one that will "benefit" the student in the sense that it is efficacious for the purpose for which it is used: the interventions benefit the student by changing the student's behavior and thus enhance the student's ability to benefit from

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<sup>68</sup> 458 U.S. 176 (1982).

<sup>69</sup> *Turnbull*, *supra* note 9.

<sup>70</sup> *Supra* note 9.

<sup>71</sup> *Supra* note 68.

special education and related services. Behavioral interventions must seek this result and cannot serve the sole purpose of punishment (with exceptions for behavior that is not a manifestation of a child's disability and to meet safety concerns spelled out in IDEA<sup>72</sup>).

## ***2. Consideration of Positive Behavioral Interventions and Supports: Discipline***

The second "consideration" provision obtains when the student is subjected to certain types of discipline. The procedures for the discipline are significant and bear close analysis. 20 U.S.C. § 1415(k)(1)(A) (1999) gives LEAs the authority to remove a student from the student's current placement "to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days to the extent such alternatives would be applied to children without disabilities" or "to an appropriate interim alternative educational setting for the same amount of time that a child without a disability would be subject to discipline, but for not more than 45 days if—

- a. the child carries or possesses a weapon to or at school, on school premises, or to or at a school function, under the jurisdiction of a State or a local educational agency; or
- b. the child carries or possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function under the jurisdiction of a State or local educational agency."

In our opinion, 20 U.S.C. § 1415(k)(1)(B) (1999) imposes on LEAs a requirement concerning positive behavioral interventions and supports when these disciplinary actions are taken against a child with a disability. That is because it states: "if the [LEA] did not conduct a functional behavioral assessment and implement a behavioral intervention plan for such child before the behavior that resulted in the [discipline], the agency shall convene an IEP meeting to develop an assessment plan to address that behavior." This meeting must take place "either before or not later than 10 [business] days after taking [the disciplinary action]." Further, "if the child already has a behavioral intervention plan, the IEP team shall review the plan and modify it, as necessary, to address the behavior". If a behavioral intervention plan was not already in place, the IEP team is required to create one after completion of necessary assessments (but within the required time-frame (see below)).

Although IDEA itself describes Functional Behavioral Assessment (FBA) (Behavioral Intervention Plan (BIP) requirements in terms of the disciplinary actions described in 20 U.S.C. § 1415 (k)(1)(A) (1999), the IDEA regulations clarify that the FBA and BIP are required when "either first removing the child for more than 10 school days in a school year or commencing a removal that constitutes a change of placement under § 300.519, including [changes of placement for weapon or drug violations under § 300.520(a)(2)]."<sup>73</sup> "Change of placement" means removals of "more than 10

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<sup>72</sup> See 34 U.S.C. §§ 300.520, 300.521 (1999).

<sup>73</sup> 34 C.F.R. § 300.520(b)(1) (1999).

consecutive school days” or a “series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year, and because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another.”<sup>74</sup>

The discipline provisions are sufficiently complex that we have included a decision tree, detailing the disciplinary process, as Appendix A. Please note that our analysis involves only federal law and the state laws may further restrict disciplinary practices.

Note that the FBA and BIP requirements make no specific mention of positive behavioral interventions and supports in the event of disciplinary action. When, however, the need for discipline arises, the IEP team is required to create, review, or revise any “behavioral intervention plan” for the sole purpose of “addressing” the student’s sanctionable behavior. If it has to develop the plan in the first place, it must do so by conducting a “functional behavioral assessment” before implementing a plan based on the assessment. In our view, and for reasons we set out below, the term “functional behavioral assessment” is inseparable in the research and practice literature from positive behavioral intervention and supports. Further, the “impede” provision requires the team to consider positive behavioral interventions and supports in order for the LEA to address learning-impeding behavior. Thus, a fair reading of the section is that the team must at least consider positive behavioral interventions and supports as interventions to address the behavior for which the student is disciplined.

Moreover, the Department of Education has explained in its commentary on 34 C.F.R. § 300.520 (1999) that positive behavior interventions and supports may themselves comprise the behavioral intervention plan: “If, under § 300.346 (a) and (c), IEP teams are proactively addressing a child’s behavior that impedes the child’s learning or that of others in the development of IEPs, those strategies, including positive behavioral interventions, strategies and supports in the child’s IEP will constitute the behavioral intervention plan that the IEP team reviews under paragraph (b)(2) of [§ 300.520]”<sup>75</sup> It therefore seems to us that, whenever the IEP team is required to examine an existing BIP, the team will be re-examining the extent to which a functional behavioral assessment and possibly a positive behavioral intervention plan should be undertaken and developed.

## **C. Student Behavior: The “Impeding” Standard and the IEP**

### ***1. Defining “Impeding Behavior”***

As we have explained above, PBS must be considered whenever a child’s behavior “impedes” his or her learning or the learning of others. But what is meant by the term “impedes?” What is the standard that triggers IDEA’s PBS requirement? IDEA and its regulations do not define “impede” or set a standard.

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<sup>74</sup> 34 C.F.R. § 300.519 (1999).

<sup>75</sup> 64 Fed. Reg. 12.620 (1999).

We define the term “impeding behavior”<sup>76</sup> to mean those behaviors of the student that a) interfere with the learning of the student or of others and are externalizing (such as verbal abuse, aggression, self-injury, or property destruction), are internalizing (such as physical or social withdrawal, depression, passivity, resistance, social or physical isolation, or noncompliance), are manifestations of biological or neurological conditions (such as obsessions, compulsions, stereotypies, or irresistible impulses), are manifestations of abuse, neglect, exploitation or maltreatment, or are disruptive (such as annoying, confrontational, defiant, or taunting), b) could cause the student to be disciplined pursuant to any state or federal law or regulations, or could cause any consideration of a change of the student’s education placement, and c) are consistently recurring and therefore require functional behavioral assessment and the systematic and frequent application of positive behavioral interventions and supports.

The first component of our definition (“interfere”) relates to the terms used by IDEA, its regulations, and the Department of Education. Notably, “impeding behavior” has not been defined by IDEA, its regulations, or the Department of Education. IDEA itself and its regulations use only the term “impede,” but the Department has used the term “interfere” and “significantly impair” in phrases and manners that indicate that “impede,” “impair,” and “interfere” may have similar meanings.<sup>77</sup> The Department’s statement is: “school officials have powerful incentives to implement positive behavioral interventions, strategies and supports whenever behavior interferes with the important teaching and learning activities of school.”<sup>78</sup>

The Department’s clarification is significant and useful. It is significant because it instructs courts, hearing officers, state and local school administrators and other professionals, and parents and advocates for students with disabilities concerning how they should interpret and apply IDEA and its regulations. Moreover, the Department’s comments are useful because they use words that the statute and its regulations do not use.

The term “incentive” is different from the term “requirement.” An incentive is a positive reason for acting; a requirement is a legal duty to act. The difference in meaning is consistent with our argument above that the PBS provisions do create a presumption in favor of that technology.

The term “interferes” seems to be a synonym for “impede.” But note what follows the term “interferes”—namely, “the important teaching and learning activities of the school.” This phrase asks a decision-maker—such as the student’s IEP team, a hearing officer, or a court—to determine what is an “important” activity and to distinguish it from an “unimportant” or “less important” activity.

Moreover, the phrase also adds the words “teaching and”, suggesting that it is not just the learning of the student in question and of other students that constitutes “impeding” but it is also the teaching—the activities of the school staff—that may be

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<sup>76</sup> See 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.346(a)(2)(i).

<sup>77</sup> 64 Fed. Reg. 12,479, 12,480, and 12,588 (1999).

<sup>78</sup> 65 Fed. Reg. 12,588 (1999).

impeded or interfered with in order for educators or others to determine that behavior does indeed “impede.” This is a defensible interpretation, because, if an educator cannot teach on account of a student’s behavior, then that student’s behavior impedes or interferes with the learning by other students. Thus, a two-pronged analysis seems to us to be called for: what behavior impedes the student’s own learning, and what behavior impedes the learning of others or the teaching to others?

It seems also that the Department considers a violation of a school code of conduct to be “impeding behavior.” In its questions and answers on IEPs, the Department states that “in most cases in which a child’s behavior that impedes his or her learning or that of others is . . . repetitive, proper development of the child’s IEP will include the development of strategies, including positive behavioral interventions, strategies and supports to address that behavior . . . . This includes behavior that could violate a school code of conduct.”<sup>79</sup>

The second component of our definition (“those behaviors that are . . .”) includes many types of behaviors and is a theoretical, pragmatic, and inclusive. It is a theoretical in that it does not rest on any single theory or explanation of why impeding behaviors occur. It is pragmatic in that it recognizes that there are many types of behaviors that impede the learning of the student with a disability and of other students, too. It is inclusive because (a) it is based on the PBS research that we cited in Part I-B, (b) includes students who have been the most usual subjects of research, namely, those with “challenging behaviors” that derive from mental retardation or autism or a combination of those or other developmental disabilities, (c) includes students who have emotional disturbance, (d) includes students who have learning disabilities, attention-deficit/hyperactivity disability, or comparable impairments, and (e) includes those whose behaviors derive from one or more movement disorders.

Moreover, our definition encompasses the identified behaviors in part because IDEA does not exclude them, in part because students with those behaviors have been subjected to discipline in school (and discipline triggers at least a functional behavioral assessment<sup>80</sup>), in part because the research into positive behavioral interventions and supports is beginning to address impeding behaviors in students who do not have developmental disabilities, and in part because students with impeding behaviors, whatever the etiology of those behaviors and however those students may be classified (labeled) by school systems, deserve the benefits of positive behavioral interventions and supports.

Another component of our definition is that the student’s behavior must be such that it “could cause any consideration of a change of the student’s educational placement.” Any change of placement must be addressed through the IEP process and by the student’s IEP team<sup>81</sup> and could result in the student being placed in a more restrictive program, possibly to the detriment of the student’s right to receive an appropriate

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<sup>79</sup> 64 Fed. Reg. 12,479 (1999).

<sup>80</sup> 20 U.S.C. § 1414(k)(1) (1999).

<sup>81</sup> 20 U.S.C. § 1414(d) (1999).

education. Whatever the consequences of the behavior, the behavior impedes learning and should result in a plan for evaluation (functional behavioral assessment) and intervention (IEP-based positive behavioral interventions and supports.)

Yet another component of our definition above relates to schools' responses to impeding behavior. IDEA and its regulations do not specify the level of impediment that triggers a functional behavioral assessment and a positive behavioral interventions and supports plan. So, a state or local educational agency may or may not set a level. The benefit of setting no level is that any impediment arguably should justify a functional behavioral assessment and positive intervention. That approach is advantageous because proactive intervention can prevent possible subsequent and sometimes less easily remediable behavior. We, however, prefer to set a level of requiring the behaviors to be "consistently recurring" and therefore to "require a systematic and frequent application" of positive behavioral interventions and supports. This arguably is consistent with the Department's comments (above) that the "proper development" of a student's IEP will include strategies, including positive behavioral interventions and supports, to address student behavior that is "repetitive."<sup>82</sup>

We are conscious that educators face various constraints when it comes to their use of positive behavioral interventions and supports and, in Part IV-D, we address some of these constraints as we discuss capacity-building. We also acknowledge that some students could benefit from positive behavioral interventions and supports even though their behaviors are not durable and chronic, that is, not a regular part of their behavioral repertoire.

But we acknowledge the present limitations of school systems and assert that the claims of students with durable and chronic behaviors to PBS are greater than the claims of students who have less durable and chronic behaviors. We therefore exclude the latter from the definition of students with impeding behaviors. Of course, if a school decides to provide positive behavioral interventions and supports to students with non-durable, non-chronic impeding behaviors, that is quite agreeable to us and indeed is consistent with a school-wide approach to improving all students' behaviors via the use of positive interventions and supports.

### **III. Justification of PBS As A Preferred Means of Behavioral Intervention**

A substantial body of research on positive behavioral interventions and supports justifies a requirement that they be the interventions of choice for those students who exhibit behaviors that impede learning.<sup>83</sup> The benefits of positive behavioral

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<sup>82</sup> 65 Fed. Reg. 12,479 (1999).

<sup>83</sup> See Sugai, *supra* note 37 and Carr et al., *Positive Behavior Support as an Approach for Dealing with Problem Behavior in People with Developmental Disabilities: A Research Synthesis*, American Association on Mental Retardation Monograph Series (1999). For further evidence, see generally the *Journal of Positive Behavior Interventions*.



interventions and supports accrue to the student who exhibits impeding behaviors, the student's family, the student's peers in general and special education, the student's teachers and other providers of general and special education and related services, and the members of the community settings in which the student participates or could participate.<sup>84</sup>

Given these benefits, positive behavioral interventions and supports are especially appropriate for use as part of a local educational agency's whole-school approach to the education of all students, whether or not they have disabilities.<sup>85</sup> Research has demonstrated that a whole-school approach that employs widespread use of positive behavioral interventions and supports and that is based on school codes of conduct and disciplinary procedures and standards derived from student, family, and staff/faculty consensus, can enhance the frequency of appropriate behaviors by all students.<sup>86</sup> Thus, positive behavioral interventions and supports become a technique for ensuring both a free appropriate public education in the least restrictive environment for students with disabilities and a school-wide environment that is safe and conducive to learning by all students.

#### **IV. Guidelines for Implementing State of Art PBS**

Thus far we have defined PBS and FBA, we have briefly set out the six principles of IDEA as a framework in which to put the PBS provisions, described those provisions, and characterized them as creating a rebuttable presumption in favor of PBS. It is now appropriate to offer guidance to schools, parents, and courts and due process hearing officers on how, and why, to implement the PBS provisions consistent with the research on PBS. Our guidance rests in part on (a) the research we cited in part I-B and (b) the provisions of IDEA and its regulations that we have cited in Part III. These guidelines comply with IDEA and, if followed, should aid in the effective implementation of PBS.

##### **A. Policy Declaration**

Because PBS entails systems change activities, an SEA or LEA should adopt policies consistent with PBS, especially its systems-change component.

This subsection declares a policy of equal educational opportunities for all students including those with disabilities, consistent with IDEA.<sup>87</sup> In our judgment and as stated by Sugai et al. (2000),<sup>88</sup> this universal policy justifies the use of PBS for all students with impeding behaviors (whether or not the students are classified into IDEA's or

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<sup>84</sup> See Positive Behavioral Support: Including People with Difficult Behavior in the Community (Lynn K. Koegel et al. eds., 1996); Mayer, *supra* note 57 at 563.

<sup>85</sup> Sugai, *supra* note 37.

<sup>86</sup> *Id.* See also Leone *supra* note 55.

<sup>87</sup> 20 U.S.C. § 1400 (d) (1999).

<sup>88</sup> *Supra* note 37.

Section 504's protection). Subsection B is consistent with IDEA,<sup>89</sup> with recent school reform legislation (i.e., Improving America's Schools Act<sup>90</sup> and the Charter School Expansion Act<sup>91</sup> and, (as Sugai et al. (2000)<sup>92</sup> pointed out), with research that demonstrates that positive behavioral interventions and supports, when made available on a school-wide basis for all students, can improve the safety and learning conditions of a school for all students.

The policy of the state (or local) educational agency should be as follows:

### **1. *Equal Educational Opportunities***

The state (or local) educational agency is committed to providing an appropriate education for all students, including those with disabilities.<sup>93</sup>

### **2. *Safe Schools***<sup>94</sup>

All students, including those with disabilities, benefit from safe, well-disciplined and orderly schools and other learning environments.<sup>95</sup>

### **3. *Positive Interventions and Effective Learning Environments***

Students' rights to positive behavioral interventions and supports plans and to a free appropriate public education in the least restrictive environment and with the use of the least restrictive and least drastic means can assure that schools will be safe and conducive environments for teaching and learning by all students.

It is not necessary to take the approach that the rights of students with disabilities and impeding behaviors need to be balanced against the rights of other students (with and without disabilities) to have safe schools and effective learning environments. Indeed, the balancing approach trades off the rights of students with disabilities and impeding behaviors to a free appropriate education against the rights of other students. It thereby creates a zero-sum approach in which one set of students is positioned opposite another set of students. The zero-sum approach inevitably favors one group of

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<sup>89</sup> 20 U.S.C. § 1400 (d) (1999).

<sup>90</sup> Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (codified as amended in scattered sections of 20 U.S.C.) (1994).

<sup>91</sup> Charter School Expansion Act of 1998, Pub. L. No 105-278, 112 Stat. 2682 (1998).

<sup>92</sup> *Supra* note 37.

<sup>93</sup> 20 U.S.C. § 1412 (a)(1); 34 C.F.R. '300.13 (1999). *See also* 34 C.F.R. §§ 300.1 (purposes), 300.121 (general requirements), and 300.122 (includes some exceptions) (1999).

<sup>94</sup> National Association of State Directors of Special Education (NASDSE), Functional Behavioral Assessment: Policy development in light of emerging research and practice (1998). NASDSE acknowledges that the FBA goals of creating effective educational goals and interventions for particular students can create A safe and conducive learning environment for everyone. *Id.* at 23.

<sup>95</sup> *See* 20 U.S.C. 1415 (k) (1999); 34 C.F.R. §§ 300.521 and 300.520 (a)(2) (1999) (dangerousness, weapons, drugs).

students over another group and is an unacceptable public policy because all students should have safe schools.

Instead, a better approach exists: With positive behavioral interventions and supports, those students with disabilities who have impeding behavior can be supported to continue in school and especially in the least restrictive educational environments. This is the thrust of the Department of Education's comments about PBS.<sup>96</sup> In addition, as described in Sugai et al. (2000),<sup>97</sup> school systems and learning environments can become more responsive to all students by taking on the PBS approach. Finally, as those authors also indicated, students without disabilities also can have behaviors that impede their own or others' learning, and teachers themselves may have behaviors that are impeding.

#### ***4. Basic Rights***

All positive behavioral interventions and supports, and a student's positive behavioral interventions and supports plan, should, to the maximum extent appropriate, a) secure or preserve a student's physical freedom and opportunities for social interaction and individual choice, b) be administered in a manner that preserves and enhances a student's right to a free appropriate public education in the least restrictive and drastic behavioral interventions.

There are two long-standing foundations for PBS. One foundation asserts that any intervention should be consistent with two principles, namely, "liberty" and "civil rights." The other foundation is IDEA, especially its principles of nondiscriminatory evaluation, appropriate (beneficial) education, and least restrictive (general curriculum) placement.

#### ***5. Consistency of Approach***

Positive behavioral interventions and supports plans should be developed and implemented in a consistent manner in all settings in which a student is receiving any educational or related services or any other interventions related to impeding behaviors.<sup>98</sup>

Positive behavioral interventions and supports should be provided in all education, habilitation, and treatment sites, including the student's home and community. The likelihood of generalization and durability of appropriate behavior is enhanced by the all-settings approach. Accordingly and to the maximum extent practicable, the student's family and all service providers should be included in the nondiscriminatory evaluation and functional behavioral assessment processes and the development, implementation,

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<sup>96</sup> 65 Fed. Reg. 12,479 and 12,480 (1999).

<sup>97</sup> *Supra* note 37.

<sup>98</sup> 34 C.F.R. §§ 300.346 (1999).

evaluation, and revision of the student's IEP and positive behavioral interventions and supports plan.

### **B. Individualized Education Programs<sup>99</sup>**

There is a logical and beneficial system for providing positive behavioral interventions and supports and for simultaneously complying with IDEA. That system begins with including the student in school (the zero-reject principle), conducting a nondiscriminatory evaluation (including, where appropriate, a functional behavioral assessment), providing an appropriate education via the IEP (which should incorporate the positive behavioral interventions and supports plan), delivering services in the least restrictive environment and in the least drastic means (that is, through positive behavioral interventions and supports), and assuring procedural safeguards and parent participation. Accordingly, we set out a process, consistent with these six principles and IDEA, for educators and other service providers to use positive behavioral interventions and supports.

As mentioned previously, IDEA requires the student's IEP team to consider "special factors"—including "positive behavioral interventions, strategies, and supports" to address "impeding" behavior—when it develops a student's IEP.<sup>100</sup> Moreover, IDEA's regulations provide further guidance to the IEP team: If, in considering the special factors described in paragraphs (a)(1) and (2) of this section, IEP team determines that a child needs a particular device or service (including an intervention, accommodation, or other program modification) in order for the child to receive FAPE, the IEP team must include a statement to that effect in the child's IEP.<sup>101</sup>

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<sup>99</sup> NASDSE, *supra* note 94 at 9. NASDSE adopts the IDEA process of providing the student with a "full and individual evaluation after screening and intervention in general education and then of developing Ainstructional planning (including IEP) and finally IEP Progress Monitoring and program modification. Indeed, NASDSE emphasizes that functional behavioral assessment (FBA) is best used on an ongoing, dynamic basis with students who display challenging behaviors. *Id.* Accordingly, NASDSE places significant monitoring and modification responsibilities on the student's IEP team. *Id.* at 14-15.

Furthermore, NASDSE makes a strong case for using FBA as part of the student's nondiscriminatory evaluation and IEP plan-development/implementation, even though IDEA requires FBA only in an the case of student discipline (20 U.S.C. 1415(k)(1) (1999))(*id.* at 18-19), noting that Congress acknowledged that educational agencies may use FBA procedures to address behavioral needs outside the context of discipline proceedings (*id.* at 19) and that it is sensible to assume that for students whose behaviors impede their learnings or the learning of others, it is prudent for FBA procedures to be used as part of positive behavioral intervention development. *Id.*

Indeed, one of NASDSE's specific recommendations is that FBA should be defined as an integrated set of practices, rather than as a set of disjointed procedures. *Id.* at 23. Under this definition, FBA is a problem-solving framework (*id.*) that is tailored to the individual according to the degree to which the behavior impedes the individual's learning or that of others (*id.* at 24). Thus, the extent of FBA—that is, the degree of assessment and plan development—depends on the extent or degree of the impeding behavior. *Id.* Another of NASDSE's specific recommendations is that educators should integrate the use of FBA throughout the special education decision-making process. *Id.* at 25.

<sup>100</sup> 20 U.S.C. § 1414(d)(3)(B); 34 C.F.R. § 300.346 (a)(2) (1999).

<sup>101</sup> 30 C.F.R. § 300.346 (c) (1999).

IDEA and its accompanying regulations justify our position that the student's IEP should incorporate the student's positive behavioral interventions and supports plan. We acknowledge, however, that there may be objections to including the plan into the student's IEP. For one thing, the regulation does not require the plan to be incorporated; instead, it requires only that the IEP must include a "statement" to the effect that the student needs a particular service, namely, the intervention called "positive behavioral interventions, strategies, and supports." For another, it may be impracticable to include the plan into the student's IEP. There are two reasons why this may be so. First, the plan itself may be exceptionally detailed; indeed, if it complies with our guidance, it most likely will be. Second, the plan may require frequent adjustments or modifications, not in its core components necessarily but in other components that enable its core components to be implemented. If the entire plan is incorporated into the IEP, it may become unwieldy to change it, for a change in the IEP (and thus in a fully incorporated plan) requires reconvening the entire IEP team. Nevertheless, we prefer to merge the student's IEP and PBS plan into one document, the IEP.

### ***1. Basis for and General Content of Individualized Education Program***

No written positive behavioral interventions and supports plan should be developed and implemented for any student unless and until the student's local education agency (acting through the individual specified by 20 U.S.C. § 1414(a) and (c) (1999)) has completed a functional behavioral assessment for that student and has used that assessment as the basis on which to develop a plan for positive behavioral interventions and supports. Each plan should provide for appropriate goals, objectives, and strategies designed to effect system-change, environmental alterations, skill training, and behavioral consequence activities.<sup>102</sup> The local educational agency should prepare a written report of the actions taken to conduct the functional behavioral assessment and of the results of the assessment. The assessment should be conducted across all settings in which the student lives and should include, without limitation, all of the components described in the definition of functional behavioral assessment and should be consistent with the characteristics of functional behavioral assessment as they have been discussed. It should also describe the extent, if any, that system-change, environmental alteration, skill instruction, and behavioral consequence activities should be undertaken, by whom, and for what period of time and under what form of monitoring and evaluation.

### ***2. IEP Team Duties and Persons Responsible***

a. When developing the student's plan, the IEP team should consist of those persons identified by 20 U.S.C. § 1414(d) (1999). It also should include an individual (who may be one of the statutorily required team members), designated as the positive

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<sup>102</sup> See 334 C.F.R. 300.340-300.350, 300.520 (1999).

behavior interventions and supports specialist, who has received training in and demonstrated mastery of positive behavioral interventions and supports, other qualified personnel knowledgeable about the student's health, educational, and habilitation needs, and other individuals as appropriate.

b. The student's plan should be implemented and supervised only by personnel with documented training and qualifications in positive behavior interventions and supports.

### **3. IEP Development**

a. Upon completion of the functional behavioral assessment, the IEP team should develop a positive behavioral interventions and supports plan for the student.

b. The plan should be incorporated into the student's IEP just as other components of the IEP are required to be incorporated into the student's IEP (pursuant to Individuals with Disabilities Education Act, 20 U.S.C. § 1414(d) (1999)) and should not merely be attached thereto and regarded as a separate document.

c. Accordingly and in order to assure that it is implemented with high fidelity, the plan should be written with sufficient detail so as to direct the implementation of the plan by all affected persons.

### **4. Plan and IEP Review<sup>103</sup>**

Every plan should: a) conform to the previously definitions, standards, and components herein, b) include positive procedures and interventions that are designed to: (1) prevent and reduce impeding behaviors performed by a student and to develop, maintain, strengthen or substitute socially desirable and appropriate behaviors in a student; (2) result in lasting positive changes in a student's behavior; (3) assure a student's physical freedom and opportunities for social interactions and individual choice; (4) preserve and enhance a student's civil rights, human dignity, and personal privacy; (5) ensure a student's right to a free appropriate public education in the least restrictive environment and with the use of the least restrictive and drastic behavioral interventions; and (6) provide a student with greater access to a variety of community settings and activities, including opportunities to participate in all those identified as transition goals in IDEA,<sup>104</sup> and those settings and activities covered by the Rehabilitation Act<sup>105</sup> and Americans with Disabilities Act,<sup>106</sup> c) include a summary of the functional behavior assessment, d) specify goals and objectives for each of the four components of positive behavioral interventions and supports, including (1) the system change activities, (2) the environmental alteration activities, (3) the student's skill and behavioral changes and the skill instruction activities and changes of, and supports provided to, all professionals delivering any education or related services to the student,

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<sup>103</sup> See 34 C.F.R. 300.340(a) (1999).

<sup>104</sup> 20 U.S.C. § 1401 (3) (1999).

<sup>105</sup> 29 U.S.C. §§ 794-794b (1999).

<sup>106</sup> 42 U.S.C. Ch. 126 (1999).

and (4) the behavioral consequences to be provided to the student, e) include a method for collecting ongoing data to determine the effectiveness of the plan on at least an annual basis, f) include a timeline for regular review and updating based on continual assessment related to each of the four components of the positive behavioral interventions and supports plan, and g) if the IEP team determines that changes are necessary to increase program effectiveness, include a plan for conducting additional functional behavioral assessments and, based on them, proposing change to the plan.

### ***5. Evaluation of a Plan's Effectiveness***

The student's IEP team should evaluate the effectiveness of the plan by a) taking baseline data across activities, settings, people, and times of the day, or using the baseline data from the functional behavioral assessment (the taking of baseline data should not delay or deny positive behavioral interventions and supports in crisis situations), b) taking measures of the frequency, duration, and intensity of the impeding behaviors (1) after the plans are implemented at scheduled intervals determined by the IEP team, and (2) across activities, settings, people, and times of the day, c) recording the data in terms of time spent acting appropriately rather than only the time spent engaging in the impeding behaviors, and d) documenting the implementation of the plan as specified therein.

### ***6. Modifications***

The student's IEP team may modify the student's positive behavioral interventions and supports plan, but only do so after reviewing the student's functional behavioral assessment and updating it as appropriate. All modifications should be incorporated into the student's IEP.

The student's IEP team may develop a plan in sufficient detail to include schedules for altering specified interventions or supports or the frequency or duration of the interventions or supports without the necessity for reconvening the IEP team. When any change of interventions or supports is to be used in multiple settings, such as the student's school, home, job sites and other settings, the behavioral intervention specialist should, before implementing any change, notify and when appropriate consult with those personnel responsible for carrying out the plans in the other settings.

### ***7. Developing a New Plan***

When warranted, the student's IEP team should develop a new positive behavioral supports and intervention plan.

### C. Permissible And Impermissible Interventions

As we have argued, IDEA creates a rebuttable presumption in favor of positive behavioral interventions and supports. By extension, we believe IDEA also creates a presumption against non-positive, or aversive, interventions. Accordingly, we here set out guidelines to restrict the use of aversive interventions and the use of physical restraints except in limited circumstances. Before setting out our guidelines, however, a few more words about IDEA are in order.

Clearly, IDEA does not prohibit the use of aversives. If Congress had wanted to prohibit them, it could have done so and would have done so by clear and explicit language. It also would have explained its decision in the Committee Report<sup>107</sup> that accompanies IDEA.

In commenting on the PBS regulations, the Department of Education took the position that “the needs of the child are of paramount importance in determining the behavioral management strategies that are appropriate for inclusion in the child’s IEP. In making these determinations, the primary focus must be on ensuring that the behavioral management strategies in the child’s IEP reflect the Act’s requirement for the use of positive behavioral interventions and strategies.”<sup>108</sup>

The quoted language simply reinforces the conclusion that we have argued, namely, that the IDEA provisions related to PBS create at least a rebuttable presumption against the use of aversive interventions and in favor of the use of positive interventions. Note that the Department uses the phrase “the Act’s requirement for the use of positive behavioral interventions and strategies.” The word “requirement” may be interpreting the Act to stringently, although that requirement would be consistent with our approach. At the very least, we regard the word “requirement” to create the presumption favoring positive interventions; whether it means more, or can mean more (consistent with the statute itself), is a matter that the courts will have to address.

We remain faithful to IDEA and the Department’s preference (or “requirement”) for positives by identifying and proscribing the interventions that we regard as “aversive” (or, alternatively speaking, “non-positive”). The proscribed interventions have been used with students who have various behaviors. Indeed, some professionals or parents may regard some of them to be necessary for the student. We disagree and add a note concerning time out.

Our call for restriction on aversive interventions is based in part on the tendency of some professionals to not include, or to under-utilize, positive interventions, to misuse or abuse acceptable behavior reduction procedures (e.g., time out and response cost), and to fail to assume responsibility for the effects and outcomes of their decisions and actions.

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<sup>107</sup> H.R. Rep. No. 95, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1997).

<sup>108</sup> 65 Fed. Reg. 12,589 (1999).



The use of “time out” serves as an excellent example. In the judgment of some,<sup>109</sup> time out is acceptable behavior change strategy if—and only if—its development and implementation meet the following requirements and standards. First, it must conform to the following consensus professional definition of time out: the removal of the opportunity to earn positive reinforcement contingent upon the occurrence of a behavior and resulting in a decrease in the probability that the behavior will be emitted in the future. Second, variations of time out range from simple removal of attention to exclusion from a setting. A procedure is time out if it is short in duration (from one to ten minutes), contingent, closely monitored, and provided for by the student’s IEP. Third, a plan must be in place to teach and encourage an acceptable replacement behavior. Fourth, the environments from which a student is timed out must have positively reinforcing qualities. Fifth, the decision to include a time out component in the student’s plan is justified by the functional behavioral assessment. Sixth, data-decision rules are in place to guide the continued use, modification of, or termination of the procedure.

When an intervention does not have these characteristics and when it is intended to cause or results in the exclusion of the student from the IEP-specified benefits of a free appropriate public education, it is not time out, but instead “seclusionary or isolation” time out and should not be used.

We acknowledge that not even the most competent educators or other service providers can anticipate and intervene positively in all behaviors of all children at all times. The fact of the matter is that some children have some behaviors that simply cannot be foreseen. Moreover, the causes of these behaviors are not always clear, thus forestalling the development of an accurate functional behavioral assessment and the development and implementation of a plan of positive behavioral interventions and supports. Further, some action, not authorized by the student’s positive behavioral interventions and supports plan, may be warranted to deal with emergencies (unforeseeable circumstances that jeopardize the student, others, or both). By allowing emergency-based interventions, defining and limiting them, and requiring various actions after they have been used, our guidelines accommodate to these facts but induce professionals to not convert the emergency intervention into a regular one, at least not without documented justification.

### ***1. Positive Interventions Required***

Only positive behavioral interventions and supports should form the basis of any positive behavioral interventions and supports plan. The types and extent of interventions in any plan should be the least intrusive, restrictive, and drastic appropriate for that student, and should produce the most benefit for the student. A

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<sup>109</sup> Mark R. Wolery, et al., *Effective Teaching: Principles and procedures of applied behavior analysis with exceptional students* (1988).

constructive, instrumental approach, in which socially acceptable and desirable behaviors are actively taught and encouraged, should be taken.

## ***2. Aversive Interventions Restricted***

No behavioral intervention and no positive behavioral interventions and supports plan should include aversive interventions, techniques, or strategies. Generally speaking, these interventions, techniques, or strategies involve the delivery of pain, result in tissue damage, or rely on humiliation as a planned consequence. Accordingly, no state or local educational agency should use any such interventions, techniques, or strategies on any student or incorporate any of them into any student's plan, specially when these interventions are already prohibited by state laws. Aversive interventions, techniques, or strategies include the following, without limitation: a) corporal punishment, including head-butting, spanking, slapping, paddling, water spray, sensory deprivation, maintenance in any physically painful position, or any other intervention that is designed or likely to cause physical pain, b) rooms, boxes, or other structures or spaces from which the student cannot readily exit, and the use of seclusionary or isolation time out, c) noxious substances, toxic, or otherwise unpleasant sprays (including water sprays), mists, or substances released in proximity to the student's face or any especially sensitive part of the student's body, d) deprivation of health-sustaining necessities, including meals, water, other nourishment, fresh air, sleep, shelter, bedding, physical comfort, access to toilet facilities, or prescribed medication, e) serial suspensions that constitute a change of placement as defined by IDEA,<sup>110</sup> f) treatment of a demeaning nature, including interventions that are designed or likely to subject the student to verbal abuse, ridicule, or humiliation or that are likely to cause emotional trauma for that student, and/or cause adverse behavioral reactions from others, g) electric shock, h) any interventions or methods that temporarily or otherwise deprive the student of the use of one or more of his or her senses, i) any interventions or methods that produce or are likely to produce tissue damage, j) the unwarranted use of drugs or other medical interventions, where "unwarranted" means not justified by, and prescribed by a physician for, any reasonable medical purpose related to the student, k) any interventions or methods that have not been authorized by the agency's policies (so long as they are consistent with this guideline), and l) any interventions or methods that preclude adequate supervision of the student.

This subsection reinforces and extends IDEA's presumption in favor of positive supports and interventions by specifying which interventions may not be used. By proscribing certain interventions and preferring others, our guideline requires professionals to move in the only acceptable direction, which is toward the use of positive behavioral interventions and supports and away from the use of those that are non-positive. Without that impetus, professionals may lapse into the use of non-positive interventions, in part out of frustration with their inability to change students' behavior

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<sup>110</sup> 20 U.S.C. § 1415(k), 24 C.F.R. § 300.519 (1999).

by positive means, in part out of convenience for themselves, and in part out of response to some family members who may desire any intervention that might change a student's behavior.

### **3. *Physical Restraints***

Except as authorized by the following subsections, positive behavioral interventions and supports plan should not include physical or mechanical devices or techniques designed to control acute or episodic aggressive behaviors or to control involuntary movements or lack of muscular control due to organic or other noncontrolable causes or conditions. Accordingly, no state or local educational agency should use such devices or techniques on any student or incorporate them into any plan for any education, intervention, or habilitation, of a student. This restriction includes using aversive devices or techniques for the purpose of punishing the student, for the convenience of the agency's staff, or as a substitute for an educational program or plan of positive behavioral interventions and supports.

a. Mechanical devices and techniques that are used to control a student's involuntary movement or lack of muscular control when due to organic causes or conditions may be employed only when (1) they are specified in the student's IEP and as determined by a professional who is qualified to make such a determination, (2) they are intended and have the effect of preventing a student from injuring himself or others or of promoting normal body positioning, physical functioning, and the development or maintenance of various functions or skills, (3) they are accompanied by positive behavioral interventions and supports, and (4) they are prescribed and implemented by trained personnel.

b. Restraints that are not authorized by the student's IEP and that are intended to control acute and/or episodic impeding behavior may be used only when the student is acting in a manner as to be a clear and present danger to himself, other students, or agency personnel and only when less restrictive measures and techniques have been proved to be or in the reasonable judgment of agency personnel will be less effective for the purposes of safety.

c. Restrictive interventions that employ a device, material, or object that simultaneously immobilizes all four extremities of a student, including the procedure known as prone containment, may be used only by personnel who are trained in the use of such an intervention and only as an emergency intervention.

d. Any use of any restraints not previously authorized should cause a meeting of the student's IEP team to be convened as soon as practicable for the purpose of reviewing the student's current IEP with respect to its appropriateness and effectiveness and for considering the use of positive behavioral interventions and supports for the student.

e. The use of any restraints should be monitored, documented, and reviewed closely and regularly.

f. No permissible mechanical restraints may be used unless the express written consent of the student's parents or of the student, if of the age of majority and

competent to consent, is obtained in advance of the use of a particularly described restraint.

Recent controversies concerning the use of restraints on students and adults who have various kinds of disabilities have prompted some Members of Congress to introduce legislation to restrict the use of restraints. In particular, recent bills in both the House of Representatives<sup>111</sup> and in the Senate<sup>112</sup> would require psychiatric facilities (hospitals, residential treatment facilities, etc.) to report data on the frequency, type, and duration of restraint/seclusions, the rationale for use, the less restrictive alternatives attempted or considered, and evidence of treatment planning to reduce the probability of future incidents. Furthermore, they would be required to report "sentinel events," which include death, burns, laceration, abrasion of the skin, fracture of any bone or any "unexpected occurrence involving a substantial impairment of the physical or psychological condition of a resident or patient."

The controversy has also prompted the Health Care Financial Administration (HCFA) to create new federal regulations<sup>113</sup> governing the use of seclusion and/or restraints for hospitals that accept Medicare or Medicaid payments. These regulations are designed to limit the use of restraints and seclusion, to improve the level of assessment and monitoring during periods of restraint or seclusion, and to set standards for the rights of individuals to participate in their own treatment decisions (including the execution of advance directives).

#### **4. Emergencies**

a. An emergency is any condition or situation that: (1) is caused by behavior of a student that is unpredictable, spontaneous, not previously manifest, or not foreseen or reasonably able to be foreseen, (2) involves a behavior for which a behavioral intervention plan or a positive behavioral interventions and supports plan has not been developed, or if a behavior intervention plan or positive behavioral interventions and supports plan has been developed, that plan is not effective at the time the student manifests the behavior, (3) poses a clear and present danger of serious physical harm to the student or others or serious property damage, and (4) cannot be immediately and effectively prevented or arrested by a response less restrictive than the temporary application of interventions that are not set out in the student's positive behavioral interventions and supports plan.

b. Emergency interventions should not be used as a substitute for positive behavioral interventions and supports.

c. Emergency interventions should not be used for longer than is necessary to contain the behavior so that it is no longer a clear and present danger.

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<sup>111</sup> The Patient Freedom From Restraint Act, H.R. 1313, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1999).

<sup>112</sup> The Freedom From Restraint Act of 1999, S. 736, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1999).

<sup>113</sup> 64 Fed. Reg. 36,070-36,089 (1999). Codified at 42 C.F.R. Part 482 (2000).

d. An emergency intervention should not be used unless other interventions have been proved to be or in the reasonable judgment of qualified professionals will be less effective for the purposes of containing the behavior that constitutes a clear and present danger.

e. When responding to an emergency, no state or local educational agency should authorize or use (1) locked seclusion, unless in a facility otherwise locked or permitted by state law to be locked when the student is in it, (2) employment of a device, material, or objects that simultaneously immobilize all four extremities of a student, except that prone containment may be used as an emergency intervention by staff who are trained to use such a restraint, and (3) an amount of force that exceeds that which is reasonable and necessary under the circumstances for the purpose of protecting the student from himself or of protecting other individuals and property from the student's behavior.

f. Any situation that requires the use of an emergency intervention should require the staff of the local education agency, within one school day after the emergency occurred, to complete, enter the student's cumulative file, attach to the student's IEP, and provide to the student's parents a Behavior Emergency Report.

g. The Behavior Emergency Report should include the following: (1) the name and age of the student, (2) the setting and location of the emergency, (3) the name and roles of the agency or other personnel who used the emergency intervention, (4) a description of the events preceding the emergency and the behavior that caused the emergency intervention, (5) a description of the intervention used and the length of time during which it was used, the effect of its use, and whether the student currently receives behavioral intervention or has a positive behavioral interventions and supports plan, (6) a description of any injuries that the student or others sustained because of the behavior or intervention, (7) a description of any property that the student damaged because of the behavior, (8) any discipline that the service-providing agency or any law enforcement agency proposes to take or has taken against the student as a result of the student's behavior, (9) the suspected causes of the student's behavior, (10) any other information relevant to the student's behavior and the intervention, and (11) efforts to inform and communicate with the student's parents or guardians concerning the use of the restraints as set out in the report.

h. All Behavior Emergency Reports should be immediately forwarded to and reviewed by a designated responsible administrator of the state or local educational agency, by the student's IEP team, and by the State Positive Behavioral Interventions and Supports Committee (with the name and other personally identifying information about the student redacted).

i. Anytime a Behavior Emergency Report is written regarding a student who does not have a behavioral intervention plan, the designated responsible local educational agency should, within two days after the emergency, schedule an assessment, including where appropriate a functional behavioral assessment, of that emergency-causing behavior, conduct an IEP review, and schedule a meeting of the IEP team to develop an interim positive behavior interventions and supports plan.

j. Anytime a Behavior Emergency Report is written regarding a student who has a positive behavioral interventions and supports plan, the designated responsible local educational agency administrator should promptly refer the report to the student's IEP team, which should promptly review the report and determine whether the incident warrants modification of the student's IEP and the plan.

k. Any situation that requires prolonged or repeated use of an emergency intervention should require the student's IEP team to promptly seek assistance from appropriate authorities, including positive behavioral interventions and supports specialists, the director of special education, or the superintendent of the local educational agency, as appropriate.

l. The state educational agency and each local educational agency should by regulations or policies and procedures describe a process and timeline for convening an IEP team meeting to evaluate the application of the emergency intervention and to adjust, if and as appropriate, the student's IEP so as to reduce or eliminate the emergency-creating behavior through positive behavioral interventions and supports.

m. Each local educational agency should collect Behavior Emergency Report data and report to the superintendent of the local educational agency at least annually (1) the number of Behavior Emergency Reports and the types of students (by age, race, sex, and type and extent of disability) for whom a Behavior Emergency Report has been prepared, and (2) the type of emergency intervention used during each such emergency.

The superintendent of the local educational agency should file the report with the State Educational Agency, the State Committee on Positive Behavioral Interventions and Supports, and the state advisory commission on special education (with the name and other personally identifying information about the student redacted).

#### **D. State Educational Agency Regulations, Capacity-Building, Application and Construction**

IDEA requires the SEA to conduct a study of the LEAs' use of discipline.<sup>114</sup> We believe that the SEA should conduct a similar study related to positive behavioral interventions and supports. Such a study, if done with objectivity and in depth, will yield data that indicate the degree to which LEAs are implementing positive behavioral interventions and supports consistently with IDEA and with this guideline.

Since the development of positive behavioral interventions and supports in each LEA, that is, statewide, is a goal of IDEA and of these guidelines, and since SEA monitoring, coupled with subsequent capacity-building, can help put positive behavioral interventions and supports into place statewide, we provide guidance concerning the study. We also suggest that the SEA create a State Positive Behavioral Interventions and Supports Committee, consisting of individuals from all education constituencies who are qualified to participate in delivering positive behavioral interventions and

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<sup>114</sup> 20 U.S.C. § 1413(j) (1999).

supports, and also consisting of an equal number of parents (as defined by IDEA<sup>115</sup>) of students with impeding behaviors, to assist in or to actually conduct the study. And we suggest that the study be presented to all of the state and local entities that have the capacity to assure that positive behavioral interventions and supports are delivered consistently with IDEA and this guideline. In short, we seek statewide evaluation and statewide response to the study.

Moreover, because positive behavioral interventions and supports is connected with student discipline (as we have explained), we also offer suggestions concerning the SEA study of LEAs' use of discipline.

### *1. State Studies of Use of Behavioral Interventions and of Discipline*<sup>116</sup>

a. On or before (a date certain), the State Education Agency should conduct a study and report to the legislature, the state special education advisory council, the State Positive Behavioral Interventions and Supports Committee, local educational agencies, parent training and information centers, community parent resource centers, and other parent/student advocacy entities concerning the use of positive behavioral interventions and supports, and other behavioral interventions, for students with disabilities.

b. The study should identify and report on the following, without limitation: (1) the frequency of use of behavioral interventions and positive behavioral interventions and supports by local educational agencies, (2) the number of local education agencies that have policies related to positive behavioral interventions and supports and other behavioral interventions, (3) how those policies, rules, or regulations differ among the local education agencies, (4) how policies differ as they relate to students with and without disabilities, (5) what differences, if any, exist between local educational agencies' definition and use of positive behavioral interventions and supports and behavioral interventions, (6) how policies within each local education agency differ with respect to non-emergency and emergency behavioral interventions, (7) the prevalence and mode of the functional behavioral assessments used by the local educational agencies, (8) whether those agencies are using procedures that are proscribed by our section on permissible and impermissible interventions and the extent to which those agencies use physical restraints (consistent or inconsistent with that section), (9) the number of students receiving positive behavioral interventions and supports who are and are not in their neighborhood schools or other schools (such as charter schools) that they would attend if they were not students with disabilities who have impeding behaviors, (10) the nature and extent of present and future costs of training educational and related services personnel and parents of students with disabilities to develop, implement, and monitor behavioral intervention plans and positive behavioral interventions and supports plans, and (11) the positive behavioral interventions and supports practices that local educational agencies report to be most

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<sup>115</sup> 34 C.F.R. § 300.500(b), 300.352(h), 300.533, 300.534 (1999).

<sup>116</sup> See 34 C.F.R. 300.500(b), 300.353(h), 300.533, 300.534 (1999).

and least effective in addressing impeding behaviors through systems change activities, environmental alterations, skill instruction, and behavioral consequences.

c. The State Educational Agency should develop the study by means of or under the supervision of a committee, titled the Positive Behavioral Interventions and Supports Committee, that consists of representatives of local educational agencies, parents of students with and without disabilities, individuals with knowledge or expertise in developing and implementing positive behavioral interventions and supports for persons with disabilities, and other interested persons, all of whom should be appointed by the Governor or the Governor's designee for staggered three-year terms.

d. The State Educational Agency also should, on or before (a date certain), conduct a study and report to the legislature, the state special education advisory council, the State Positive Behavioral Interventions and Supports Committee, local educational agencies, parent training and information centers, and parent/student advocacy entities concerning the extent to which local educational agencies discipline students with disabilities and students without disabilities. The study should include without limitation information concerning (1) the types of discipline they apply, including, without limitation, any procedures prescribed herein, removals, changes of placement, use of interim alternative educational settings, in-school suspension, out-of-school suspension, expulsions, and all other discipline changes of educational placement on account of behaviors that result in the application of school discipline or the criminal law or civil commitment processes, (2) the degree of discipline they apply (including without limitation the number of days during which a student is not in the permanent educational placement called for by the student's IEP), (3) the nature (type) and severity (extent) of the disabilities of students to whom they apply discipline, (4) the race, ethnicity, age, and sex of the students with and without disabilities to whom they apply discipline, (5) the number of students with disabilities whom they exclude from placement in their neighborhood schools or other schools they would attend because of their impeding behavior, (6) the number and race, ethnicity, age, and sex of the students with and without disabilities whom they report, on account of their behaviors that cause them to be subjected to discipline, to law enforcement authorities and to any other public agencies that are involved in criminal law and civil commitment processes, (7) the number and race, ethnicity, age, and sex of the students with and without disabilities who, having been subjected to school discipline or reported, have had their educational records, including their cumulative files or IEPs, transmitted to local educational agencies when they have left one such agency and continued their education in another such agency, (8) the type of information that local educational agencies place into the educational records of students with and without disabilities, including the students' cumulative records and IEPs, behavioral intervention plans, positive behavior interventions and supports plans concerning students' impeding behaviors, school discipline, and reporting to criminal law or civil commitment procedures, and (9) any discrepancies that may exist with respect to any of the required data between students with disabilities on the one hand and students without disabilities on the other.



e. Upon the completion of the reports described above, the State Educational Agency should develop a plan, in consultation with representatives of institutions of higher education, the state teacher certification agency, the state special education advisory council, and the state Positive Behavioral Interventions and Supports Committee, for ensuring that pre-service and in-service training on positive behavioral interventions and supports is made available to all personnel involved in the education of students with disabilities and that the training is carried out in a manner consistent with these policies and with standards for people entering the profession of education or the profession of any related services.

The SEA has authority under IDEA to issue regulations implementing IDEA;<sup>117</sup> indeed, it also has the responsibility to assure that IDEA is implemented statewide.<sup>118</sup> To that end, the SEA and LEAs also have opportunities to secure “state/local improvement grants.”<sup>119</sup> Accordingly, we make suggestions here concerning the SEA regulations, personnel standards, and conflict of laws matters.

## **2. State Regulations**<sup>120</sup>

No later than (a date certain after each of the two studies (above) is complete), the State Educational Agency should issue regulations that are not inconsistent with our guidelines, that are binding on local educational agencies. Those regulations should address, without limitation, the development, enforcement, and review by local educational agencies of policies, procedures, practices, and personnel standards related to all matters bearing positive behavioral interventions and supports plans, other behavioral interventions, and codes of student behavior and conduct.

## **3. Local Compliance**<sup>121</sup>

Upon receiving the regulations, each local educational agency should a) establish and maintain an advisory committee, whose membership should reflect that of the State Educational Agency’s Positive Behavioral Interventions and Supports Committee, to develop and monitor policies that conform to these policies, procedures, practices, and personnel standards conform to the standards for positive behavioral interventions and supports described by these policies and any related State Educational Agency regulations, c) adopt and implement policies, procedures, practices, and personnel standards that are consistent with generally accepted best practice in the field of positive behavior interventions and supports, d) include criteria for determining which students should be eligible for receiving a positive behavioral interventions and supports plan, e)

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<sup>117</sup> 20 U.S.C. § 1412(a) (1999).

<sup>118</sup> 20 U.S.C. § 1412(a)(11) (1999).

<sup>119</sup> IDEA, Part D-20 U.S.C. §§ 1451-1487 (1999).

<sup>120</sup> NASDSE, *supra* note 94 at 22-23. NASDSE recommends that state education agencies should provide policy guidance.

<sup>121</sup> See 34 C.F.R. 300.111, 300.313, 300.121, 300.141, 300.181, 300.182, 300.192, 300.220 (1999).

include criteria for determining when a student may require a positive behavioral interventions and supports plan, f) demonstrate that the local educational agency has reviewed, adopted, and implemented these policies and the State Education Agency's regulations and that the local educational agency's policies, procedures, practices, and personnel standards are consistent with each of them, g) adopt and implement policies and procedures for monitoring the use of positive behavioral interventions and supports, and h) annually, before or at the beginning of each school year, furnish a copy of and provide training and information (including the addresses and telephone numbers of the state educational agency and the local educational agency) related to the state regulations and the local policies and procedures to all parents of students with disabilities, the students, all personnel employed by it and by all other agencies having any educational responsibilities for students enrolled in the local education agency, and all parent training and information centers, community parent resource centers, and other parent training and advocacy entities.

#### ***4. State Oversight***

The State Educational Agency should regularly monitor and supervise the implementation of these guidelines by local educational agencies, and, as necessary or desirable and after consultation with the State Positive Behavioral Interventions and Supports Committee, from time to time adopt further regulations, not inconsistent with these guidelines, that should be binding on those agencies.<sup>122</sup>

#### ***5. Review of State Regulations***

At least every three years after the effective date of adoption of these guidelines, the State Educational Agency, with the participation of the State Positive Behavioral Interventions and Supports Committee, should a) review its regulations to determine their continuing appropriateness and effectiveness, and b) make such modification in the regulations as it deems necessary or desirable.

#### ***6. Capacity-Building***

In order to assure that an adequate number of properly trained professionals and parents will be available to design, implement, and monitor positive behavior interventions and supports plans, initial training and continuing education programs related to positive behavioral interventions and supports should be developed and implemented a) in institutions of higher education that train general education and special education teachers, providers of related services, and other professionals involved in the education of students with disabilities, b) in general education and

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<sup>122</sup> See 34 C.F.R. 300.556, 300.652, 300.660, 300.661 (1999). See also 64 Fed. Reg. 12,490 (1999) ("corrective action").

special education in-service teacher and other professional training programs, and c) in parent training and information centers and in other parent training and advocacy entities.

All professionals involved in the education of students with disabilities should engage in continuing education concerning positive behavioral interventions and supports at least every three years. The intensity and comprehensiveness of the initial training and continuing education that various cadres of professionals will receive should be determined by the State Education Agency in consultation with the Positive Behavioral Interventions and Supports Committee, the state advisory council on special education, local educational agencies, professional associations, parent information and training centers, community parent resource centers, and other parent training and advocacy entities, and institutions of higher education in the state.

To the maximum extent practicable, in-service initial training, continuing education, activities of the State Educational Agency and local educational agencies should be consistent with state and local agencies' other comprehensive systems of personnel development activities, school improvement initiatives (under Individuals with Disabilities Education Act, Part D, and under other federal or state school reform or school improvement initiatives), and curricula of institutions of higher education in the state.<sup>123</sup>

As we have often noted, capacity-building statewide (within the LEAs and within other education delivery-systems) is necessary to assure that the promise of positive behavioral interventions and supports is realized. To that end, Preservice training (in institutions of higher education) and parent training (via parent training and information centers or other comparable entities) are necessary. A multi-faceted approach to capacity building is indeed the only one that can assure that positive behavioral interventions and supports require system changes and environmental alterations, capacity-building must address all systems and entities (and individuals) with which the eligible students have contact.

## **7. Best Practices**

*a. In consideration of the fact that positive behavioral interventions and supports are now well-researched interventions and that state-of-art delivery of positive behavioral interventions and supports is well documented, the State of Educational Agency, local educational agencies, and other providers of special or general education, and of related services should use best practices in implementing positive behavioral interventions and supports. These include, and state and local educational agencies and all other providers of special or general education and related service should use in conducting a functional behavioral assessment and in developing a positive behavioral interventions and support plan, the following: (1) Systems change*

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<sup>123</sup> See 34 C.F.R. 300.382 (1999); 64 Fed. Reg. 12,600 (1999).

activities, (2) Environmental alteration activities, (3) Skill instruction activities, and (4) Behavioral consequence activities.

*b.* In addition, best practices include and educators and related service providers and other professionals should use the following:

(1) Educators and related service providers and other professionals should offer hands-on, ongoing, rather than episodic positive behavioral interventions and supports to families, teachers, and other professionals, over long periods of time.

(2) When hands-on, ongoing support is available, the support that student and the student's educators and families receive eventually can and should be transferred from professional providers to more typical, non-professional caregivers.

(3) Educators and other service providers should transform their roles from experts who unilaterally select a student's goals and design interventions to collaborators who, in collaboration with student's IEP team (including the family, student, and members of the student's social support network), and other care-givers, define the dimensions of a student's comprehensive lifestyle change, thereby ensuring the social validity of positive behavioral interventions and supports, and they should do so in a manner that represents a good fit with the reality of day-to-day contextual constraints, thereby ensuring the practicality and relevance of positive behavioral interventions and supports.

(4) To accomplish the above, other best-practice standards include the following: (a) repeated functional behavioral assessments that identify, on an ongoing basis, the system, environmental, skill-instruction, and behavioral consequence factors that may cause a student's impeding behaviors; (b) direct linkage between these assessments and other evaluation information and the design of positive behavioral interventions and supports plan; (c) intervention in and alteration of all relevant environments, a strategy that almost invariably means the use of multicomponent interventions geared toward systems-change activities, environmental alteration activities, skill-instruction, and behavioral consequence activities; (d) ensuring that relevant contexts are ecologically valid, i.e., typical professionals and nonprofessionals carry out intervention in typical settings; (e) addressing the long-term perspective of a student and family by designing and redesigning interventions and positive behavioral interventions and supports plans as changes in a student's or family's life circumstances warrant, to the end that plans will have a broad lifespan orientation rather than a narrow crisis-management orientation; (f) viewing a student and family as an integral part of the educational system by constructing interventions and positive behavioral interventions and supports plans that respond to the personal needs and concerns of the student and family, thereby ensuring practicality and relevance; and (g) addressing social validity issues by defining goals in terms of comprehensive lifestyle change and support, not just reduction in impeding behaviors.

## 8. Personnel Preparation

*a. All personnel involved in the education of students with disabilities should be trained to (1) respond to students' impeding behaviors, (2) provide timely and appropriate responses so that impeding behaviors will be reduced or eliminated, and (3) develop and implement student-appropriate positive behavioral interventions and supports plans for those students who need them, thereby assuring an environment in which effective teaching and learning can occur.*

*b. Inasmuch as the conceptualization, science, and application of positive behavioral interventions and supports is constantly changing, state-level and district-level personnel preparation and continuing education should be a repetitive process and all personnel involved in the education of students with disabilities should be required to have not only initial training in positive behavioral interventions and supports but also continuing education in positive behavioral interventions and supports at least every three years.<sup>124</sup>*

*c. The State Educational Agency should develop and monitor the implementation by local educational agencies of personnel standards,<sup>125</sup> which standards should include, without limitation, (1) the qualifications and training required of all personnel who will participate in the development and implementation of positive behavioral interventions and supports plans, (2) the qualifications and training required of all positive behavioral intervention specialists, each of whom, before being qualified to be such a specialist, should have received training in and demonstrated mastery of the development and implementation of techniques of functional behavioral assessment and positive behavior interventions and supports, and (3) the qualifications and training required of personnel who may use emergency procedures and interventions.<sup>126</sup>*

The capacity of an LEA to deliver positive behavioral interventions and supports—and indeed to comply with IDEA—depends in part on the capacity of the personnel employed in the LEA. For that reason, IDEA addresses school capacity-building and personnel capacity in various provisions: 20 U.S.C. §§ 1412(a)(11), (12), (14), (15), (16), (18), and (19); 1412(e); 1413(a)(3) and (4)(B); 1413(f), 1413(g) (1999); and Part D-20 U.S.C. §§ 1451-1487 (1999). Here, we suggest that school capacity and personnel capacity is a universal concern: that is, it is a matter for all educators, not just those who are qualified or employed in special education or have other specialized training. Significantly, IDEA presumes that professionals qualified as school psychologists and school social workers are qualified to deliver positive behavioral interventions and

<sup>124</sup> See 34 C.F.R. 300.23, 300.135, 300.135(a)(1), 300.136, 300.136(a)(1), 300.136(g), 300.221, 300.380(f), 300.381, 300.382, 300.382(h), 300.3893 (1999); 64 Fed. Reg. 12,600 (1999).

<sup>125</sup> NASDSE, *supra* note 94 at 23. NASDSE recommends that state agencies should set a professional practice standard for FBA through policy guidance. Indeed, NASDSE specifically refers to staff development requirements of IDEA (20 U.S.C. “ 1451(a)(5), 145(a)(6)(H), and 1453(c)(3)(D) (1999)) as a justification for its recommendation (NASDSE, *supra*, at 26).

<sup>126</sup> See 34 C.F.R. 300.23, 300.135, 300.136, 300.370, 300.381, 300.382 (1999).

supports.<sup>127</sup> But that fact alone does not mean that only those professionals should be capable of delivering positive behavioral interventions and supports. If positive behavioral interventions and supports are to be useful to students with impeding behaviors, including those who participate in the general curriculum, it is appropriate for all educators to be able to participate in delivering positive behavioral interventions and supports and therefore to be trained to do so. Moreover, a program of in-service education, consistent with a comprehensive system of personnel development,<sup>128</sup> seems a promising way to develop and maintain schools' personnel capacity.

### **9. Other System-Focused Capacity Building**

*In addition to the activities carried out under the sections above, the State Educational Agency should design, implement, and evaluate all other appropriate methods of system-focused capacity building including those employed under Individuals with Disabilities Education Act, Part C (early intervention) and Part D (school improvement), under the Improving America's Schools Act (Goals 2000, amending Elementary and Secondary Education Act), and under the Technology-Related Assistance for Individuals with Disabilities Act of 1988, as amended.*

### **10. Monitoring**

*In consideration of the fact that state and local educational agencies and all other providers of special or general education and related services have a legal duty to implement best practices in positive behavioral interventions and supports, the State Educational Agency should establish policies and procedures for regular monitoring of the use of those practices, which policies and procedures should provide for a) technical assistance to local educational agencies and other entities that do not use the best practices, b) targeted withholding of state or federal education funds (as allowable under applicable provisions of Individuals with Disabilities Education Act and state law) from non-complying local educational agencies, and c) on-site monitoring by the State Educational Agency and the State Positive Behavioral Interventions and Supports committee of local educational agencies at least every three years.*

*IDEA authorizes the SEA to establish personnel development and standards,<sup>129</sup> to selectively withhold funds,<sup>130</sup> and to monitor LEAs.<sup>131</sup> This policy is consistent with IDEA.*

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<sup>127</sup> 34 C.F.R. § 300.24(b)(9)(vi) and (b)(13)(v) (1999).

<sup>128</sup> 20 U.S.C. § 1412(a)(3) (1999).

<sup>129</sup> 20 U.S.C. § 1413(a)(14) and (15), 343 C.F.R. § 1413(a)(3) (1999).

<sup>130</sup> 20 U.S.C. § 1413(d)(1) (1999).

<sup>131</sup> 20 U.S.C. § 1412(a)(11) and (12) (1999).

### **11. Conflict of Laws**

*These guidelines and the applicable State Educational Agency regulations and conforming local educational agency policies and procedures regarding positive behavioral interventions and supports should govern in the event of a conflict between them and other laws, policies, or regulations and guidelines of the state and its state and local educational agencies; and these guidelines and the applicable State Educational Agency regulations should govern in the event of a conflict between them and the policies and procedures of a local educational agency.*

*Because IDEA applies to nonpublic schools and other facilities in which students with disabilities are educated consistent with IDEA,<sup>132</sup> we suggest ways in which to make IDEA and positive behavioral interventions and supports a statewide benefit.*

### **12. Nonpublic Schools**

*This guideline applies to all nonpublic schools or other agencies that enroll students with disabilities.<sup>133</sup>*

### **13. Prohibitions**

*No state or local education agency or nonpublic school or other agencies that enroll students with disabilities may authorize, order, consent to, or pay for any of the interventions prohibited by these guidelines.*

### **14. Due Process**

*Provisions of this guideline related to 20 U.S.C. § 1415 (1999) may be contested under IDEA's procedural safeguards. No mediation agreement, hearing officer, or judge may order the implementation of a behavioral intervention that is prohibited by these guidelines or by applicable consistent state or local regulations.<sup>134</sup>*

### **15. Liberal Construction**

*These guidelines should be construed liberally so as to provide students with disabilities the greatest possible access to positive behavioral interventions and supports.*

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<sup>132</sup> 20 U.S.C. § 1412 (a)(10) (1999); 34 C.F.R. §§ 300.400-300.487 (1999).

<sup>133</sup> See 34 C.F.R. 300.2, 300.22, 300.450 (1999).

<sup>134</sup> See 34 C.F.R. 300.500-300.589, 300.519-300.529 (1999).

## V. The Balancing Argument: A False and Dangerous One

In recent years, incidents of violence have become more highly visible to the public, and this is especially true in cases of violence in our schools.<sup>135</sup> Certainly, safety in the classroom—a place that is supposed to be a safe haven of learning—is a legitimate and important concern that may warrant some change in policy. But change sometimes can be harmful if it is not well-informed and if new forms of intervention have not been proven effective. True, some “quick fixes” may improve school safety but seemingly fail to account for other needs of students and other policies. Zero tolerance policies arguably have been taken too far by some schools, resulting, for example, in students being suspended for bringing aspirin to school.<sup>136</sup> In such cases, a student’s education is put at risk or altogether abandoned in favor of unreasonably strict and harsh rules for punishment.<sup>137</sup>

Schools implementing zero-tolerance or comparable policies are faced with a particular problem when disciplining students with disabilities. Under IDEA, students with disabilities have the right to a free and appropriate public education. This right restricts the abilities of schools to implement discipline, especially expulsion that terminates the right to an education. Many school administrators and others, such as parents and policy-leaders, have come to view IDEA in an adversarial light, as a law that unfairly restricts their abilities to maintain a safe school environment. Further, they may have come to see the rights of students with disabilities as conflicting with the goals of school safety.

The view that school safety concerns must be balanced against the rights of children with disabilities has been espoused by policy commentators, schools, courts, and sometimes also by parents.<sup>138</sup> However, as we explain below, we believe the balancing approach creates a false dichotomy. These concerns need not be weighed against each other. School safety need not suffer as a result of IDEA implementation, and the interventions used to maintain school safety need not interfere greatly with the education of the child.

How can the two goals of school safety and honoring the IDEA rights of students with disabilities who break school rules be advanced consistently with each other? The answer is that IDEA provides a number of resources to help schools deal with

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<sup>135</sup> Note 1, *supra*.

<sup>136</sup> Harvard University, *supra* note 1. This report explains that some schools have treated aspirin, Midol, and Certs as drugs, and paper clips, nail files, and scissors as weapons. In two examples from Pennsylvania, one child in kindergarten was suspended for bringing a toy ax to school as part of his Halloween costume, and in another incident, a 6-year-old was suspended for bringing toenail clippers to school.

<sup>137</sup> *Id.*

<sup>138</sup> See generally Anne P. Dupre, *A Study in Double Standards, Discipline, and the Disabled Student*, 75 Wash. L. Rev. 1 (2000); Kurt M. Graham, *An Idea on How to Amend the Individuals with Disabilities Education Act in Order to Protect Students and Promote Equality*, 45 Wayne L. Rev. 1599 (1999); Kelly S. Thompson, *Limits On the Ability to Discipline Disabled School Children: Do the 1997 Amendments to the IDEA Go Far Enough?*, 32 Ind. L. Rev. 565 (1999).



behavioral issues. It provides for personnel development, instructional resources, and innovative interventions and strategies that can aid schools in implementing school-wide safety plans that will help to deal not only with behavioral problems among children with disabilities, but with those that occur throughout the school.

Primary among these interventions and strategies is the use of Positive Behavioral Supports (PBS). As we have pointed out, PBS is a proactive strategy for encouraging desired behavior and discouraging undesired behavior through system change, environmental change, skill instruction (teaching desired behavior), and behavioral consequences.

Implementation of PBS will satisfy concerns about both school safety and IDEA rights. Though there of course is a need for behavioral consequences, we must look at the nature and means of such consequences to ensure that they serve the purpose(s) intended. Under IDEA, the purpose is a free appropriate (beneficial) education in the least restrictive setting. Further, punishment in one setting of the child's life (the school) very often fails to make the desired impact because the child's inappropriate behavior may be reinforced in other environments and thus may continue to carry over into the child's school life. Our approach under PBS is that the child's behavior no longer is seen as the responsibility of only the school or of the parent(s). It certainly is no longer the sole responsibility of a special education teacher. PBS encourages system-wide responses and new partnerships between general and special education, between parents, students, and schools, and between schools and their communities in order to change the policies and environments that reinforce undesired behavior and fail to encourage desired behavior.

In this article we have explained and defined Positive Behavioral Supports (PBS), explained the role(s) of PBS within the Individuals with Disabilities Education Act (IDEA), described the value of PBS to all schools for dealing with behavioral issues, and offered guidance on the implementation of both PBS and IDEA in a manner that supports safe schools without risking the rights of students to be educated. We believe that schools who have been trying to "strike the balance" between school safety and the rights and education of their students with disabilities can, through the use of PBS, abandon that construction of the problem and find the resources needed to meet both of these goals.

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## APPENDIX A

### Summary of Disciplinary Procedure/"Decision Tree"<sup>139</sup>

Following is a basic "decision tree" and summary of key issues for determining the responsibility of school personnel and limitations of their authority under IDEA in disciplining children with disabilities.

#### I. Summary of basic key questions regarding disciplinary removal of a child with a disability:

Is the disciplinary intervention a removal? If so, does the removal constitute a change of placement? Even if not a change of placement, will the child have been removed for more than 10 cumulative days within the same school year? What duties or limitations of authority are involved with each of these circumstances?

#### II. Decision tree for removal

When does removal constitute a change of placement? What are the limitations of school personnel authority with regard to removal?

#### **A. Removal for more than 10 consecutive days:**

##### 1. When is this allowed? Only in the following instances:

- a. Weapon or drug violations in accordance with 34 C.F.R. § 300.520(a)(2),

OR

- b. Maintaining current placement is substantially likely to result in injury to the child or others (34 C.F.R. § 300.521), OR
- c. Parents of the child with a disability do not object, OR
- d. The behavior is not a manifestation of the disability (as decided in a manifestation determination meeting in accordance with 34 C.F.R. § 300.523) and the child is being disciplined in the same manner as a child without a disability.

2. In all cases of removal for more than 10 consecutive days, a change of placement has occurred (34 C.F.R. § 300.519).

#### **B. Removal for 10 consecutive days or less:**

1. When is this allowed? This is allowed when the student commits "any violation of school rules" and if nondisabled students are subject to the same discipline (34 C.F.R. § 300.520(a)(1)(i)).

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<sup>139</sup> Reprinted with permission from Turnbull, *supra* note 9, at 100-101. All citation to Code of Federal Regulations are from 1999.

2. May more than one such removal be imposed during a school year? Yes, but only for “separate incidents of misconduct (as long as those removals do not constitute a change of placement under § 300.519(b))” (34 C.F.R. § 300.520(a)(1)).
3. Do removals of 10 consecutive days or less constitute a pattern?
  - a. This decision is made by school personnel, subject to due process rights of parent(s).
  - b. A series of removals “constitute a pattern because they cumulate to more than 10 school days in a school year, and because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another” (34 C.F.R. § 300.519(b)).
  - c. Where a pattern exists, a change of placement has occurred.
4. Where removals do not constitute a pattern, no change of placement has occurred.
  - a. BUT will the child have been removed for more than 10 cumulative days in the same school year?
  - b. If so, the LEA must (a) perform a functional behavioral assessment and implement a behavioral intervention plan (or review that plan, if one already exists), and (b) provide services (adequate to ensure FAPE) in accordance with 34 C.F.R. § 300.121. In this case, school personnel, in consultation with the child’s special education teacher, determine what services will be provided. 34 C.F.R. § 300.121 (d)(3)(i).
  - c. If not, no behavioral assessment/plan development/review is required, and no services are required.

### III. FAPE and service provision requirements:

Any removal for more than 10 cumulative days in the same school year triggers two key requirements:

A. The IEP team is required to perform a functional behavioral assessment and implement a behavioral intervention plan (or review that plan, if one already exists).

1. An LEA must conduct a functional behavioral assessment and implement a behavioral intervention plan either before or not later than 10 business days after either first removing the child for more than 10 school days in a school year or after commencing a removal that constitutes a change of placement. That is to say that any time a change of placement occurs, even after the FBA and BIP have been done, the IEP team must meet to review the BIP. Also, the IEP team is required to meet upon the first removal of a child for more than 10 school days in a school year, regardless of whether the FBA and BIP have been completed previously. The IEP team, however, is not required to meet when the FBA and BIP have been already done and another short-term removal is imposed that is not a change of placement but is subsequent to the first removal beyond 10 days within the same school year. In this case, the IEP team

members must review the plan individually. A meeting must be held in these cases only if any member of the IEP team believes that a modification is necessary.

2. An FBA plan is required within 10 business days of the proposed removal, and the BIP is required to be prepared in a second, separate meeting as soon as practicable after the FBA plan meeting. "As soon as practicable," however, may be right away after the FBA meeting. Therefore, in effect, an IEP team might not be required to call separate meetings on separate days but could do the FBA and the BIP in separate, consecutive meetings on the same day (but only if practicable to do so).

B. The LEA must provide services to the child in accordance with 34 C.F.R. § 300.121(d)(3).

#### IV. Changes of placement (34 C.F.R. § 300.519):

A. School personnel have no authority to unilaterally institute a removal that constitutes a change of placement, except that if a "substantial likelihood of injury," weapons, or drugs is at issue, the child can be removed immediately, subject to later review, to protect the safety of others in the current placement setting (the same is true for violations of the school's code of conduct, if the behavior is determined not to be a manifestation). Also, the school can remove a child and discipline him or her just as it would a child without a disability if the child's behavior was not a manifestation of his or her disability.

1. In cases of weapons or drug violations (34 C.F.R. § 300.520(a)(2)), removal can be ordered unilaterally by school personnel (and implemented by the IEP team, who determines the IAES), subject only to due process rights of the parent(s) (but parents have no rights to use the 34 C.F.R. § 300.514 "stay-put" rule in these instances).

2. Similarly, a school can hold an expedited due process hearing and the hearing officer can institute a removal to an IAES under 34 C.F.R. 300.521 if school personnel believe that maintaining current placement is substantially likely to result in injury to the child or others. ("Stay put" does not apply here, either).

B. When change of placement occurs, additional requirements are triggered (see 64 Fed. Reg. P. 12,626), including:

1. A manifestation determination must be done (34 C.F.R. §§ 300.523 and 300.524).

a. There is a general rule that children with disabilities may not be disciplined through a change of placement for behavior that is a manifestation of their disability (this arises out of Section 504 of the Rehabilitation Act). Exceptions to that general rule are the 45-day alternative placements described in § 300.520(a)(2) for weapons or drug violations and in § 300.521 for "substantial likelihood of injury." Parental consent to a change of placement is also an exception. When the child falls under one of the exceptions but the behavior is a manifestation of the child's disability, the child may be

returned to class after the IEP team makes adjustments to the plan (but this is not required) (See 64 Fed. Reg. P. 12,625-12,626).

b. If it is determined that the behavior was not a manifestation of the child's disability, the child may be disciplined in the same manner as a child without a disability would be disciplined—with the exception that FAPE services must be provided, and of course the work on the functional behavioral assessment/behavioral intervention plan must be done.

2. FAPE services must be provided, and the IEP team is required to perform a functional behavioral assessment and implement a behavioral intervention plan (or review that plan if one already exists). The FBA is a form of nondiscriminatory evaluation, and the BIP that derives from the FBA should be included in the IEP. The IEP team (which always includes the parent(s)) determines what FAPE services will be provided (34 C.F.R. § 300.121(d)(3)(ii)). This is true for all changes of placement except those involving removal under 34 C.F.R. § 300.521 for “substantial likelihood of injury,” in which case FAPE services (IAES) determinations are made by school personnel in consultation with the child's special education teacher, and are reviewed by the hearing officer (34 C.F.R. § 300.521(d)).

3. School personnel must provide notice to parent(s) (34 C.F.R. § 300.503) (prior to removal).

4. The LEA/SEA must provide mediation procedures through which parents may seek to resolve any dispute (34 C.F.R. § 300.506).

5. Parents are provided due process hearing and appeal rights under 34 C.F.R. §§ 300.507-300.513.

6. Removal is subject to the right of parent(s) to invoke the “stay-put” rule (pendency provisions—34 C.F.R. § 300.514)(except in the cases of removal for 34 C.F.R. § 300.520(a)(2) weapon or drug violations, 34 C.F.R. § 300.521 removals for substantial likelihood of injury, or during pending expedited hearings on these issues under 34 C.F.R. § 300.526 (c)).