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Should States Ban the Use of Non-positive Interventions in Special Education? Re-examining Positive Behavior Supports Under the IDEA

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SHOULD STATES BAN THE USE OF NON-POSITIVE INTERVENTIONS IN SPECIAL EDUCATION? RE-EXAMINING POSITIVE BEHAVIOR SUPPORTS UNDER THE IDEA

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I. INTRODUCTION

It is a bedrock principle of special education law that each disabled child is entitled to an "individualized education program"[1] that will meet that child's "unique needs."[2] In *Bryant v. New York State Education Department*,[3] the United States Court of Appeals for the Second Circuit issued a decision that could have far-reaching implications for this bedrock principle. In *Bryant*, the Second Circuit held that the provisions of the Individuals with Disabilities Education Act (IDEA)[4] permit a state educational agency to ban the use of non-positive behavior interventions.[5] Scientific research demonstrates that such interventions can effectively treat severe self-injurious and aggressive behavior in disabled children.[6] By endorsing a statewide ban

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[1] 20 U.S.C. § 1414(d)(2)(a) (2012).

[2] *Id.* § 1400(d)(1)(A).

[3] 692 F.3d 202 (2d Cir. 2012).

[4] 20 U.S.C. §1400.

[5] *Bryant*, 692 F.3d at 215.

[6] *See id.* at 221 (Sullivan, J., concurring in part and dissenting in part) (citing studies that "describe

on certain behavior interventions, the Second Circuit's ruling severely impacts a child's right to an individualized educational program tailored to meet that child's unique needs.

The plaintiffs in *Bryant* challenged the authority of the New York State Educational Department (NYSED) to issue regulations that prohibit the use of "aversive interventions"[7] for children who are eligible for special education under IDEA.[8] The Second Circuit held that IDEA permits NYSED to adopt a statewide "policy that relies on positive behavioral interventions only."[9]

The decision in *Bryant* is deeply flawed for several reasons. First, the Second Circuit erred when it held that a state educational agency, like NYSED, may issue regulations banning the use of non-positive interventions within the state. In fact, IDEA explicitly directs educators to "consider the use of positive behavioral interventions and supports[] *and other strategies*" to address behavior that may impede the child's learning.[10] By ruling that IDEA permits a state to preclude the use of any non-positive interventions, the Second Circuit impermissibly wrote the words "and other strategies"[11] out of the statute.

Second, the Second Circuit erred when it held that the Supreme Court's decision in

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the *need* for aversive interventions in certain instances" (emphasis in original)).

[7] *Id.* at 210 (majority opinion); N.Y. COMP. CODES R. & REGS. TIT. 8, §§ 19.5(b)(1), 200.22(e) (2014).

[8] 692 F.3d at 210; N.Y. COMP. CODES R. & REGS. TIT. 8, § 19.5(b)(1)

[9] *Bryant*, 692 F.3d at 213.

[10] 20 U.S.C. § 1414(d)(3)(B)(i) (2012) (emphasis added) (listing special factors that a child's IEP team must consider).

[11] *Id.*

Board of Education of Hendrick Hudson Central School District v. Rowley[12] requires deference to NYSED's educational choices made through the agency rule-making process.[13] In *Rowley*, the Court held that courts should defer to educators' choice of methodology only when that choice has been made as to a particular child and has been the subject of a due process hearing initiated by the child's parents.[14] *Rowley* does not require the judiciary to defer to methodology choices that are made at the state agency level via the agency rule-making process.

Finally, the Second Circuit misunderstood the science of applied behavior analysis. The court stated that a ban on non-positive interventions "prohibit[ed] only consideration of a single method of treatment without foreclosing other options."[15] Non-positive interventions, however, are not a "single method" among many equally available methods. Rather, behavior interventions exist along a hierarchy pursuant to which positive-only interventions are considered less intrusive than non-positive interventions and are to be implemented earlier in the hierarchy.[16] If positive-only interventions are ineffective to treat severe behavior and non-positive interventions

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[12] 458 U.S. 176 (1982).

[13] *Bryant*, 692 F.3d at 216.

[14] 458 U.S. at 208.

[15] *Bryant*, 692 F.3d at 214.

[16] *See, e.g.*, Dorothea C. Lerman & Christina M. Vorndran, *On the Status of Knowledge for Using Punishment: Implications for Treating Behavior Disorders*, 4 J. APPLIED BEHAV. ANALYSIS 431, 431–464 (2002) (addressing the research on punishment and its effect in clinical settings); Sarah-Jeanne Salvy et al., *Contingent Electric Shock (SIBIS) and a Conditioned Punisher Eliminate Severe Head Banging in a Preschool Child*, 19 BEHAV. INTERVENTIONS 59, 59–72 (2004) (discussing several non-positive behavioral interventions including contingent electric shock).

are banned by the state law, then the behavior may become untreatable. Moreover, research demonstrates that, for some children, an effective intervention plan will require a combination of both positive and non-positive interventions.[17] A ban on non-positive interventions could prevent such children from receiving the appropriate multi-component behavior plan.[18]

IDEA's requirements for the use of behavioral interventions likely will be addressed when Congress next amends and reauthorizes IDEA. Many disability rights organizations have advocated for legislative action that would ban the use of "aversive interventions."[19] In recent years, members of Congress have introduced several bills designed to create federal educational

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[17] Salvy, *supra* note 16, at 60, 70.

[18] *See infra* Part II(E) (discussing the positive aspects of a multi-component behavior plan).

[19] *See, e.g., Restraint and Seclusion (APRAIS)*, TASH, http://tash.org/advocacy-issues/coalitions-partnerships/aprais/ (last visited Aug. 2, 2014). Non-positive or aversive interventions are not synonymous with seclusion or restraint, although some disability rights organizations do define "aversive interventions" to include seclusion and restraint (as well as other forms of abusive interventions). Council of Parent Attorneys and Advocates (COPAA), *Unsafe in the Schoolhouse: Abuse of Children With Disabilities*, COPAA (May 27, 2009), http://c.ymcdn.com/sites/www.copaa.org/resource/collection/662B1866-952D-41FA-B7F3-D3CF68639918/UnsafeCOPAAMay_27_2009.pdf. However, seclusion or restraint should be used only in emergency situations that involve an imminent risk of serious physical injury to the child or others. *See* United States Dep't of Educ., *Restraint and Seclusion: Resource Document*, (May 2012), ED.GOV 3 http://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf (stating that restraint and seclusion are not "routine" measures). Behavioral interventions, in contrast, are designed by professionals to address problem behavior exhibited by a specific child. The use of a particular behavioral intervention on a systematic basis differs from the emergency use of seclusion and restraint.

policy on the appropriate use of aversive behavioral interventions in a school setting.[20] However, none of that proposed legislation has been enacted. Thus, the next IDEA reauthorization process will be the opportunity for Congress to craft educational policy on this important topic.

This Article contends that a complete ban on the use of non-positive behavioral interventions violates a core tenet of the IDEA: specifically that each child with a disability is entitled to an individualized education program designed to meet that child's unique needs. Part I of this Article provides a summary of applied behavior analysis and an overview of the "positive behavior supports" (PBS) movement. Part II sets forth the history of IDEA and the statutory provisions that address the use of behavior interventions. Part III discusses various states' regulations regarding the use of non-positive, or aversive, interventions, including the New York regulations. Part IV examines the litigation that was filed after the New York regulations were issued. Part V details the weaknesses of the Second Circuit's ruling in *Bryant* and its potential consequences on the educational programming of children with severe behavior. Part VI recommends various ways in which Congress could amend IDEA to clarify the statutory references to behavioral interventions techniques.

II. APPLIED BEHAVIOR ANALYSIS AND POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS

A. Basic Principles of Applied Behavior Analysis

Applied Behavior Analysis (ABA) is a science "devoted to the understanding and improvement of human behavior."[21] The title, ABA, is significant. The word "applied" indicates

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[20] *See infra* Part II(D) (discussing the bills and senate reports).

[21] JOHN. O. COOPER ET AL., APPLIED BEHAVIOR ANALYSIS 3 (2d ed. 2007). The Cooper text, known as the "White Book," is an iconic textbook in the field of Applied Behavior Analysis. *Id.* at xv (Preface).

that ABA is designed to bring about changes in socially significant behavior that will improve a person's daily life in terms of social interaction, self-care, vocation, and recreational activities.[22] The word "behavior" requires that the behavior analyst[23] precisely define a particular behavior and accurately measure changes in that behavior.[24] Finally, the word "analysis" requires the behavior analyst to determine that there is a causal relationship between any intervention chosen and changes in behavior.[25] One of the hallmarks of good "analysis" is the ability to reliably (or repeatedly) demonstrate a change in behavior when an intervention is introduced.[26]

A core concept of ABA is the "three-term contingency[,]" or the "ABCs," of behavior analysis.[27] The ABCs can be described as follows: the occurrence of a particular behavior (B) will depend on both the antecedent conditions (A) that exist before the behavior occurs and the consequences (C) resulting from the behavior.[28] When examining behavior, an initial requirement is to determine both the antecedent to the behavior and the consequences that

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[22] *Id.* at 16.

[23] The term "behavior analyst" as used in this Article refers broadly to professionals who use ABA principles in their field and specifically includes school psychologists. Because behavior analysis principles are increasingly applied in school, "[e]ffective school psychologists are apt to be good behavior analysts." Ruth A. Ervin & Kristal E. Ehrhardt, *Behavior Analysis and School Psychology*, *in* HANDBOOK OF APPLIED BEHAVIOR ANALYSIS 113, 128 (John Austin & James E. Carr eds., 2000).

[24] COOPER, *supra* note 21, at 16.

[25] *Id.* at 17.

[26] *Id.*

[27] *Id.* at 41–42.

[28] *Id.* at 42.

naturally (i.e., in the absence of any planned intervention) occur whenever the behavior is displayed.[29] Once the ABCs of the behavior are known, interventions can be devised to reduce problem behavior and increase appropriate behavior.[30]

Another essential premise of ABA is that all behavior, either appropriate or problematic, serves a function for the individual who exhibits the behavior. A child who is disruptive in class, for example, may engage in the behavior because it gets the teacher's attention. The function of such behavior is attention-seeking, which could include a desire either for positive attention (praise) or negative attention (scolding or reprimand).[31] Another common function of such behavior is escape from task.[32] A child who feels overwhelmed by a particular demand may engage in problem behavior as a means to interrupt the demand being placed on the child.[33] Problem behavior also may serve the function of gaining the child access to desired tangible items or activities.[34] Finally, for some children with disabilities, problem behavior can serve a function known as automatic reinforcement, where the behavior provides internal feedback that

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[29] *Id.*

[30] *Id.*

[31] Ruth A. Ervin et al., *A Descriptive Analysis and Critique of Empirical Literature on School-based Functional Assessment*, 30 SCH. PSYCH. REV. 193, 203–04 (2001); Lynn Koegel et al., *Interventions for Children with Autistic Spectrum Disorders in Inclusive School Settings*, 19 COGNITIVE & BEHAV. PRAC. 401, 402 (2012).

[32] DANIEL CRIMMINS ET AL., POSITIVE STRATEGIES FOR STUDENTS WITH BEHAVIORAL PROBLEMS 74–75 (2007); Ervin, *supra* note 31, at 203–04.

[33] CRIMMINS, *supra* note 32, at 8–9.

[34] *Id.* at 74–75.

the child desires.[35] That feedback can be sensory, as in the case of a child who engages in head-banging, rocking, hand-flapping, inappropriate vocalizations, hair-pulling, or self-biting.[36]

When first examining a particular behavior exhibited by a child, the behavior analyst will undertake a process known as a Functional Behavioral Assessment (FBA). An FBA is the process of identifying and defining a particular behavior, its function, the antecedent events that reliably predict the occurrence of the behavior, and the consequences or events that in the absence of interventions may further the function of the behavior.[37] A properly conducted FBA could reveal, for example, that the antecedent to a particular behavior is a task that overwhelms the child and that one consequence of the behavior, such as being removed from class, serves the function of allowing the child to escape from the task. Because the consequence furthers the function of the behavior, the behavior analyst would say that the consequence "maintains" the behavior. [38]

Armed with the results of a comprehensive FBA, the behavior analyst can begin to devise a behavioral intervention plan (BIP) that alters antecedents to the behavior to keep the behavior from occurring or introduces consequences for the behavior when it occurs, or uses a combination of both antecedents and consequences.[39]

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[35] COOPER, *supra* note 21, at 501–02.

[36] Eileen M. Roscoe et al., *A Comparison of Noncontingent Reinforcement and Sensory Extinction as Treatments for Self-Injurious Behavior*, 31 J. APPLIED BEHAV. ANALYSIS 635 (1998).

[37] COOPER, *supra* note 21, at 500; CRIMMINS, *supra* note 32, at 90; H. Rutherford Turnbull III, et al., *IDEA, Positive Behavioral Supports, and School Safety*, 30 J.L. & EDUC. 445, 456 (2001).

[38] Lerman & Vorndran, *supra* note 16, at 433.

[39] COOPER, *supra* note 21, at 486–97 (discussing antecedent interventions).

Antecedent-based interventions are designed to alter preexisting environmental conditions or variables that exist or occur before a behavior is demonstrated.[40] Some antecedents to problem behavior may be "setting events," such as lack of sleep, illness, or noise in the environment.[41] Other antecedents may be the introduction of a request or task upon the individual, triggering the behavior.[42] If the function of a problem behavior is to escape from a task demand, the behavior analyst can change the antecedent conditions by "shortening the task, simplifying the demands, [or] clarifying the instructions."[43] These targeted changes to antecedent conditions are interventions that are designed to keep problem behavior from occurring.[44]

Consequence-based interventions are implemented when behavior occurs, with the intention to affect the frequency with which the behavior will reoccur in the future.[45] Consequences can act either to increase (in the case of an appropriate behavior) or decrease (in the case of a problem behavior) the frequency with which behavior will occur in the future.[46]

There are two available consequences: reinforcement and punishment.[47] A "reinforcer" is

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[40] *Id.* at 28.

[41] CRIMMINS, *supra* note 32, at 8, 109 (identifying four dimensions for setting events); George Sugai et al., *Applying Positive Behavior Support and Functional Behavioral Assessment in Schools*, 2 J. POSITIVE BEHAV. INTERVENTIONS 131, 138 (2000).

[42] CRIMMINS, *supra* note 32, at 8; Sugai, *supra* note 41, at 138.

[43] Koegel, *supra* note 31, at 403.

[44] *Id.*

[45] COOPER, *supra* note 21, at 33–37; CRIMMINS, *supra* note 32, at 19.

[46] Turnbull, *supra* note 37, at 453–454.

[47] Cooper, *supra* note 21, at 34–37.

any consequence that is designed to increase the likelihood of behavior occurring in the future.[48] A "punisher" is any consequence that is designed to decrease the likelihood that the behavior will occur in the future.[49]

Each type of consequence can be further divided. Positive reinforcement occurs when the behavior is followed by a consequence that will increase the likelihood of the behavior occurring in the future.[50] Positive reinforcement commonly occurs when parents verbally praise a child for good behavior; the verbal praise will increase the likelihood that the behavior will occur more frequently in the future. Other common forms of positive reinforcement include allowing access to preferred items (toys or an electronic device), bits of food, hugs or "high[]fives," and the like.[51]

Negative reinforcement occurs when good behavior leads to the elimination of an unwanted condition.[52] A simple example of negative reinforcement is the ability of a child who has done satisfactory school work to "take a break" from work. The unwanted condition—having to do school work—is removed by virtue of the child's satisfactory completion of a task.

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[48] *Id.* at 34.

[49] *Id.*; CRIMMINS, *supra* note 32, at 21.

[50] COOPER, *supra* note 21, at 36; CRIMMINS, *supra* note 32, at 19.

[51] There are also "schedules of reinforcement," which determine the frequency with which reinforcement is delivered to the child. Continuous reinforcement is delivered every time the child engages in the desired behavior, and is used most often when a child is learning a new behavior. CRIMMINS, *supra* note 32, at 25. Partial or intermittent reinforcement reinforces behavior occasionally, and is used most often to maintain appropriate behavior that the child displays regularly. *Id.*

[52] *Id.* at 19.

Punishment also can be divided into positive and negative punishment. Negative punishment occurs when the child loses access to either desired conditions or the opportunity to acquire desired materials for a period of time.[53] For example, negative punishment occurs when a child who does not behave appropriately loses a privilege, such as watching TV. Positive punishment occurs when a condition is introduced to the child as a consequence of the behavior.[54] An example of positive punishment might be the requirement that a child who has thrown objects on the floor must clean up the mess.

Intrinsically the terms "reinforcement" and "punishment" do not have any moral or social value attached to them.[55] An adult may inadvertently reinforce a behavior even when the adult is not interacting "positively" with a child, such as the circumstances in which a child who seeks adult attention engages in disruptive behavior, causing the adult to scream at the child. Conversely, an adult who applies a punisher is not acting with any malice or ill will.[56]

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[53] COOPER, *supra* note 21, at 329.

[54] *Id.*

[55] Ron Van Houten et al., *The Right to Effective Behavioral Treatment*, 21 J. APPLIED BEHAV. ANALYSIS 381, 384 (1988) ("Techniques are not considered as either 'good' or 'bad' according to whether they involve the use of antecedent rather than consequent stimuli or reinforcement rather than punishment.").

[56] COOPER, *supra* note 21, at 328 ("It is important to point out that punishment is defined neither by the actions of the person delivering the consequences…nor by the nature of those consequences."); Nirbhay N. Singh et al., *Nonaversive and Aversive Interventions: Issues*, *in* PERSPECTIVES ON THE USE OF NONAVERSIVE AND AVERSIVE INTERVENTIONS FOR PERSONS WITH DEVELOPMENTAL DISABILITIES 3, 4 (Alan C. Repp & Nirbhay N. Singh eds., 1990) (explaining that "punishment" is a term with a technical

To address a specific behavior, the behavior analyst will take the results of an FBA and design a behavioral intervention plan (BIP) that will increase appropriate behavior and reduce inappropriate behavior as desired.[57] In determining which interventions to select, professional standards have established a hierarchy of interventions under which the behavior analyst should select the "least restrictive" intervention that may bring about a change in the behavior.[58] This hierarchy attempts to ensure that interventions are no more intrusive to the person's life or independence than are necessary to produce the desired effect.[59] And yet the behavior analyst also must consider whether the least restrictive intervention will be effective to change behavior. Choosing an intervention simply because it is less intrusive is "unacceptable … [if] available research indicate[s] that other procedures would be more effective."[60]

While intrusiveness—the extent to which an intervention affects a person's life or independence—is a concept as to which professional judgment might vary in any particular case,

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meaning).

[57] CRIMMINS, *supra* note 32, at 89.

[58] COOPER, *supra* note 21, at 350-51; *see e.g.*, Gina Green, *Least Restrictive Use of Reductive Procedures: Guidelines and Competencies*, *in* PERSPECTIVES ON THE USE OF NONAVERSIVE AND AVERSIVE INTERVENTIONS FOR PERSONS WITH DEVELOPMENTAL DISABILITIES, *supra* note 56 at 479, 479-493 (discussing the restrictive procedures of the rules that "govern the use of behavior change").

[59] COOPER, *supra* note 21, at 350; *see also* Christina M. Vorndran & Dorothea C. Lerman, *Establishing and Maintaining Treatment Effects with Less Intrusive Consequences via a Pairing Procedure*, 39 J. APPLIED BEHAV. ANALYSIS 35, 35 (2006) (stating as a "general consensus . . . that interventions should be designed to be as least intrusive or restrictive as possible.").

[60] Van Houten, *supra* note 55, at 383.

a consensus has emerged that consequences based on reinforcement are considered less intrusive than consequences based on punishment such that, "whenever possible,"[61] the behavior analyst is to select reinforcement consequences before punishment consequences.[62] Thus, the proper application of the least restrictive or intrusive hierarchy would dictate that a BIP would start with a "comprehensive positive program."[63] If those positive measures do not change the problem behavior, then the BIP might be modified to include punishment-based interventions.[64]

B. Early Applications of ABA Principles to Treat Severe Behavior

The most well-known researcher in the field of ABA is B.F. Skinner. Skinner, however, primarily applied ABA principles to animals.[65] The first known application of ABA principles on

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[61] *See BACB Guidelines for Responsible Conduct for Behavior Analysts: Guideline 4.05* BEHAV. ANALYST CERTIFICATION BD., http://bacb.com/index.php?page=57 (last visited Aug. 31, 2014) [hereinafter BACB guidelines] ("The behavior analyst recommends reinforcement rather than punishment whenever possible.").

[62] *Id.* at 4.05; COOPER, *supra* note 21 at 350-51; *see also* Stacey L. Carter & John J. Wheeler, *Considering the Intrusiveness of Interventions*, 20 INT'L. J. OF SPECIAL EDUC. 136, 136–37 (2005) (ranking interventions from Level I to Level IV).

[63] Maurice A. Feldman, *Balancing Freedom from Harm and Right to Treatment for Persons with Developmental Disabilities*, in PERSPECTIVES ON THE USE OF NONAVERSIVE AND AVERSIVE INTERVENTIONS FOR PERSONS WITH DEVELOPMENTAL DISABILITIES, *supra* note 56, at 261, 266.

[64] Michael R. Mayton et al. *Intrusiveness of Behavioral Treatments for Adults with Intellectual Disability*, 35 RES. DEVELOPMENTAL DISABILITIES 54, 55 (2014) (noting that a hierarchy of intrusiveness that progresses from least to most intrusive, as follows: reinforcement-based interventions, extinction procedures, response cost procedures, and the use of aversive stimuli).

[65] CRIMMINS, *supra* note 32, at 18.

a human subject took place in 1949.[66] Beginning in the 1950s and 1960s, other professionals began to apply Skinner's principles to human behavior, resulting in many "pioneering applications of behavior principles to education."[67] The year 1968 marked the "formal beginning of contemporary applied behavior analysis,"[68] when, among other events, the Journal of Applied Behavior Analysis began publication.[69]

Some of the early applications of ABA involved disabled children who engaged in severe, potentially life-threatening behaviors.[70] Such behaviors can threaten the health and safety of both the child and others, and cause the children to be isolated from their families and communities, even leading to life-long institutionalization.[71]

A 1969 study by Ivar Lovaas and James Simmons describes the types of self-destructive behaviors that some children exhibit:

> This behavior consists primarily of "head-banging" (against walls and furniture), "arm-banging" (against sharp corners), beating themselves on their heads or in their faces with their fists or knees, and biting themselves on wrists, arms, and shoulders. In some children, the self-destructive behavior can be severe enough to

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[66] COOPER, *supra* note 21, at 10–16 (describing historical underpinnings of ABA and its application to human behavior).

[67] COOPER, *supra*, note 21, at 14; *see also* CRIMMINS, *supra* note 32, at 19 (noting that Skinner's work "has been replicated and extended by many other researchers and clinicians").

[68] COOPER, *supra* note 21, at 16.

[69] *Id.*

[70] O. Ivar Lovaas & James Q. Simmons, *Manipulation of Self-Destruction in Three Retarded Children*, 3 J. APPLIED BEHAV. ANALYSIS 143, 143 (1969).

[71] *Id.*; Van Houten, *supra* note 55, at 382 (dangerous behaviors can "serve as barriers to . . . independence or social acceptability").

> pose a major problem for the child's safety. Thus, one can frequently see that such children have removed large quantities of flesh from their bodies, torn out their nails, opened wounds in their heads, broken their noses, etc.[72]

Several other scientific articles detail such severe behavior.[73] These articles also detail how these behaviors isolate these children from their families and communities.[74] Indeed, the longer that a child exhibits self-injurious and aggressive behaviors, the more intractable the behavior becomes.[75] Thus, it is imperative that the child who engages in self-injurious, aggressive, or other destructive behaviors quickly receive the most effective and appropriate intervention that will bring about meaningful change in the child's behavior.[76]

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[72] *Lovaas* & *Simmons*, *supra* note 72 (typeface altered).

[73] *See, e.g.*, Louis P. Hagopian et al., *Effectiveness of Functional Communication Training with and Without Extinction and Punishment: A Summary of 21 Inpatient Cases*, 31 J. APPLIED BEHAV. ANALYSIS 211, 213 (1998) (detailing the self-destructive behavior exhibited in each client involved in a study including hitting, slapping, throwing objects, and running toward an open door); Rachel H. Thompson et al., *Effects of Reinforcement for Alternative Behavior During Punishment of Self-Injury*, 32 J. APPLIED BEHAV. ANALYSIS 317, 319 (1999) (detailing the "SIB" or self-injurious behavior exhibited in each participant in the study including hitting and other forceful contact); Ron Van Houten & Ahmos Rolider, *Recreating the Scene*: *An Effective Way to Provide Delayed Punishment for Inappropriate Motor Behavior*, 21 J. APPLIED BEHAV. ANALYSIS 187, 188 (1988) (examining the aggressive behavior of two participants in the study including biting other children and stealing small items).

[74] Lovaas & Simmons, *supra* note 72, at 143.

[75] Koegel, *supra* note 31, at 402 (Without appropriate interventions, challenging behaviors can "persist across an individual's lifespan.").

[76] Glen Dunlap et. al., *Preventing Serious Behavior Problems Through Skill Development and Early Intervention*, *in* PERSPECTIVES ON THE USE OF NONAVERSIVE AND AVERSIVE INTERVENTIONS FOR

In early applications of ABA to treat such severe problem behavior, the concept of an FBA had not yet been developed. Therefore, behavioral interventions often were applied in a reactive manner to address behavior as it occurred without any preliminary determination about the antecedent conditions to, or the function of, the behavior.[77] Many of these early interventions applied several forms of punishment consequences that were physical or painful in nature. Among the forms of punishment that were detailed in the literature were use of noxious liquids, sprays of water mist in the face, slapping, hitting, physical restraint, or contingent electric shock.[78] The word "aversive" began to appear in the scientific literature as an adjective to describe the application of these techniques to address problem behavior.[79] These unpleasant or

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PERSONS WITH DEVELOPMENTAL DISABILITIES, *supra* note 56, at 273, 276 (noting that problem behavior, if untreated, becomes more intense and complex).

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

[78] *See, e.g.* Michael F. Dorsey et al., *Treatment of Self-Injurious Behavior Using a Water Mist: Initial Response Suppression and Generalization*, 13 J. APPLIED BEHAV. ANALYSIS 343, 343–53 (1980) (examining a study which "evaluated the effects of a fine mist of water applied to the face contingent upon self-injurious behavior"); Lovaas & Simmons, *supra* note 72, at 143 (discussing the use of "straitjackets" or tying a child's feet to his or her bed as forms of restraint); Barry A. Tanner & Marlene Zeiler, *Punishment of Self-Injurious Behavior Using Aromatic Ammonia as the Aversive Stimulus*, 8 J. APPLIED BEHAV. ANALYSIS 53, 53–57 (1975) (detailing the use of aromatic ammonia as aversive stimuli); *see also* Stacey B. Seiden & Perry A. Zirkel, *Aversive Therapy for Handicapped Students*, 48 EDUC. L. REP. 1029, 1032–35 (1989) (reviewing the psychological literature and relevant cases).

[79] CRIMMINS, *supra* note 32, at 3 ("Aversives came into use when professionals encountered difficulty managing seemingly intractable patterns of dangerous or destructive behavior" such as self-

painful aversive therapies were "sometimes used inappropriately or abusively."[80]

Beginning in the 1970s, the nation experienced a heightened awareness of deplorable conditions in some institutional settings where adults and children with disabilities resided. In 1972, a television documentary on the conditions at Willowbrook State School on Staten Island, New York, gave the public shocking video footage of naked children sitting on the floor in overcrowded, filthy rooms or being fed by staff workers who shoveled food into the children's mouths using the staff workers' hands.[81] In reaction, several lawsuits were filed seeking to reform conditions at these institutions or, alternatively, to release the institution's residents.[82] One such case, *Halderman v. Pennhurst State School & Hospital*,[83] detailed some of the abusive practices used at institutions to manage residents' behavior, including widespread use of physical restraints for long periods of time, the use of seclusion rooms to control residents, and physical

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injury or aggression.).

[80] Crighton Newsom & Kimberly A. Kroeger, *Nonaversive Treatment*, *in* CONTROVERSIAL THERAPIES FOR DEVELOPMENTAL DISABILITIES: FAD FASHION AND SCIENCE IN PROFESSIONAL PRACTICE 405, 406 (John W. Jacobson et. al., eds. 2005).

[81] Video footage of conditions at the Willowbrook State School can be found at *Willowbrook State School Exposed. Unbelievable* (YouTube Video Mar. 12, 2011), http://www.youtube.com/watch?v=dbiYJkiX-Dg; *see also* David J. Rothman & Sheila M. Rothman, THE WILLOWBROOK WARS 86–87 (1984) (detailing the squalid conditions of the Willowbrook school including "the stench of urine and sweat" and "chronic shortages of clothing, sheets, and bedding").

[82] N.Y. State Ass'n for Retarded Children, Inc. v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975); Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972).

[83] 446 F. Supp. 1295 (E.D. Pa. 1977).

abuse at the hands of staff or other residents.[84]

In response to such revelations, both federal and state governments enacted statutes or regulations designed to promote the rights of disabled individuals to be treated with dignity.[85]

C. Rise of the Positive Behavioral Interventions and Support Movement

As news reports and court cases raised public awareness about the treatment of disabled individuals in institutional settings, behavior analysts began to debate the ethics of using interventions that involved pain, discomfort, or undignified treatment.[86] Some advocates argued that professional ethics dictated that disabled individuals should be free from discomfort or pain, while others argued that individuals had a right to effective treatment to treat severe behavior, even if the treatment itself involved some pain or discomfort.[87] In the 1980s, this debate among policy makers, advocacy groups, and behavior analysts about the use of aversive interventions became "fierce."[88] Some professionals and policy makers, including officials at the United States Department of Education, theorized that positive-only, nonaversive interventions could provide a behavior support structure of both effective and dignified treatment, but there was no scientific

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[84] *Halderman*, 446 F. Supp. at 1306–11.

[85] Dennis P. Saccuzzo, *Legal Regulation of Behavior Modification for Developmentally Disabled and Other Handicapped Person*s, 25 OHIO N.U. L. REV. 27, 35–36 (1999) (discussing events leading to states' enactment of protections for developmentally disabled individuals receiving mental health or other health care treatment generally).

[86] CRIMMINS, *supra* note 32, at 2–3; Seiden & Zirkel, *supra* note 78, at 1030.

[87] CRIMMINS, *supra* note 32, at 3.

[88] Madeleine Will, *Foreword*, *in* EDWARD G. CARR ET AL., POSITIVE BEHAVIOR SUPPORT FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES: A RESEARCH SYNTHESIS xv (1999).

research to support the use of a positive-only intervention scheme.[89]

Over the course of several years, the federal government, through the United States Department of Education, spent several million dollars to fund research into the use of positive or non-aversive approaches to managing behavior.[90] This federally funded research yielded scientific support for a positive-only behavioral intervention structure.[91] Thus, the "positive behavior support" (PBS), or "positive behavior interventions and supports" (PBIS), movement emerged.[92]

One of the founding tenets of the early PBS movement was to add a "values" component to the scientific principles of ABA.[93] By adding community and social values to the science of ABA, PBS proponents deemed certain interventions, even if effective to address problem behavior, unacceptable on the grounds that they were "dehumanizing or degrading."[94]

PBS proponents also contended that the widespread use of aversive interventions

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[89] *Id.* at xv.

[90] *See infra* Part II(C) (explaining that the National Institute on Disability and Rehabiltation Research (NIDRR) awarded a multimillion-dollar grant to university researchers to study Nonaversive Behavior Management).

[91] A 1999 monograph was described as providing the "scientific grounds" that policy makers had "wanted a decade ago" to justify the use of a positive-only intervention scheme. Foreword of Madeleine Will, *supra* note 88, at xv.

[92] Edward G. Carr et al., *Positive Behavioral Support: Evolution of an Applied Science*, 4 J. POSITIVE BEHAV. INTERVENTIONS 4 (2002) [hereinafter "Carr 2002"]; CRIMMINS, *supra* note 32, at 3.

[93] CRIMMINS, *supra* note 32, at 4, 41; Sugai, *supra* note 41, at 134.

[94] Carr 2002, *supra* note 92, at 6; Sugai, *supra* note 41, at 134-36.

stemmed from the belief that problem behavior was due to an individual's unchangeable characteristics, such as disability type, without considering extrinsic environmental factors that might contribute to problem behavior.[95] Noting that "people in community settings are interdependent,"[96] PBS proponents challenged non-disabled individuals to alter their perception of the behavior of a disabled individual:

> [T]he focus of intervention must be on changing problem context, not problem behavior. We must move beyond blaming the victim (e.g., certain people have problems that must be "treated") to holding societal contexts accountable (e.g., certain people live in deficient environments that must be redesigned).[97]

This focus on problem context translated into enthusiastic adoption of the FBA process and great emphasis on devising interventions that would modify antecedent conditions to keep problem behavior from occurring.[98] PBS proponents contended that the proactive nature of a PBS approach could "remediate the environment[] . . . so as to prevent future occurrences of the problem behavior."[99] Changing antecedent conditions might include changing the student's physical environment or daily schedule or taking steps to minimize noise or "other

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[95] Sugai, *supra* note 41, at 137.

[96] Carr 2002, *supra* note 92, at 11.

[97] *Id.*

[98] CRIMMINS, *supra* note 32, at 3 ("One distinctive feature of the PBS movement enabled it to supplant earlier ABA technologies that were based primarily on punishment: the emphasis on the prominent role of function in maintaining problem behavior."); Sugai, *supra* note 41, at 135–37.

[99] EDWARD G. CARR ET AL., POSITIVE BEHAVIOR SUPPORT FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES 5 (1999) [hereinafter Carr 1999].

environmental irritants."[100] Other antecedent interventions that could reduce the frequency of problem behavior at school might involve changes to the curriculum, interspersing easy tasks with difficult ones, and changing the complexity or number of instructions from the teacher.[101]

By pairing changes in antecedent conditions with positive reinforcement of appropriate behavior, PBS proponents theorized that the frequency of appropriate behavior would increase, leading to a natural decrease in problem behavior.[102] A pure, PBS-based intervention plan thus would not contain any affirmative intervention to address problem behavior on the theory that problem behavior naturally would fade away once the individual understood the efficacy of gaining positive reinforcement for appropriate behavior.[103]

Indeed, some PBS proponents soundly condemned the use of "aversive procedures that address problem behaviors with reactive, crisis-driven strategies."[104] These professionals challenged the belief that punishment was a necessary form of behavioral intervention, labeling

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[100] Turnbull, *supra* note 37, at 452.

[101] Carr 1999, *supra* note99, at 12–14; Turnbull, *supra* note 37, at 452–53.

[102] Carr 1999, *supra* note 99, at 14–15. The primary focus was on changing the environment to "increase opportunities for the display of positive behavior," while decreasing the frequency of problem behavior was termed an "important, but secondary, goal of PBS." Carr 2002, *supra* note 92, at 4–5.

[103] Carr 1999, *supra* note 99, at 8 ("[I]mprovements in environmental conditions and repertoires of positive behavior can produce, as a side effect, decreases in problem behavior.").

[104] Carr 2002, *supra* note 92, at 9; Carr 1999, *supra* note 99, at 5 ("[U]sing aversive procedures conforms best to a crisis management paradigm; using PBS conforms best to a prevention paradigm."); CRIMMINS, *supra* note 32, at 5 ("Because it awaits the occurrence of problem behavior, reactive discipline relies predominantly on punishment and often fails to consider the concerns of learners").

that position as a "myth" founded on a natural human tendency to punish offending behavior.[105] These PBS proponents contended that their "proactive" approach to problem behavior would "rende[r] the traditional use of punishment obsolete and unnecessary."[106]

However, early PBS proponents had some disagreements about whether certain interventions were indeed "positive."[107] A good illustration of this difficulty involved two forms of reinforcement known as "DRO" and "DRA."[108] A "DRO" ("Differential Reinforcement of Other behavior") delivers positive reinforcement to a child who does not engage in problem behavior for a specified period of time, even if the child is not otherwise engaged in a specified appropriate behavior.[109] A "DRA" ("Differential Reinforcement of Alternative behavior") delivers reinforcement when the child engages in a specified alternative behavior that is designed to replace the problem behavior.[110] Even though a child could be reinforced through both

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[105] Anne M. Donnellan & Gary W. Lavigna, *Myths About Punishments*, *in* PERSPECTIVES ON THE USE OF NONAVERSIVE AND AVERSIVE INTERVENTIONS FOR PERSONS WITH DEVELOPMENTAL DISABILITIES, *supra* note 56, at 35.

[106] *Id.* at 33.

[107] Carr 1999, *supra* note 99, at 14–15. Indeed, it has been suggested that the word "positive" is just "sugar coating" to make PBS sound more appealing. *See* James A. Mulick & Eric M. Butter, *Positive Behavior Support: A Paternalistic Utopian Delusion*, *in* CONTROVERSIAL THERAPIES FOR DEVELOPMENTAL DISABILITIES: FAD, FASHION AND SCIENCE IN PROFESSIONAL, *supra* note 80, at 385, 390–91 ("Sugar coatings make you feel nice.").

[108] Carr 1999, *supra* note 99, at 14–15 (describing DRO and DRA).

[109] *Id.* at 14.

[110] *Id.* at 15.

intervention forms, some PBS proponents argued that a DRO was not positive because "frequent display of problem behavior results in repeated omission of positive reinforcers, an aversive event."[111] In the view of those behavior analysts, a DRO operated as a form of punishment.[112] Still other PBS proponents disagreed, arguing that a DRO should be considered a "positive" intervention.[113]

The "DRA/DRO controversy"[114] is only illustrative of the debate about whether particular interventions are acceptable.[115] It is a good example, however, of the difficulty of

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[111] *Id.* at 14. For an in-depth analysis of whether DRO is best classified as reinforcement or punishment, see Ahmos Rolider & Ron Van Houten, *The Role of Reinforcement in Reducing Inappropriate Behavior: Some Myths and Misconceptions*, *in* PERSPECTIVES ON THE USE OF NONAVERSIVE AND AVERSIVE INTERVENTIONS FOR PERSONS WITH DEVELOPMENTAL DISABILITIES, *supra* note 56, at 119, 119–22.

[112] Carr 1999, *supra* note 99, at 14.

[113] Donnellan & LaVigna, *supra* note 105, at 39 (identifying DRO as a positive strategy).

[114] Mulick, *supra* note 107, at 394.

[115] There were similar debates about other intervention techniques. *See, e.g.*, CRIMMINS, *supra* note 32, at 24 (time-out may be used, but can be misused if not monitored carefully); Alan C. Repp & Kathryn G. Karsh, *A Taxonomic Approach to the Nonaversive Treatment of Maladaptive Behavior of Persons with Developmental Disabilities*, *in* PERSPECTIVES ON THE USE OF NONAVERSIVE AND AVERSIVE INTERVENTIONS FOR PERSONS WITH DEVELOPMENTAL DISABILITIES, *supra* note 56, at 331, 332 (identifying time-out and overcorrection as aversives); Tristan M. Smith, *When and When Not to Consider the Use of Aversive Interventions in the Behavioral Treatment of Autistic Children*, in PERSPECTIVES ON THE USE OF NONAVERSIVE AND AVERSIVE INTERVENTIONS FOR PERSONS WITH DEVELOPMENTAL DISABILITIES, *supra* note 56, at 287, 288 (time-out and overcorrection differ from

labeling behavior interventions as "positive."

D. PBS Evolves into a "Framework" for School-Wide Behavioral Support System

Although "developed initially as an alternative to [the use of] aversive interventions,"[116] in the 2000s, the PBS movement began to "shift[] focus"[117] to become a set of practices and systems for school-wide behavioral support for all children.[118] PBS now encompasses much more than a means to devise appropriate interventions to address a single student's behavioral issues.[119] Rather, PBS is a universal framework through which educators can select and implement behavioral practices on a school-wide basis to improve the behavior of all students.[120]

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aversives because they do not involve physical punishment); Turnbull, *supra* note 37, at 479 (setting several conditions under which time-out may be acceptable).

[116] Sugai, *supra* note 41, at 133.

[117] George Sugai & Brandi Simonsen, *Positive Behavioral Interventions and Supports: History, Defining Features, and Misconceptions*, PBIS.ORG 2 (June 21, 2012) http://www.pbis.org/common/cms/files/pbisresources/PBIS_revisited_June19r_2012.pdf

[118] *Id.*

[119] Sugai, *supra* note 41, at 133 (PBS has grown from "an intervention approach for individual students to an intervention approach for entire schools"); *see also What is School-Wide Positive Behavior Interventions & Supports?* OSEP Center on Positive Behav. Interventions & Supports PBIS.ORG (May 13, 2009) http://www.pbis.org/school/what_is_swpbs.aspx ("More importantly, SWPBS is NOT a curriculum, intervention, or practice, but IS a *decision making framework that guides selection, integration, and implementation of the best evidence-based academic and behavioral practices for improving important academic and behavior outcomes for all students.")* (emphasis in original) (typeface altered).

[120] CRIMMINS, *supra* note 32, at 4–5 (describing PBS as a framework to be implemented on a school-

System-wide PBS practices include discipline policies, safe-schools initiatives, social-skills training programs, and anti-bullying and anti-harassment efforts.[121] The use of a PBS framework in schools is said to provide many benefits that range far beyond the specific occurrence of a problem behavior in a particular child with a disability, including improving academic achievement school wide (because time devoted to behavioral issues in the classroom is reduced) and reducing school violence, bullying, and harassment.[122]

The current PBS framework takes the entire school community and divides it into three "zones" of support. These zones are represented by a pyramid, where the pyramid is divided into three areas: (1) primary prevention, (2) secondary prevention, and (3) tertiary prevention.[123] The largest zone, primary prevention, is a school-wide framework for all students and staff and is applicable across all school settings.[124] Secondary prevention efforts are directed at "at-risk" students who have not yet begun to engage in problem behaviors.[125] Tertiary, or "red-zone," prevention strategies are to be implemented for students who currently exhibit problem

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wide and community-wide basis); *see also* Sugai & Simonsen, *supra* note 117, at 2.

[121] CRIMMINS, *supra* note 32, at 38–39.

[122] *Id.* at 7.

[123] The pyramid is displayed at *Early Childhood PBIS*, PBIS.ORG http://www.pbis.org/community/early-childhood (last visited Aug. 31, 2014); Sugai, *supra* note 41, at 136 (displaying the pyramid, which divides the school population as follows: eighty to ninety percent of students are students without serious problem behaviors, five to fifteen percent of students are "at-risk" for problem behaviors, and one to seven percent of students display "chronic/intense" problem behavior).

[124] *Early Childhood PBIS*, *supra* note 123.

[125] CRIMMINS, *supra* note 32, at 39–40.

behaviors.[126]

Within this framework, however, very little information is provided to educators about specific interventions that are recommended for use with children in the "red zone" who display problem behavior. The website of the United States Department of Education's Office of Special Education Programs (OSEP), has a section on the tertiary level of the pyramid that contains only very general information about the FBA process and development of BIPs.[127] Other texts that address intervention strategies for children in the "red zone" address only mild behavior exhibited by young children.[128] Indeed, the bulk of the research regarding implementation of the PBS pyramidal framework has focused on the primary tier, with the result that the secondary and tertiary systems have been demonstrated "solely by very distinct and limited examples."[129] Thus, it is somewhat difficult to determine how the PBS framework can operate effectively to aid in

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[126] *Id.* at 40.

[127] *See Tertiary FAQs*, PBIS.ORG, http://www.pbis.org/school/tertiary-level/tertiary-faqs (last visited Aug. 31, 2014) (explaining the basics of tertiary level prevention through the most frequently asked questions).

[128] *See, e.g.*, LAURA A. RIFFEL, POSITIVE BEHAVIOR SUPPORT AT THE TERTIARY LEVEL: RED ZONE STRATEGIES 47–48, 122, 133–34 (2011) (examples include a young child who burps the alphabet, a preschool-aged child who has tantrums, or a kindergarten-aged child who bites other children to gain access to toys).

[129] Terrance M. Scott & Justin Cooper, *Tertiary Tier PBIS in Alternative, Residential, and Correctional Settings: Considering Intensity in Evidence-based Practice*, 36 EDUC. AND TREATMENT CHILDREN 3, 102 (2013); Terrance M. Scott et al., *Decision-Making in Secondary and Tertiary Interventions of School-wide Systems of Positive Behavior Support*, 33 EDUC. AND TREATMENT CHILDREN 4, 528 (2010).

designing appropriate interventions to address the severe self-injurious or aggressive behavior of a particular child.

E. Professional Responses to the PBS Movement

The early- to mid-1990s debate about "aversive" versus "positive" interventions was highly controversial, leading to shouting matches and other similar behavior.[130] Some behavior analysts accused those in favor of aversive, or punishment-based, interventions of committing torture.[131] Proponents of punishment-based interventions argued that several years of research had demonstrated the effectiveness of aversive or punishment-based interventions to reduce severe behavior and that it was immoral to forego these effective treatments.[132] As various professional organizations and disability rights groups began to issue position papers on the topic, the opposing sides became very entrenched.[133]

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[130] *Preface in* PERSPECTIVES ON THE USE OF NONAVERSIVE AND AVERSIVE INTERVENTIONS FOR PERSONS WITH DEVELOPMENTAL DISABILITIES, *supra* note 56, at 3, 4, xiii ("At conferences and elsewhere, we have seen the issue dissolve into one in which individuals literally deride each other's competence . . . ."). For a highly critical review of the PBS movement, see e.g. Mulick & Butter, *supra* note 107, at 385–404.

[131] Singh, *supra* note 56, at 6 (posing the question whether aversive procedures resemble torture).

[132] *Id.*

[133] Beginning as early as 1981, both disability-rights and professional scientific organizations issued resolutions or other position statements on the ethics of using aversive interventions. In 1981, a disability-rights organization, The Association for Persons with Severe Handicaps (TASH), issued as Resolution on the Cessation of Intrusive Interventions. *Tash Resolution on Positive Behavioral Supports*, TASH.ORG (adopted October 1981) (last revised March 2000) http://tash.org/about/resolutions/tash-resolution-positive-behavioral-supports/. Thereafter, several professional organizations issued position statements

Leaving aside the rhetoric, however, the PBS movement is credited with making several important contributions to the science of behavioral interventions. First, the PBS movement is credited with emphasizing the "systems perspective on problem behaviors,"[134] a perspective that requires critical analysis of the antecedent environmental conditions that might cause problem behavior to occur.[135] This PBS focus on environmental conditions has led to nearly universal acceptance of the FBA process and the development of protocols for conducting FBAs.[136] The PBS movement also spurred research into antecedent-based interventions and other "nonpunitive procedures."[137] The PBS movement led to an "explosion" of research regarding both antecedent-based interventions and reinforcement-based (as opposed to punishment-based) interventions.[138]

The PBS movement also spurred a critical debate about the interplay between the effectiveness of interventions and the humane treatment of disabled individuals. Over the years, this focus on the treatment acceptability of interventions caused several professionals in the field to reexamine their own views about the circumstances, if any, under which certain behavioral interventions are appropriate.[139] Surveys of professional behavior analysts, whether they are PBS

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that took varying positions on the ethics of using aversive interventions. Seiden & Zirkel, *supra* note 78, at 1030–31; Singh, *supra* note 56, apps. A–E.

[134] Newsom & Kroeger, *supra* note 80, at 414.

[135] *Id.*

[136] *Id.*

[137] Feldman, *supra* note 63, at 263.

[138] Newsom & Kroeger, *supra* note 80, at 414.

[139] *See* Fredda Brown, et. al. *Personal Paradigm Shifts Among ABA and PBS Experts: Comparisons in Treatment Acceptability*, 10 J. BEHAV. INTERVENTIONS 212, 218 (2008) (survey of both ABA and PBS

proponents or not, indicate that behavior analysts have increased their use of positive-based interventions and decreased their use of punishment-based interventions from earlier decades.[140]

And yet there are several criticisms of a PBS, or "positive-only," approach to behavioral interventions. First, critics note that some children demonstrate severe behavior at such a high rate of frequency that it is difficult to find appropriate behaviors that can be "positively" reinforced, with the result that children cannot be engaged in any meaningful learning until the interfering behaviors are reduced by punishment.[141] Indeed, for individuals whose problem behavior is a function of automatic reinforcement, such as sensory stimulation, a reinforcement-only intervention may not be effective because the external reinforcer being delivered (a toy or piece of food) is not "potent" enough to overcome the internal sensory stimulation of the behavior itself.[142]

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experts indicated that the acceptability of punishment-based interventions declined over time); Craig A. Michaels, et. al., *Personal Paradigm Shifts in PBS Experts: Perception of Treatment Acceptability of Decelerative Consequence-Based Behavioral Procedures*, 7 J. POSITIVE BEHAV. INTERVENTIONS 93, 93–94 (2005) (survey of PBS experts indicated that acceptability of punishment-based interventions declined between 1970s and 1990s).

[140] Brown, *supra* note 139, at 218 (survey of both ABA and PBS experts); Michaels, *supra* note 139, at 93–94 (survey of PBS experts).

[141] Newsom & Kroeger, *supra* note 80, at 417 ("[S]everal studies with autistic children show that learning may be very slow and unstable due to the interference of problem behaviors . . . over a long period of time. Progress does not improve for some children until interfering behaviors are reduced by punishment.").

[142] Roscoe, *supra* note 36, at 636 ("One possible explanation for the limited effectiveness of DRO and DRA procedures with individuals who engage in stereotypic behavior is that stimulation produced by the

In addition, many behavioral analysts, whether pro-PBS or not, agree that an optimal intervention plan for many disabled individuals with severe behavior may require a combination of both reinforcement-based and punishment-based interventions.[143] Indeed, there is a wealth of research that demonstrates that "[t]he combination of reinforcement and punishment is superior to reinforcement alone."[144] Depending on the particular individual, "reinforcement-based interventions may be ineffective without the use of extinction or punishment."[145] Thus, effective treatment for some individuals might require a "multicomponent approach to intervention"[146]

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behavior is continuously available."); Thompson, *supra* note 73, at 322 (In a study of three individuals with self-injurious behavior, "[r]einforcement alone did not result in a decrease" of the behavior).

[143] Carr 1999, *supra* note 99, at 6 ("[F]or many years, it has been considered a best practice to accompany the use of aversives with a detailed . . . plan that embodies the major features of PBS"); CRIMMINS, *supra* note 32, at 11 ("Punishment as [c]orrective [f]eedback [h]as a [p]lace in [p]ositive [i]nterventions"); Singh, *supra* note 56, at 4 ("Some form of contingent aversive stimulation, together with a positive reinforcement program, may be used to control the behavior if it is life-threatening to the individual."). Indeed, the Guidelines issued by the Behavior Analyst Certification Board require that, whenever punishment procedures are deemed necessary, the behavior analyst must "always include[] reinforcement procedures for alternative behavior[s]." BACB Guidelines, *supra* note 61.

[144] Saul Axelrod, *Myths That (Mis)guide Our Profession*, *in* PERSPECTIVES ON THE USE OF NONAVERSIVE AND AVERSIVE INTERVENTIONS FOR PERSONS WITH DEVELOPMENTAL DISABILITIES, *supra* note 56, at 59, 62–63 (reviewing the literature); Hagopian, *supra* note 73, at 224–25 (Severe behavior decreased at greatest frequency when functional communication training, a position intervention, was paired with punishment procedures.).

[145] Thompson, *supra* note 73, at 317.

[146] Carr 1999, *supra* note 99, at 9.

that would include "non-PBS strategies."[147] A multicomponent intervention plan that applies both reinforcement-based and punishment-based interventions together can effectively reduce the frequency of severe behavior and allow individuals whose behavior caused their admission to highly restrictive residential settings to transition back to their family homes or community group home living.[148]

Another criticism of the PBS movement stems from the difficulty of labeling any particular interventions as "positive" or "aversive." Indeed, one commentator noted that, as the PBS movement began to take hold, "[p]rocedures [that were] deemed aversive by some people in policy-making roles began to include various relatively mild procedures, just as many behavior analysts had originally feared."[149] The DRA/DRO debate is just one example of the difficulty of using subjective terms like "positive" to describe a particular form of intervention. The need to identify certain approaches as "positive" to be "consumer friendly" has been derided by some.[150] Others note that a potentially ominous side effect of over-labeling interventions as prohibited

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[147] *Id.*; *see also* Gregory P. Hanley, et. al., *On the Effectiveness of and Preference for Punishment and Extinction Components of Function-Based Interventions*, 38 J. APPLIED BEHAV. ANALYSIS 51, 52 (2005) (stating that "function-based treatments" "may not be effective for all individuals"); Lerman & Vorndran, *supra* note 16, at 432 (discussing the common treatment that "may in fact reduce problem behavior through the mechanism of punishment").

[148] *See* Page, *supra* note 71, at 42–43 (detailing the results of behavior interventions plans in assisting disabled children and adults in moving from highly restrictive institutional settings to less restrictive settings, including community group home living).

[149] Newsom & Kroeger, *supra* note 80, at 415.

[150] Hanley, *supra* note 147, at 51.

"aversive" interventions may be the increased use of medication to control problem behavior.[151]

Finally, some commentators note that structuring the environment of a disabled individual in a way that eliminates all punishment-based consequences ignores the reality of life.[152] Punishment is a natural consequence of life,[153] and a "totally non-aversive approach would constitute poor preparation for a [disabled individual] transitioning to an ordinary community residential or work setting."[154] Rather, behavioral interventions based on punishment can play a vital role in preparing disabled individuals to understand the demands of community living and be successful in that context.[155]

F. Current Punishment-Based Interventions

Without doubt, the PBS movement caused behavior analysts to reexamine moral and ethical issues surrounding the use of punishment-based interventions.[156] Some behavior analysts articulated a need for further research into the proper role of punishment as a means to address problem behavior.[157] Others declared that procedures such as "water squirts, ammonia capsules,

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[151] Newsom & Kroeger, *supra* note 80, at 415.

[152] Robert H. Horner, *On.the Status of Knowledge for Using Punishment: A Commentary*, 35 J. APPLIED BEHAV. ANALYSIS 465, 465 (2002); Lerman & Vorndran, *supra* note 16, at 447, 457.

[153] Horner, *supra* note 152, at 465.

[154] Newsom & Kroeger, *supra* note 80, at 417.

[155] Axelrod, *supra* note 144, at 60.

[156] Brown, *supra* note 139, at 213 (surveying experts in the field on the issue of treatment acceptability of various interventions); Michaels, *supra* note 139, at 93.

[157] COOPER, *supra* note 21, at 353 ("More [r]esearch on [p]unishment [i]s [n]eeded."); Lerman, *supra* note 16, at 431.

pinching, and hair pulling, have . . . become unacceptable in virtually all settings."[158] The current edition of a leading ABA text states that behavioral interventions must be physically safe for the child and caregivers and "contain no elements that are degrading or disrespectful to participants."[159]

Punishment-based interventions discussed in the current literature do not include the aversive therapies described in the early literature, with the exception of contingent electric shock.[160] A common punishment-based intervention is a verbal reprimand, made in close proximity to the student and delivered with eye contact while firmly grasping the student's shoulders.[161] Another punishment-based intervention is response blocking, when a behavior is physically interrupted as it begins.[162] Response blocking is effective in reducing problem behaviors such as hand mouthing or eye poking.[163] A third punishment-based intervention is

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[158] Newsom & Kroeger, *supra* note 80, at 410.

[159] COOPER, *supra* note 21, at 350. Treatment must be "(a) designed for therapeutic effectiveness, (b) delivered in a compassionate and caring manner, (c) assessed formatively to determine effectiveness and terminated if effectiveness is not demonstrated, and (d) sensitive and responsive to the overall physical, psychological, and social needs of the person." *Id.*

[160] Contingent electric shock can be delivered either by device worn on the head, arm or leg that delivers low-level electric stimulation for up to two seconds. Bryant v. N.Y. State Educ. Dep't., No. 8:10-cv-036, 2010 WL 3418424 at *1, n.3 (N.D.N.Y. Aug, 10, 2010); COOPER, *supra* note 21, at 344. The use of such devices, which are deemed to be medical devices, has been cleared by the Food and Drug Administration. *Bryant*, 2010 WL 3418424 at *1, n.3.

[161] COOPER, *supra* note 21, at 338–39.

[162] COOPER, *supra* note 21, at 339.

[163] *Id.*

contingent exercise, where the child who engages in problem behavior might be required to stand up and sit down ten times.[164] A fourth punishment-based intervention is overcorrection, which requires the child who has exhibited problem behavior to repeatedly practice an appropriate behavior.[165]

Other punishment-based interventions use negative punishment techniques, where reinforcement is discontinued when problem behavior occurs. One such method is "time-out," in which a child who has displayed problem behavior loses the ability to earn reinforcement for a period of time.[166] A related method of negative punishment is "response cost," which is akin to a fine.[167] Response cost provides a definite amount of lost reinforcement as a consequence of engaging in problem behavior.[168]

Contingent electric shock is still discussed as a form of punishment, although the ethical and moral concerns are noted, and electric shock is described as the methodology that the

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[164] *Id.* at 341.

[165] *Id.* at 342–44; Singh, *supra* note 56, at 5.

[166] COOPER, *supra* note 21, at 357–63; Singh, *supra* note 56 at 5.

[167] COOPER, *supra* note 21, at 363–64.

[168] *Id.* at 364–65. There also is an intervention technique known as "extinction" that does not fall neatly into either the reinforcement or punishment category. Extinction is used to remove any reinforcement that previously encouraged or maintained problem behavior. Extinction removes any reinforcement that may have existed in the environment before interventions were implemented. For example, if behavior served the function of gaining attention, extinction would eliminate all forms of attention for that behavior. *Id.* at 457.

"practitioner turns to when all other methods have failed."[169]

Recent studies of ABA and PBS experts demonstrate that, although the two groups do rank the acceptability of punishment-based interventions differently, the differences are not as stark as the previously robust debate might have indicated. A survey of PBS experts indicated that three-quarters of the PBS experts would employ interventions using extinction or mild reprimand.[170] Sixty percent of PBS experts surveyed would recommend an intervention using response cost.[171] Fifteen percent of PBS experts stated that they would recommend overcorrection as an intervention.[172] 9.7% of PBS experts indicated that they would, under appropriate circumstances, recommend the use of contingent electric shock.[173]

The ABA experts indicated a greater willingness to recommend any of the punishment-based interventions, although only slightly more than one-quarter of ABA experts indicated that they would recommend contingent electric shock.[174]

III. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

A. History

Before 1975, disabled children had no uniform right to attend public school throughout the United States.[175] After the Supreme Court determined in *Brown v. Board of Education*[176] that

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[169] *Id.* at 353.

[170] Michaels, *supra* note 139, at 99.

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] Brown, *supra* note 139, at 217.

[175] *See generally* Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A*

racially segregated education violated the Equal Protection Clause of the Fourteenth Amendment,[177] advocates for the disabled began to assert that children with disabilities also were entitled to an equal educational opportunity.[178] Yet even following the decision in *Brown*, judicial decisions and state statutes specifically allowed public schools to keep disabled children who were deemed "'uneducable'"[179] from attending public school.[180]

More than a decade after the Court's decision in *Brown*, Congress enacted the Elementary and Secondary Education Act of 1965, which provided grants to school districts that voluntarily provided special education services.[181] In 1973, Congress enacted Section 504 of the Rehabilitation Act, a general civil rights statute that prohibited discrimination against the

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Study in the Interpretation of Radical Statutes, 24 U.C. DAVIS L. REV. 349, 355–56 (1990).

[176] 347 U.S. 483 (1954).

[177] *Id.* at 495.

[178] Advocate for the disabled successfully argued in two landmark cases decided in the early 1970s that children with disabilities were entitled to equal access to public education. *See e.g.*, Mills v. Bd. of Ed. of Dist. of Columbia, 348 F. Supp. 866, 874–75, 878 (D.D.C. 1972); Pa. Ass'n. for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 302 (E.D. Pa. 1972) [hereinafter PARC].

[179] *See, PARC*, 343 F. Supp. at 282 n.3 (quoting a Pennsylvania statute that permitted a school district to exclude a child from school based on the opinion of the school psychologist that the child was "'uneducable and untrainable'").

[180] *See* Weber, *supra* note 175, at 355–56 (detailing various judicial decisions and state statutes that excluded children with disabilities from public school).

[181] Pub. L. No. 89-10, § 201, 79 Stat. 27, 27 (1965).

disabled by any organization or entity that received federal assistance.[182] Neither of these laws, however, required that disabled children receive a public education.[183]

Federal funding for special education first occurred in 1975, when Congress passed the Education for All Handicapped Children Act (EAHCA).[184] The EAHCA conditioned the states' receipt of federal funds upon compliance with the statute's requirement that each child with disability receive a "free appropriate public education," or FAPE.[185] In 1990, Congress reauthorized the EAHCA with several substantive amendments, including renaming the statute the Individuals with Disabilities Education Act (IDEA).[186] IDEA was again reauthorized and amended in both 1997 and 2004.[187]

Because IDEA is a federal funding statute, states that receive IDEA funds are required to comply with the statutory scheme, including creating policies and procedures that will implement the requirements of IDEA.[188] The states also must monitor schools' compliance with the statute.[189] IDEA does allow the states to determine certain policies or procedures that are

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[182] Pub. L. No. 93-112, 87 Stat. 355, 394 (1973) (codified at 29 U.S.C. § 794(a) (1988)).

[183] For a discussion of early federal legislative initiatives and voluntary efforts undertaken by various states to educate children with disabilities, see Weber, *supra* note 175, at 357–58.

[184] Pub. L. No. 94-142, 89 Stat. 773, 775 (1975).

[185] *Id.* at 780.

[186] Pub. L. No. 101-476, 104 Stat. 1103, 1142 (1990).

[187] Pub. L. No. 108-446, 118 Stat. 2467 (2004); Pub. L. No. 105-17, 111 Stat. 37 (1997).

[188] 20 U.S.C. §1412(a)(1)(A) (2012).

[189] *See id.* §1412 (a)(1)(A), (4), (5)(A), (11) (setting forth conditions under which states are eligible for funding).

necessary to implement IDEA, but except as to those identified matters, the states must conform to the provisions of IDEA.[190] Nothing in the statute allows the states to prohibit the use of particular behavioral interventions.[191]

B. Critical Provisions of IDEA

From the time of its initial passage in 1975 through the present, IDEA has contained certain fundamental principles that govern the provision of special education to disabled children. The first fundamental principle is that the educational goal is very broad. In reauthorizing IDEA in 2004, Congress articulated a "national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities."[192] The educational goal for children with disabilities stretches far beyond the "3 R's" of reading, writing, and "'rithmetic."[193] The goal is to prepare children with disabilities to live, to the fullest extent possible, well-rounded lives as valued members of their communities.[194]

A second governing principle of IDEA is the requirement that each child with a disability

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[190] Examples include such choices as to whether a foster parent may act as a parent for IDEA purposes or whether the state will implement a single-tier or two-tiered administrative process to resolve disputes. *See id.* §1401(23) (defining a foster parent as a parent for purposes of the statute); *id.* §1415(f)(1)(A) (2012) (detailing due process procedures available to parents or the local educational agency to ensure compliance with the statute).

[191] Turnbull, *supra* note 37, at 478.

[192] 20 U.S.C. § 1400(c)(1).

[193] *See generally id.* § 1400(c)(5).

[194] *Id.* § 1400(c)(1), (d)(1)(A).

receive a FAPE.[195] In its 1983 decision in *Board of Education v. Rowley*, the Supreme Court addressed the critical question of how to measure whether a proposed educational program constituted an "appropriate" education for a particular child.[196] In *Rowley*, the parents of a deaf child sought to have their public school district provide the child with a sign language interpreter in all academic classes.[197] After the school district refused to do so, the parents initiated administrative proceedings, and the school district prevailed at both levels of a two-tiered administrative process.[198]

The parents then filed suit in federal district court.[199] The district court disagreed with the findings at the administrative level below and concluded that the school district's proposals did not provide the child with a FAPE.[200] In so holding, the court defined an "appropriate education" as one that provided the disabled child with an "opportunity to achieve his [or her] full potential

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[195] *Id.* at § 1400(d)(1)(A). A FAPE is defined as special education services that (a) "[a]re provided at public expense, under public supervision and direction . . ." (b) "[m]eet the standards of the SEA . . ."; (c) "[i]nclude an appropriate preschool, elementary school, or secondary school education in the State involved; and" (d) conform to the child's individualized education program (IEP). 34 C.F.R. §300.17 (2012).

[196] Bd. of Educ.of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 186 (1982).

[197] *Id.* at 184.

[198] *Id*. at 185.

[199] *Rowley*, 458 U.S. at 154; Rowley v. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., 483 F. Supp. 528, 531 (S.D.N.Y. 1980) [hereinafter District-level *Rowley*]

[200] District-level *Rowley*, 483 F. Supp. at 536.

commensurate with the opportunity provided to other children."[201] After the Second Circuit Court of Appeals affirmed the lower court's ruling, the United States Supreme Court granted certiorari and reversed.[202]

The Court first determined that the FAPE requirement had both a substantive and a procedural aspect.[203] As to the substantive aspect, the Court rejected the district court's standard for measuring an appropriate education.[204] Deeming the district court's holding as a requirement that the educational program "maximize the potential"[205] of a disabled child, the Court instead chose a far lower threshold.[206] Defining its standard as a "basic floor of opportunity,"[207] the Court held that an appropriate education is one that is "individually designed to provide

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[201] *Id.* at 534. The district court in *Rowley* articulated a number of potential definitions of an appropriate education. *Id.* The court noted that an appropriate education "could mean an 'adequate' education" that would do no more than allow a child to progress from grade to grade and meet the minimum requirements to earn a high school diploma. *Id.* The court also stated that an appropriate education "could also mean one which enables the handicapped child to achieve his or her full potential." *Id.* The court characterized its view as a standard somewhere between the measure of "adequate" and "achiev[ing] his or her full potential." *Id.* The district court's standard has been referred to as the "proportional maximization standard." Mark C. Weber, *Common-Law Interpretation of Appropriate Education: The Road Not Taken in* Rowley, 41 J.L. & EDUC. 95, 96 (2012).

[202] *Rowley*, 458 U.S. at 186, 210.

[203] *Id.* at 189.

[204] *Id.*at 189–90.

[205] *Id.* at 189.

[206] *Id.* at 200.

[207] *Id.* at 201.

educational benefit to the handicapped child."[208] The Court then concluded that the services provided by the school district were sufficient to confer "educational benefit" on the child and, thus, the district had provided a FAPE.[209] The Court also determined that the procedural aspect of the FAPE requirement is satisfied when the child and his or her parents are afforded all of IDEA's procedural requirements for notice and parental participation in the process of developing the child's educational plan.[210]

A third governing principle of special education is that each disabled child has an individualized educational program (IEP).[211] The IEP is a written document that sets forth the "specially designed instruction"[212] that will meet that particular child's unique needs. IDEA

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[208] *Id.*

[209] *Id.* at 201, 210. The Court recognized that the phrase "educational benefit" was a flexible concept that would depend in large part on the nature and severity of each child's disability. *Id.* at 202. Indeed, the Court explicitly declined to establish a single test by which the adequacy of an educational benefit would be measured. *Id.* Although the Court explicitly confined its analysis to the facts of the particular case before it, the decision has been universally interpreted as creating a standard to be applied in all cases. *See* Amy J. Goetz et al., *The Devolution of the* Rowley *Standard in the Eighth Circuit: Protecting the Right to a Free and Appropriate Public Education by Advocating for Standards-Based IEPs*, 34 HAMLINE L. REV. 503, 504 n.5 (2011) ("It is clear from the decision itself that the *Rowley* Court intended only to articulate a framework for analyzing whether Amy Rowley had been provided a FAPE," but "[n]otwithstanding this disclaimer, the *Rowley* Court's analysis has been uniformly cited by courts throughout the nation as a standard for determining whether a FAPE has been provided.").

[210] *Rowley*, 458 U.S. at 209.

[211] *Id.* at 181–82.

[212] The federal regulations define "specially designed instruction" as "adapting, as appropriate to the

contains very detailed provisions about the composition of a child's IEP team, the contents of the IEP, the process by which an IEP is developed, and the parties' rights to seek administrative and judicial review in the event of a disagreement.[213] The IEP document has been described as the "cornerstone" of the disabled child's right to an education.[214]

As a corollary to the right to an IEP designed to meet the child's unique needs, the child is entitled to receive educational services in the least restrictive environment[215] that will allow the child to learn. Special education does not occur only in a public school building; if a child's unique needs require that the child be placed in either a private day school or a residential

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needs of an eligible child . . . the content, methodology, or delivery of instruction." 34 C.F.R. §300.39(b)(3) (2012).

[213] 20 U.S.C. § 1414(d)(1)-(4) (2012). The IEP must contain the following information: (a) the child's present levels of performance; (b) a description of annual goals and objectives for the child's educational performance; (c) a means to "measure" whether the child has attained the prescribed goals and objectives; (d) the methods by which educators will report on the child's progress towards meeting goals and objectives; (e) a statement of the specific special educations services and supplementary aids and supports that the child will receive; and (f) a statement as to the extent to which the child will not participate with typically developing peers in the general education classroom or activities, among other information. *Id.* § 1414(d)(1)(A)(i)(I)–VI) (2012).

[214] *See, e.g.*, White *ex rel.* White v. Ascension Parish Sch. Bd., 343 F.3d 373, 378 (5th Cir. 2003) ("The cornerstone of the IDEA is the IEP."); Tenn. Dep't of Mental Health & Mental Retardation v. Paul B., 88 F.3d 1466, 1471 (6th Cir. 1996) ("The development and implementation of the IEP are the cornerstones of the Act.") (citing Honig v. Doe, 484 U.S. 305, 311 (1988)).

[215] 20 U.S.C. § 1412(a)(5)(A) (2012).

facility, such a placement must be made at public expense.[216] When a child is placed in a private school by a public agency, that school must conform to all of the requirements of IDEA.[217]

Finally, when it passed the EAHCA in 1975, Congress also recognized that children with disabilities and their parents needed robust due process protections to ensure that schools would fully implement the statute's requirements.[218] Prior to 1975, when a school district excluded a child from public school on grounds that the child was "uneducable," parents had no notice or opportunity to challenge the school district's decision to exclude the child from school.[219] Congress remedied that circumstance by giving parents several vitally important due process rights.[220] These "procedural protections created powerful tools for parents as they advocated for

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[216] *See id.* § 1412(a)(10)(B) (addressing placement of children in private schools by public agencies).

[217] 20 U.S.C. §1412(a)(10)(B)(i). *See also* Thomas A. Mayes & Perry A. Zirkel, *State Educational Agencies and Special Education: Obligations and Liabilities*, 10 B.U. PUB. INT. L.J. 62, 73 (2000) (discussing IDEA's requirement that children placed in private schools at public expense receive a FAPE).

[218] Pub. L. No. 94-142, § 3(b)–(c), 89 Stat. 773, 788–89 (1975).

[219] *See Pa. Ass'n. for Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 293 (E.D. Pa. 1972) ("It is not disputed that prior to this suit, parents of retarded children who are plaintiffs were not afforded a hearing or, in many instances, even notice of their child's exclusion from public school"); Weber, *supra* note 175, at 358 (Prior to the passage of the EAHCA, "state legislation frequently lacked enforcement mechanisms that parents could use if their children were wrongfully denied educational services").

[220] These due process rights "f[a]ll into four broad categories: notice, consent, participation, and challenge." Julie F. Mead &Mark A. Paige *Parents as Advocates: Examining the History and Evolution of Parents' Rights to Advocate for Children with Disabilities Under the IDEA*, 34 J. LEGIS. 123, 125–26 (2008).

access to public education for their children with disabilities."[221] Indeed, the Supreme Court in *Rowley* recognized that these "elaborate and highly specific procedural safeguards" reflect the great importance that Congress placed on parental participation in all aspects of the child's educational planning and progress.[222] The extensive and detailed procedural protections afforded to disabled children, and their parents acting as advocates for their children, are another fundamental principle of special education.

C. The 1997 and 2004 Amendments to IDEA

Before 1997, IDEA lacked any provisions regarding behavioral interventions to address problem behavior that might impede a disabled child's ability to learn. Beginning as early as 1987, however, the federal government began to appropriate funds to research "non-aversive" or "positive" approaches to manage behavior of children and adults with disabilities. In 1987, the National Institute on Disability and Rehabilitation Research (NIDRR) awarded a grant of several hundred thousand dollars to university researchers to study "'Nonaversive Behavior Management.'"[223] In 1990, Congress amended the Developmental Disabilities Assistance and Bill of Rights Act to provide funds for research about "positive behavior management programs" that might improve the lives of individuals with disabilities.[224] When Congress again amended the same Act in 1994, Congress authorized the Department of Education to award grants for

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[221] *Id.* at 127.

[222] Bd. of Educ.of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 205 (1982).

[223] J.M. Johnston et al., *Positive Behavior Support and Applied Behavior Analysis*, 29 THE BEHAV. ANALYST 51, 53 (2006).

[224] Pub. L. No. 101-496 § 17, 104 Stat. 1191, 1200, 1202 (1990).

research into the use of "positive behavioral supports" to support individuals with disabilities.[225]

Similarly, in 1991, the Department of Education issued several funding priorities, pursuant to its authority under Section 204 of the Rehabilitation Act of 1973, for research that would "lead to the development of methods, procedures, and devices that will benefit individuals with disabilities, especially those with the most severe disabilities."[226] From 1991 to 1997, the Department of Education repeatedly articulated one of its funding priorities to be research into the use of "positive intervention strategies" to address "excess behaviors" in disabled individuals.[227] Indeed, in 1996, OSEP established a "Center on Positive Behavioral Interventions and Supports."[228]

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[225] Pub. L. No. 103-230 § 152, 108 Stat. 284, 321–322 (1994).

[226] Proposed Funding Priorities for the National Institute on Disability and Rehabilitation Research for Fiscal Years 1992–93, 56 Fed. Reg. 58,280 (Nov. 18, 1991).

[227] *See e.g.*, Office of Special Education and Rehabilitative Services, Notice of Proposed Priorities, 62 Fed. Reg. 13,972, 13,974 (Mar. 24, 1997); Department of Education Notice Inviting Applications for New Awards for Fiscal Year 1996, 60 Fed. Reg. 47830–32 (Sept. 14, 1995); Department of Education Notice of Final Priority for Fiscal Years 1994–1995, 58 Fed. Reg. 53,370, 53,370–71 (Oct. 14, 1993); Notice of Final Funding Priorities for the National Institute on Disability and Rehabilitation Research for Fiscal Years 1992–93, 57 Fed. Reg. 14,288, 14,294–95 (Apr. 17, 1992). In May 1997, before the passage of the 1997 amendments to IDEA, the Department of Education issued a notice regarding the availability of grants to fund research to examine the use of "non-aversive interventions" to reduce or "eliminate severe problem behaviors" in children with disabilities. Notice of Final Funding Priorities for Fiscal Years 1997–1998, 62 Fed. Reg. 25,760, 25,767 (May 9, 1997).

[228] *See Positive Behavior Interventions & Supports,* PBIS.ORG, http://www.pbis.org (last visited Aug. 31, 2014) (describing the program and its purpose). The pbis.org website describes the purpose of

When Congress amended IDEA in 1997, it added language about the use of behavioral interventions to treat problematic behavior. The 1997 amendments amended 20 U.S.C. Section 1414(d)(3)(B)(i) to require that a child's IEP team consider a variety of "special factors" that might adversely affect the child's educational performance.[229] One of those special factors was the circumstance where a child's behavior might impede the child's learning.[230] The statute provided that the IEP team should consider "strategies, including positive behavioral interventions, strategies, and supports to address" problematic behavior.[231]

Congress's intent in inserting this language into IDEA cannot be determined. The legislative history, including the House and Senate reports, does not reveal any discussion by Congress about the reasons why this language was inserted into the statute.[232] The House and

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the Center on Positive Behavioral Interventions and Supports as "giv[ing] schools capacity-building information and technical assistance for identifying, adapting, and sustaining effective school-wide disciplinary practices." *Supporting District Structures & Teams through a State-Level Plan Power Point found at* http://www.pbis.org/presentations/chicago-forum-09 (last visited Aug. 31, 2014). According to the Department of Education, "the Center has two foci: (1) Broad dissemination to schools, families, and communities [that the] technology of school-wide positive behavioral interventions and support exists; and (2) Demonstrations at the level of individual students, schools, districts, and states that school-wide positive behavioral interventions and support are feasible and effective." U.S. Dep't of Educ., *Other Sites: Special Education and Rehabilitative Services*, ED.gov, http://www2.ed.gov/about/contacts/gen/othersites/specedrs.html. (last visited Aug. 31, 2014).

[229] Pub. L. No. 105-17, §614(d)(B)(3)(i)), 111 Stat. 37 (1997).

[230] *Id.*

[231] *Id.*

[232] *See* S. REP. NO. 105-17, (1997), *available at* 1997 WL 244967; H.R. REP. NO. 105-95, (1997),

Senate reports also are silent on the topic. The term "positive behavioral interventions" is not defined in the statute, the implementing regulations, or the comments that accompany the implementing regulations.[233]

The ability of school officials to discipline children with disabilities was a hot-button issue at the time, and the 1997 amendments did add procedures to address the discipline issue.[234] Indeed, the provisions regarding discipline provide the most detailed references to behavioral intervention techniques. Under the 1997 amendments, school officials were required to determine whether the behavior leading to disciplinary measures previously had been the subject of an FBA or a BIP.[235] If not, the child's IEP team was to convene and consider whether an FBA should be conducted and a BIP implemented.[236] While the statutory provisions regarding discipline do not use the term "positive behavioral interventions or supports," they are the only provisions in IDEA that refer to FBAs and BIPs.

Congress again reauthorized and amended IDEA in 2004.[237] At that time, Congress

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available at 1997 WL 258948 (providing no discussion of the language); Turnbull *supra* note 37, at 449–50 (discussing lack of insight into Congress's motives in including the language).

[233] Turnbull, *supra* note 37, at 449–50. The implementing regulations appeared at 34 C.F.R. pt. 300 (1999). The comments to the implementing regulations appeared at 64 Fed. Reg. 12,406, 12,406 (Mar. 12, 1999).

[234] Pub. L. No. 105-17, §615(k)(1)(B), 111 Stat. 37, 94 (1997).

[235] *Id.*

[236] *Id.* If the child's behavior previously had been the subject of an FBA and implementation of a BIP, the team was to consider whether the BIP should be modified. *Id.*

[237] Pub. L. No. 108-446, 118 Stat. 2647 (2004) (later codified at 20 U.S.C. §1400 *et. seq*. (2006)).

amended the language of Section 1414(d)(B)(3)(i) slightly. The statute now provides that "in the case of a child whose behavior impedes" learning, the child's IEP team shall "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior."[238] Congress also amended the provisions relating to discipline of a disabled child, but without altering the requirements that, in certain circumstances, an FBA be conducted and a BIP be implemented.[239]

As was true in 1997, the legislative history of the 2004 amendments do not demonstrate that Congress intended to limit behavioral interventions to "positive" interventions or otherwise ban the use of non-positive interventions. The Senate's Committee on Health, Education, Labor and Pension did hear testimony about the use of behavioral supports in school in a hearing entitled "IDEA: Behavioral Supports in School."[240] The main focus of the hearing, however, was the issue of whether IDEA's current disciplinary process "force[d] schools to keep disruptive,

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Although IDEA has not undergone any substantive revisions since 2004, the statutory provisions were amended slightly in 2010 as part of an effort by Congress to substitute the terms "intellectual disability" and "individual with an intellectual disability" for terms "mental retardation" or "mentally retarded individual," respectively, wherever those terms appeared in any federal statute. *See* Pub. L. No. 111-256, 124 Stat. 2643 (2010).

[238] 20 U.S.C. §1414(d)(B)(3)(B)(i) (2012). A November 2003 Senate report on the 2004 amendments to IDEA identify research conducted by OSEP as demonstrating that the use of positive behavioral interventions can reduce the incidence of significant behavioral problems *See* S. REP. NO. 108-185, at 22, (2003) *available at* http://www.gpo.gov/fdsys/pkg/CRPT-108srpt185/pdf/CRPT-108srpt185.pdf.

[239] 20 U.S.C. §1415(k) *et seq.*

[240] S. REP. NO. 108-185 (2003), at 3.

aggressive, and violent children in regular classrooms."[241] One of the witnesses was Dr. George Sugai; at the time of the hearing, Dr. Sugai was a member of the faculty at the University of Oregon and a Co-Director of the National Center on Positive Behavioral Interventions and Supports, the OSEP-funded PBIS Center.[242] Dr. Sugai's testimony focused on "schoolwide positive behavioral supports"[243] and did not provide any detail about the means by which positive-only behavioral interventions might be implemented in a BIP to address a particular child's behavior.[244]

The Senate Report that accompanied the Senate bill does state the opinion of the Senate Committee on Health, Education, Labor and Pensions that, "in most cases," positive behavior supports and interventions can reduce problematic behavior.[245] That statement, however, is not

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[241] *Examining the Implementation of the Individuals with Disabilities Education Act (IDEA), Focusing on Behavioral Support in Schools to Ensure Safe Schools for Students and Teachers While Protecting the Rights of Students with Disabilities: Hearing Before the S. Comm. on Health, Education, Labor, and Pensions*, 107th Cong. 4 ([2d Sess.] 2002) (statements of Senator Jeff Sessions) [hereinafter *IDEA Senate Hearing*].

[242] *IDEA Senate Hearing*, *supra* note 241, at 9 (testimony of George Sugai,) (information introduced by the Chairman).

[243] *IDEA Senate Hearing*, *supra* note 241, at 32 (testimony of George Sugai).

[244] Members of Congress cited Dr. Sugai's testimony on the topic of using positive behavioral supports on a schoolwide basis to reduce disciplinary problems, but not on the topic of appropriate interventions to address problem behavior exhibited by a specific child. *See IDEA*, 150 CONG. REC. S11546 (daily ed. Nov. 19, 2004) (statements of Senator Ted Kennedy); *IDEA*, Statements of Tom Harkin, 150 CONG. REC. S11850 (daily ed.Nov. 24, 2004) (statements of Tom Harkin).

[245] S. REP. NO. 108-185, at 32 (2003), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-

accompanied by any further details that would illuminate the Committee's opinion. In addition, the House Conference Report released just before Congress voted on the 2004 amendments does not contain any discussion of the relative merits of positive behavioral interventions or any proposed ban on the use of aversive interventions.[246]

The 2004 Amendments did add certain references to positive behavioral interventions and supports in other sections of IDEA. In the "Findings and Purposes" section of the statute,

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108srpt185/pdf/CRPT-108srpt185.pdf. The 2004 amendments to IDEA began as House Bill 1350. The Senate bill was Senate Bill 1248. Both bills contained the identical language about the use of "positive behavioral interventions or other strategies" to address problematic behavior. The House Report that accompanied House Bill 1350 had no specific comments on the language. The Senate Report that accompanied Senate Bill 1248 stated:

> The committee has heard a great deal from professionals about the behavior of students with disabilities, the danger posed by some behavior, and the effect that behavior has on the learning environment. The committee believes that, in most cases, the behavior of students can be addressed and prevented effectively through positive behavioral interventions and supports. Therefore, section 614(d)(3)(B)(i) requires IEP teams to provide positive behavioral interventions and supports for children with disabilities whose behavior impedes their learning or the learning of others. The committee believes that taking this proactive approach should result in reductions in behavior problems and disciplinary referrals, as well as improved educational results for students with disabilities.

S. REP. NO. 108-185, at 32.

[246] *See* H.R. CONF. REP. NO. 108-779 (2004), *available at* 2004 WL 2711859 (providing no discussion of the merits). Some commentators contend that IDEA's language accords "preferred status" to positive behavioral interventions and supports. *See* CRIMMINS, *supra* note 32, at 6 (discussing the references to PBS in the 2004 reauthorization of IDEA); Turnbull, *supra* note 37, at 462 (noting that the "IDEA" creates a *rebuttable presumption* in favor of positive behavioral intervention sand supports") (typeface altered).

Congress stated that research demonstrated the education of children with disabilities "can be made more effective by," among other things, providing positive behavioral interventions and supports.[247] Congress also authorized funding to train school personnel in the use of positive behavioral supports and interventions.[248]

D. Federal Legislative Proposals to Define and Regulate Aversive Behavioral Interventions

In recent years, several bills have been introduced in Congress that would address the use of aversive behavioral interventions in an educational setting. In December 2009, a bill was introduced both in the House of Representatives and the Senate, respectively, that proposed federal legislation to regulate the use of seclusion and restraint in schools.[249] The Senate and House bills both would prohibit the use of "aversive behavioral interventions that [would] compromise [the] health and safety"[250] of students, although such aversive behavioral interventions are not defined. Rather, each bill proposed to have the Secretary of Education promulgate regulations that would set standards for the use of, among other items, "aversive behavioral interventions."[251] The House bill was passed in the House of Representatives and was sent to the Senate, where both bills then were referred to the Senate's Committee on Health,

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[247] 20 U.S.C. § 1400(c)(5)(F) (2012).

[248] *See, e.g., id.* §§ 1462(a)(6), 1465(b)(1)(B).

[249] Keeping All Student Safe Act, H.R. 4247, 111th Cong. (2009), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-111hr4247rfs/pdf/BILLS-111hr4247rfs.pdf; Preventing Harmful Restraint and Seclusion in Schools Act, S. 2860, 111th Cong (2009), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-111s2860is/pdf/BILLS-111s2860is.pdf.

[250] H.R. 4247 §3(3)(B); S. 2680 §(3)(3)(B).

[251] H.R. 4247 §5(a)(1)(D); S. 2680 §5(a)(1)(D).

Education, Labor and Pensions.[252]

In both 2012 and 2013, the House bill was re-introduced in the House.[253] In July 2013, the bill was referred to the House's Subcommittee on Early Childhood, Elementary and Secondary Education.[254]

IV. STATE REGULATIONS ON THE USE OF AVERSIVE INTERVENTIONS

In the years since IDEA first included the term "positive behavioral interventions and supports," some states have taken action either at the legislative or regulatory level to address the use of aversive interventions in an educational setting. Currently twelve states and the District of Columbia have statutes or regulations that address the use of aversive interventions, procedures, or techniques at school.[255] These statutes and regulations vary widely both in defining aversive

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[252] *Bill Summary & Status of H.R. 4247*, 111th Cong. Major Congressional Actions (2009–2010),THE LIBRARY OF CONG. http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR04247:@@@R (last visited Aug. 31, 2014).

[253] Keeping All Students Safe Act, H.R. 1381, 112th Cong. (2011); Keeping All Students Safe Act, H.R. 1893, 113th Cong. (2013) (bill summary and status available at http://thomas.loc.gov/cgi-bin/bdquery/z?d113:h.r.01893).

[254] H.R. 1893 (bill summary and status available at http://thomas.loc.gov/cgi-bin/query/z?c113:H.R.1893).

[255] CAL EDUC. CODE. §§ 56520, 56521.2 (2013); D.C. CODE §§ 38-2561.01, 38-2561.03 (West WestlawNext current through Feb. 21, 2014); 704 Ky. Admin. Regs. §7:160 (2013), http://www.lrc.ky.gov/kar/704/007/160.htm; 05-071 Code Me. R. §§ 2(1), 6(2)(F) (2013), http://www.maine.gov/sos/cec/rules/05/chaps05.htm; Mont. Admin. R. 10.16.3346 (2013), http://www.mtrules.org/gateway/Print_RV.Asp?RV=30430; N.Y. Comp. Code R. & Regs tit. 8,.§§ 19.5(b), 200.22(e) (2006); NEV. REV. STAT. ANN. §§ 388.521–388.5317, 449.765–449.786, 394.353–

interventions and regulating their use.[256]

394.379 (2013) (public instruction; hospitals and mental health facilities; and private educational institutions, respectively); N.H. Code R. Ed. 1113.04–1113.15, 1114.07–1114.22 (2013) (district-run programs and non-public programs, respectively); N.C. GEN. STAT. ANN. § 115C-391.1 (2011); Ohio Admin. Code 3301-35-15 (2013), http://codes.ohio.gov/oac/3301-35-15; 22 Pa. Code §§ 14.133, 711.46 (2008) (applicable to special education services and programs generally and to charter schools and cyberschools); Wash. Admin. Code. § 392-172A-03120(1)–(2) (2013), http://apps.leg.wa.gov/wac/default.aspx?cite=392-172A-03120; 5-42 Wyo. Code R. § 6 (LexisNexis 2013). Conn. Agencies Regs. §17a-227-1(c).

[256] Two states, Delaware and Connecticut, have regulations that ban the use of "aversive techniques" in nonpublic schools, but the term "aversive techniques" is not defined anywhere in the regulations. *See* 16-Del. Admin. Code. 3320-20.11.13 (2014); Conn. Agencies Regs. § 17a-238-10 (2014) (prohibiting the use of aversive techniques in "residential schools"); Conn. Agencies Regs. § 17a-227-1(aa) (2014) (defining residential schools). Although the term "aversive techniques" is not defined, the Connecticut regulations define an "aversive procedure" as "the planned use of an event which may be unpleasant, noxious, or otherwise cause discomfort, to alter the occurrence of a specific behavior or to protect an individual from injuring himself or others." Conn. Agencies Regs. §17a-227-1(c). This defined term is not applied anywhere in the regulations.

Rhode Island's regulations also contain a definition of "aversive interventions/strategies" in regulations governing the use of seclusion and restraint, but the definition is not applied in any other regulation. 21-2 R.I. Code R. §§ 39:3.2, 39:3.20 (LexisNexis 2013) (including the definitions section and noting that the provisions governing physical restraint do not apply the definition of aversive interventions or strategies).

Several states have provisions that govern the use of seclusion (sometimes called time-out) and

Pennsylvania's regulations, entitled "Positive Behavioral Support," state that positive, not negative, measures should form the basis for behavioral support programs for disabled children.[257] The regulations also define "aversive techniques" as "deliberate activities designed to establish a negative association with a specific behavior."[258] The Pennsylvania regulations provide examples of prohibited aversive techniques, including corporal punishment; locked rooms or spaces; noxious substances; "deprivation of basic human rights, such as withholding meals [or] water"; "treatment of a demeaning nature"; and "electric shock."[259]

The regulations specify that, when a disabled child's behavior impedes learning, the child's IEP team is required to develop a "positive behavioral support plan," which must include "methods that utilize positive reinforcement and other positive techniques to shape a student's or eligible young child's behavior, ranging from the use of positive verbal statements as a reward for good behavior to specific tangible rewards."[260] Notwithstanding this emphasis on positive reinforcement, Pennsylvania does allow the use of restraint, as that term is defined, to be included in a child's IEP as an approved behavioral intervention under certain circumstances.[261]

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restraint in school, but those provisions do not discuss "aversive" interventions, procedures or techniques. For a comprehensive survey of state regulations regarding the use of seclusion and restraint, see Daniel Stewart, *How Do the States Regulate Restraint and Seclusion in Public School? A Survey of the Strength and Weaknesses in State Laws*, 34 HAMLINE L. REV. 531 (2011).

[257] 22 Pa. Code §14.133 (2008).

[258] *Id.* §§ 14.133(b), 711.46(b).

[259] *Id.* §§ 14.133(e), 711.46(e).

[260] *Id.* §§ 14.133(b), 711.46(b).

[261] *Id.* §§ 14.133(c)(2), 711.46(c)(2).

Wyoming defines "aversives" as interventions that are "intended to induce pain or discomfort to a student for the purpose of eliminating or reducing maladaptive behaviors."[262] The Wyoming regulations do not provide any examples of aversive interventions, which are "prohibited practices" that may not be utilized under any circumstances.[263] Behavioral interventions may include "positive strategies, program or curricular modifications, and aids and supports required to address the disruptive behaviors."[264] Wyoming does, however, permit the use of certain forms of restraint and seclusion as part of a "planned behavioral intervention" without articulating the standards under which restraint or seclusion would be included in a BIP.[265]

Ohio also defines aversive interventions as interventions that "induce pain or discomfort to a student for the purpose of eliminating or reducing maladaptive behaviors."[266] The Ohio regulations further provide that such interventions include "noxious, painful and/or intrusive stimuli, including any form of noxious, painful or intrusive spray, inhalant or taste."[267] Ohio defines "[p]ositive behavior intervention and supports" as both "systemic and individualized positive strategies to reinforce desired behaviors, diminish reoccurrences of challenging

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[262] 5-42 Wyo. Code R. § 6(j)(i) (2013).

[263] *Id.* § 6(j).

[264] *Id.* § 6(d).

[265] *Id.* § 7(b). The Wyoming regulations prohibit the use of mechanical restraint or prone restraint under any circumstances. *Id.* § 6(j). The regulations also distinguish between different forms of seclusion and prohibit under any circumstances the use of "locked seclusion." *Id.* § 6(n).

[266] Ohio Admin. Code 3301-35-15(A)(1) (2013).

[267] *Id.*

behaviors, and teach appropriate behaviors to students."[268]

Kentucky and Maine both prohibit the use of "[a]versive behavioral interventions" on any child "at any time."[269] These two states define an aversive behavioral intervention similarly. For example, Kentucky defines the intervention as one that "the implementer knows would cause physical trauma, emotional trauma, or both, to a student even when the substance or stimulus appears to be pleasant or neutral to others."[270] The Kentucky regulations provide specific examples of aversive interventions, including "hitting, pinching, slapping, water spray, noxious fumes, extreme physical exercise, loud auditory stimuli, withholding of meals, or denial of reasonable access to toileting facilities."[271]

The District of Columbia defines aversive interventions as "specific strategies for behavioral-treatment intervention" that include noxious, painful, intrusive stimuli, sprays, or inhalants; electric shock; pinches and deep muscle squeezes; withholding adequate sleep, shelter, clothing, bedding, or bathroom facilities; withholding food or water or intentionally altering staple food or drink to make it distasteful; or the use of chemical restraint.[272] However, the District of Columbia's prohibition on the use of aversive intervention applies only to children

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[268] *Id.* at 3301-35-15(A)(7).

[269] 704 Ky. Admin Regs.7:160(3)(2)(c) (2013); 05-071 Code Me. R. §§ 2(1), 6(2)(F) (2001) (defining "aversive procedure" and prohibiting its use "under any circumstances" respectively).

[270] 704 Ky. Admin Regs. 7:160(1); 05-071 Code Me. R. § 2(1) (providing a similar definition of an "aversive procedure").

[271] 704 Ky. Admin. Regs. 7:160(1).

[272] D.C. CODE § 38-2561.01(1) (West, WestlawNext current through Feb. 21, 2014).

who are enrolled in nonpublic schools at public expense.[273]

Montana defines "aversive treatment procedures" as physical restraint and isolation time-out, two terms which are defined in the regulations.[274] Those two aversive treatment procedures may be included as planned interventions in a child's IEP only after a documented failure of positive behavioral interventions to effectively address the behavior.[275] Montana prohibits other practices, such as procedures "intended to cause physical pain"; the use of "aversive mists, noxious odors, [or] unpleasant tastes"; and mechanical restraint, among others, but does not label those procedures as either "aversive" or "interventions."[276]

Nevada, California, Washington, and New Hampshire define aversive behavioral interventions[277] to include, with some variations in language, the following: (a) noxious odors or tastes (or taste treatment programs); (b) noxious, toxic or unpleasant mists, sprays, or substances; (c) unreasonable force, restraint, or corporal punishment; (d) electric shock; or (e) isolation or removal to a locked room.[278] A subset of these states also prohibit the following: (a) verbal and mental abuse, humiliation, or ridicule; (b) forced exercise; (c) blasts of air or painful noises or sounds; (d) withholding food, liquid, adequate sleep, shelter, clothing, bedding, or access to

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[273] D.C. CODE § 38-2561.03.

[274] Mont. Admin. R. 10.16.3346(2) (2013).

[275] *Id.* 10.16.3346(7).

[276] *Id.* 10.16.3346(4).

[277] While substantively prohibiting certain behavioral interventions, California's code does not use the term "aversive behavior interventions." *See* CAL. EDUC. CODE § 56521.2 (2013).

[278] CAL. EDUC. CODE § 56521.2(A); NEV. REV. STAT. ANN. §§ 388.5215, 394.354, 449.766 (2013); N.H. Code R. Ed. 1113.04(c), 1114.07(G) (2013); Wash. Admin. Code § 392-172A-03125 (2013).

bathroom facilities; (e) chemical restraint; (f) deprivation of one or more of the child's senses; (g) water treatment; or (h) deprivation of medication.[279]

California and Nevada prohibit the use of these aversive behavioral interventions, although restraint may be used in emergency circumstances.[280] In Nevada, the use of restraint on a child may require the child's IEP team to consider whether to conduct an FBA and implement a "positive behavior plan" and "positive behavioral supports."[281] Those two terms are not defined, but the Nevada Administrative Code does define "[p]ositive behavioral supports" as "a process for integrating behavior analysis . . . which focus[es] on promoting positive changes in behavior and enhancing the overall quality of life for pupils . . . without the use of negative or aversive means."[282]

Washington and New Hampshire allow certain forms of physical contact or restraint to be approved aversive interventions that are written into a child's IEP (presumably as part of a BIP) but only after certain conditions have been met.[283] These conditions include documenting the failure of positive behavioral interventions and specifying the type of aversive interventions to be

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[279] CAL. EDUC. CODE § 56521.2(a); NEV. REV. STAT. ANN. §§ 388.5215, 394.534, 449.766; N.H. Code R. Ed. 1113.04(c), 1114.07(g); Wash. Admin. Code §392-172A-03125.

[280] CAL. EDUC. CODE § 56521.1; NEV. REV. STAT. ANN. § 388.5275.

[281] NEV. REV. STAT. ANN. §§ 388.5275, 388.528.

[282] Nev. Admin. Code § 388.077 (2013).

[283] Washington allows the use of "bodily contact," "isolation," and "physical restraint" as part of a child's BIP. Wash. Admin. Code §§ 392-172A-03130, 392-172A-03135. New Hampshire allows "non-medical mechanical restraint" and "[p]hysical restraint" to be included in a child's IEP. N.H. Code R. Ed. §§ 1113.06, 1114.09.

used; the reasons why aversive interventions are determined to be appropriate; the "circumstances under which the aversive interventions may be used"; the training and qualifications of the individual who will administer the aversive interventions; a means to evaluate the "effects of the use of the aversive interventions"; a time limit for the use of the intervention[s]; a system to record the "frequency, duration, and results of the intervention[s]"; and giving notice to the child's parents.[284] These states also require that positive behavioral interventions be implemented before any aversive interventions.[285]

A. The New York Regulations

1. The Impetus for the Regulations

Through 2005, New York had no regulations that addressed the use of aversive interventions in an educational setting. In July 2006, the New York State Education Department (NYSED) issued a notice indicating that NYSED had adopted "emergency" regulations that banned the use of aversive interventions.[286] The same notice also provided notice to the public that NYSED was seeking comments on proposed non-emergency rule-making that would ban the inclusion of aversive interventions in a child's IEP.[287] Following a notice and comment period, in November 2006, NYSED issued revised regulations that became final.[288]

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[284] N.H. Code R. Ed §§ 1113.06, 1114.09; Wash Admin. Code § 392-172A-03135.

[285] N.H. Code R. Ed. §§ 1113.06, 1114.09; Wash Admin Code § 392-172A-03120.

[286] *See* Notice of Proposed Emergency Adoption and Proposed Rule-Making, XXVIII N.Y. Reg. 10, 11 (July 12, 2006) (noting that the proposed rule was meant to develop certain behavior intervention standards).

[287] *Id.* at 11.

[288] N.Y. Comp. Codes R. & Regs. tit. 8, § 19.5(b).

NYSED was prompted to consider regulations that would ban the use of aversive interventions after, among other things, an April and May 2006 site visit to the Judge Rotenberg Center in Canton, Massachusetts (the "JRC").[289] The JRC is a residential facility for children and adults with severe behavioral issues.[290] It has a very controversial past and has been the subject of intense criticism for its practices.[291] The JRC is known for using aversive interventions

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[289] *See* Brief in Opposition to Petition for Writ of Certiorari to United States Court of Appeals for the Second Circuit at 1–2, *Bryant v. N.Y. State Educ. Dep't*, 2013 WL 1329632 (Mar. 29, 2013).

[290] *Id.* at 4.

[291] For decades, the JRC has been intensely criticized for its methods. *See e.g.*, Sharon Freagon, *One Educator's Perspective on the Use of Punishment or Aversives: Advocating for Supportive and Protective Systems*, *in* PERSPECTIVES ON THE USE OF NONAVERSIVE AND AVERSIVE INTERVENTIONS FOR PERSONS WITH DEVELOPMENTAL DISABILITIES, *supra* note 56, at 146, 136–150. In 1985, the JRC, then known as the Behavior Research Institute (BRI) was located in Providence, Rhode Island, although students from other states, including Massachusetts, were enrolled at the facility. In 1985, a student who was a Massachusetts resident died of asphyxiation at the BRI facility, apparently while being restrained. *Id.* at 149. As a result of that incident, the State of Massachusetts sued the BRI in order to have certain practices or methods discontinued. In 1986, the BRI and the State of Massachusetts reached a settlement that required the facility to obtain court approval before using aversive interventions with any student. *See* Judge Rotenberg Educ. Ctr., Inc. v. Comm'r of the Dep't. of Mental Retardation, 677 NE.2d 127, 132 n.5 (Mass. 1997) (reciting history leading to settlement).

Over the years, there have been several reports of abuse at the JRC, including video taken in 2002 of one student being restrained and shocked and another incident in 2007 when students received dozens of shock treatments by staff. *See Judge Rotenberg Center Trial: Tape Shows Teen Being Shocked 31 Times*, HUFFINGTON POST, http://www.huffingtonpost.com/2012/04/12/judge-rotenberg-center-

trial_n_1420633.html (last visited Aug. 31, 2014) (noting that the JRC's attorney stated that the treatment plan was followed); Bianca Vázquez Toness, *Founder Forced To Leave Controversial Special Needs School*, 90.9 WBUR NPR BOSTON, http://www.wbur.org/2011/05/26/rotenberg (last visited Aug. 31, 2014) (referencing the 2007 incident in the discussion of the resignation of Matthew Israel, the founder of the JRC). In 2011, as part of a deal with prosecutors to avoid prosecution stemming from the 2007 incident, the Executive Director of the JRC, Matthew Israel, resigned from his position. *School Head Quits After Shock Snafu*, THE BERKSHIRE EAGLE http://www.berkshireeagle.com/northeastnews/ci_18141525 (updated May 26, 2011, 11:24 PM) (last visited Aug. 31, 2014). Even after this resignation, reports continue to surface about abusive practices at the JRC. *See, e.g.*, Chris Burrell, *Report Criticizes Canton School that uses Shock Therapy*, PATRIOT LEDGER, http://www.patriotledger.com/x1506808054/Report-criticizes-Canton-school-that-uses-shock-therapy (updated May 7, 2013, 7:12 AM) (last visited Aug. 31, 2014).

In 2010, a disability rights organization submitted a report to the United Nations Special Rapporteur on Torture urging that the Special Rapporteur initiate an inquiry to address whether practices at the JRC violated the United Nations Convention against Torture. *See* Laurie Ahern & Eric Rosenthal, *Torture not Treatment: Electric Shock and Long-Term Restraint in the United States on Children and Adults with Disabilities at the Judge Rotenberg Center* (2010) (available at www.mdri.org). In response, Special Rapporteur Manfred Nowak stated that he had sent an appeal to the United States government to investigate the school. *See* Katie Hinman & Kimberly Brown, *UN Calls Shock Treatment At Mass. School "Torture"* ABCNEWS, http://abcnews.go.com/Nightline/shock-therapy-massachussetts-school/story?id=11047334 (last visited Aug. 31, 2014). U.N. Special Rapporteur Juan Mendez also stated that the use of shock treatment can constitute "torture." *See* Mike Beaudet & Kevin Rothstein, *U.N. Investigating Judge Rotenberg Center's use of Shocks*, FOX BOSTON, http://www.myfoxboston.com/story/18840703/2012/06/20/un-investigating-judge-rotenberg-centers-use-of-shocks ("'The passage of electricity through anybody's body is clearly associated with pain and

including, particularly, contingent electric shock.[292]

Although the JRC is located in Massachusetts, in 2006 there were just over 150 New York students[293] who were enrolled at the JRC. Some of those students had been placed there by New York school districts under the provisions of IDEA.[294] Because some students were placed

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suffering. Now it depends on the level and time and whether there's any rationale for it.'") (updated July 4, 2012, 8:16 PM) (last visited Aug. 31, 2014).

In February 2013, the Autistic Self Advocacy Network sent a letter to the Food and Drug Administration urging that the government revoke the "cleared" status for the device through which electric shock is delivered to students. *See Letter to the Food and Drug Administration on the Judge Rotenberg Center*, AUTISTIC SELF ADVOCACY NETWORK, (Feb. 12, 2013) http://autisticadvocacy.org/2013/02/letter-to-food-and-drug-administration-on-the-judge-rotenberg-center (arguing for the elimination of "contingent electric shock and other aversive interventions").ASAN also urged the government to deny the JRC any clearance to use any further devices that would allow the facility to deliver shock treatment to students. *Id.*

[292] The JRC has FDA clearance to use a device known as a "Graduated Electronic Decelerator device" to deliver electronic shock. Bryant v. N.Y. State Educ. Dep't, No. 8:10-cv-036, 2010 WL 3418424 at *1 n.3 (N.D.N.Y. Aug, 10, 2010).

[293] *See* Memorandum from Rebecca H. Cort to the Members of the Board of Regents, EMSC-VESID Committee, *Policy on the Use of Aversive or Noxious Stimuli in Public and Private Schools Serving Student with Disabilities*, (March 20, 2006) *available at* http://www.regents.nysed.gov/meetings/2006Meetings/March2006/0306emscvesidd6.htm. [hereinafter Cort memorandum] (discussing the numbers of New York State students approved for electric shock treatment).

[294] *See* 20 U.S.C. § 1412(a)(10(B) (2006) (provisions governing children who are "placed in, or referred to, private schools by public agencies").

at the JRC by their local New York school districts, the JRC was subject to periodic reviews by NYSED officials.[295]

In September 2005, NYSED officials visited the JRC to conduct a regular review, and in January 2006, the JRC received confirmation from NYSED that the facility was in compliance with New York regulations.[296] Just two months later, however, both the JRC and the State of New York were sued by a former JRC student who alleged that the use of contingent electric shock by the staff at JRC violated the student's civil rights.[297] The student alleged that NYSED had "negligently failed to investigate" the practices of the JRC and had negligently failed to

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[295] *Bryant*, 2010 WL 3418424 at *2.

[296] *See* Letter from Jerri Forshaw, Reg'l Assoc., N.Y. State Educ. Dep't, to Matthew Israel, Exec. Dir., Judge Rotenberg Center, (Jan. 11, 2006) *available at* http://www.judgerotenbergeducationalcenter.net/NYSEDNov05report.pdf. (providing documentation and notification of compliance); Letter from Jerri Forshaw, Reg'l Assoc., N.Y. State Educ. Dep't, to Matthew Israel, Exec. Dir., Judge Rotenberg Ctr. (Nov. 17, 2005), *available at* http://www.judgerotenbergeducationalcenter.net/NYSEDNov05report.pdf. (providing notification of the final report of the September 2005 visit).

[297] *See* Exhibit A, Nicholson Verified Pet., at 1, 6, to Aff. of Rebecca Cort Filed in Opposition to Pl. Mot. for T.R.O. and Prelim. Inj., *Alleyne v. NY St. Educ. Dept.*, Civil Action No. 06-cv-00994-GLS (N.D.N.Y., filed August 21, 2006) (arguing that the JRC's failure to properly perform its duties under the law and its use of aversives threatened the student's life); Exhibit B, Nicholson Claim, at 1–3, to Aff. of Rebecca Cort Filed in Opposition to Pl. Mot. for T.R.O. and Prelim. Inj., *Alleyne v. NY St. Educ. Dept.*, Civil Action No. 06-cv-00994-GLS (N.D.N.Y., filed August 21, 2006) (making a claim against New York State and the New York State Department of Education for monetary damages).

enforce certain New York laws regarding the use of corporal punishment.[298]

The filing of the lawsuit and apparent "questions from legislators, the Board of Regents[,] and others"[299] prompted NYSED to take action. On March 20, 2006, Rebecca Cort of NYSED forwarded a memorandum to the New York Board of Regents raising the issue whether the Regents "[s]hould . . . adopt a new policy that prohibits or limits the use of certain behavioral approaches, including the use of certain aversive or noxious stimuli to reduce or eliminate maladaptive behaviors of students."[300]

In April, NYSED began an in-depth review of practices at the JRC.[301] On June 12, 2006, the team conducting the review issued a report sharply criticizing the JRC.[302] Among other findings, the report stated that staff at the JRC employed aversive behavioral interventions on students who had no "clear history of self-injurious behaviors" or who had not demonstrated

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[298] *See* Nicholson v. State, 23 Misc.3d 313 (N.Y. Ct. Cl. (2008)) (granting defendants' motions for summary judgment).

[299] *See* Exhibit F to Aff. of Rebecca Cort Filed in Opposition to Pl. Mot. for T.R.O. and Prelim. Inj., at 1 *Alleyne v. NY St. Educ. Dept.*, Civil Action No. 06-cv-00994-GLS (N.D.N.Y., filed August 21, 2006) [hereinafter Cort Exhibit F] (reporting on the findings of the April and May visits of NYSED).

[300] *See* Cort Memorandum, *supra* note 293 (recommending that the Board of Regents discuss making a new policy and pursuing "legislative and/or regulatory action").

[301] *See* Aff. of Rebecca Cort filed in Opposition to Pl. Mot. for T.R.O. and Prelim. Inj., at ¶10 *Alleyne v. NY St. Educ. Dept.*, Civil Action No. 06-cv-00994-GLS (N.D.N.Y., filed August 21, 2006) (noting that the review consisted of interviewing staff and students, and reviewing records).

[302] Cort Exhibit F, *supra* n. 299 at 2–3.

aggressive or destructive behaviors warranting the application of an aversive intervention.[303] The report also found that there was "limited evidence" either that students had received FBAs as might be required by the IDEA or that JRC staff had collected the data necessary to prepare FBAs.[304] The report also criticized the JRC educational programming as a "punishment model" that was "organized around the elimination of problem behaviors largely through punishment, including the use of delayed punishment practices."[305] As a result, the report found, "[t]he privacy and dignity of students [wa]s compromised in the course of JRC's program implementation."[306]

Several days after the publication of the report criticizing the JRC, NYSED published its Notice of Emergency Rule-Making in which it adopted the regulations on an emergency basis while simultaneously providing the public with an opportunity for notice and comment.[307] After receiving comments and holding public hearings, NYSED issued the final regulations in November 2006.[308]

2. The Content of the Regulations

The regulations generally define an aversive intervention as one "that is intended to induce pain or discomfort to a student for the purpose of eliminating or reducing maladaptive

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[303] *Id.* at 3.

[304] *Id.*

[305] *Id.*

[306] *Id.*

[307] XXVIII N.Y. Reg. 10, at 11 (July 12, 2006); June 22, 2006 Notice Of Emergency Rule-Making, http://www.p12.nysed.gov/specialed/behavioral/requirements606.htm

[308] XXVIII N.Y. Reg. 13 (November 15, 2006).

behaviors."[309] The regulations further identify specific forms of prohibited aversive interventions, including the application of "noxious, painful, intrusive stimuli or activities; strangling, shoving, deep muscle squeezes"; "any form of noxious, painful or intrusive spray, inhalant or tastes"; the denial or delay in providing a meal or "intentionally altering staple food or drink in order to make it distasteful"; "movement limitation used as a punishment, including but not limited to helmets and mechanical restraint devices"; and other similar actions.[310]

The New York regulations also identify certain interventions or techniques that are not prohibited aversive interventions. The regulations allow the use of "such interventions as voice control, limited to loud, firm commands; time-limited ignoring of a specific behavior; token fines as part of a token economy system; brief physical prompts to interrupt or prevent a specific behavior; interventions medically necessary for the treatment or protection of the student; or other similar interventions."[311]

New York also provided a "[c]hild-specific exemption to [the] use [of] aversive interventions" that included both a grandfather clause and a sunset date.[312] The grandfather clause allowed a child's IEP to include the use of aversive interventions for any school year subsequent to the 2008-2009 school year only if the child's "IEP include[d] the use of aversive interventions as of June 30, 2009."[313] The regulations also permitted the continued use of aversive interventions, as provided in a child's IEP, for three academic school years following

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[309] N.Y. Comp Code R. & Regs. tit. 8, § 19.5(b).

[310] *Id.* § 19.5(b)(2).

[311] *Id.*

[312] *Id.* § 200.22(e).

[313] *Id.*

promulgation of the regulations, up to and including the 2008–2009 school year.[314] After the 2008-2009 school year, the regulations sought to ban the use of aversive interventions entirely.[315]

The regulations allowed the use of aversive interventions pursuant to the child-specific exemption only when a child "display[ed] self-injurious and/or aggressive behaviors that threaten[ed] the . . . well being of" either the child or others.[316] If the child displayed such behavior, a panel of experts was required to be convened to approve the use of aversive interventions for that particular child.[317]

NYSED submitted the regulations to the United States Department of Education in 2007 and, in June 2007, received a letter that the regulations were substantially consistent with

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[314] *Id.*

[315] *See* Brief in Opposition to Petition for Writ of Certiorari, *supra* note 289, at *7 (pdf pages 3-4, 7) (recognizing that there was a statewide policy prohibiting the use of aversive interventions).

[316] N.Y. Comp. Code R. & Regs. tit. 8, § 200.22(e)(1).

[317] *Id.* § 200.22(e)(6)(i)–(ii). These provisions of the regulations acknowledge that aversive interventions are supported by scientific research and can be effective to reduce severe behavior. First, the regulations provide that any approved aversive interventions must be "implemented consistent with peer-reviewed research." *Id.* § 200.22(f)(2)(v). Second, the regulations require the panel of experts to determine either that a "full range of evidence-based positive behavioral interventions have been consistently employed over an appropriate period of time and have failed to result in sufficient improvement of a student's behavior," or that the child's behavior "pose[s] significant health and safety concerns that warrant the use of aversive interventions to effect rapid suppression of the behavior and a range of nonaversive prevention strategies have been employed and have failed to provide a sufficient level of safety." *Id.* § 200.22(e)(6)(i)–(ii)

IDEA.[318]

V. LITIGATION CHALLENGING THE NEW YORK REGULATIONS

A. The *Alleyne* Litigation

In August 2006, while the emergency regulations were in place, several parents of students enrolled at the JRC sued NYSED, seeking a temporary restraining order enjoining NYSED from enforcing the regulations.[319] In *Alleyne v. New York State Education Department*, all of the children had IEPs that authorized the use of aversive interventions, including the use of contingent electric shock, to address severe behavior.[320]

In September 2006, the district court granted the plaintiffs' motion for a preliminary injunction and enjoined enforcement of the regulations against those students.[321] In October 2006, the district court issued another injunction based on the plaintiffs' concerns that the children's IEPs were not being "revised for the [following] school year" or "were being revised without parental consent" with the intention of excluding the use of aversive interventions in the children's IEPs.[322] In a February 2007 hearing, the federal district court issued a further

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[318] *See* Brief in Opposition to Petition for Writ of Certiorari, *supra* note 289, at *21 (pdf pages 4 and 21) (arguing that the "court's ruling . . . is . . . consistent with the position of the federal agency responsible for education policy").

[319] *Alleyne v. N.Y. State Educ. Dep't.*, Civil Action No. 1:06-cv-00994-GLS at ¶¶ 1–5 (N.D.N.Y. 2007) (Complaint filed Aug. 16, 2006) [hereinafter *Alleyne* Complaint]

[320] *See Alleyne* Complaint, *supra* note 319, at ¶¶ 92-158 (detailing treatment history and then-current IEP provisions of the *Alleyne* plaintiffs).

[321] Alleyne v. N.Y. State Educ. Dep't., 516 F.3d 96, 99 (2d Cir. 2008) (reciting procedural history).

[322] *Id.*

injunction enjoining NYSED from enforcing certain revisions that the Department had made in January 2007 to the state regulations.[323] The court expressed concern that the January 2007 revisions, which required that any aversive interventions be implemented by a "licensed or certified professional," would in practice discontinue the use of aversive interventions, thereby circumventing the court's prior injunction.[324]

NYSED appealed the court's February 2007 order.[325] The Second Circuit reversed and remanded on the ground that the district court had not considered "irreparable harm and likelihood of success on the merits."[326] The defendants then filed motions for summary judgment, and in 2010, the court granted in part and denied in part the defendants' summary judgment motions.[327]

The court first considered the plaintiffs' "global" claim that the regulations conflicted with provisions of IDEA. On that global claim, the court held that the NYSED regulations represented "a permissible educational policy choice" and that the "prevailing disfavor for aversive techniques weighs strongly in favor of the validity of the regulations."[328] The court granted the defendants' motion for summary judgment as to plaintiffs' "facial attack" on the regulations as being contrary to the dictates of IDEA.[329]

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[323] *Id.* at 100.

[324] *Id.* at 99–100..

[325] *Id.* at 100

[326] *Id.* at 102.

[327] Alleyne v. N.Y. State Educ. Dept't., 691 F. Supp. 2d 322, 327–328 (N.D.N.Y. 2010).

[328] *Id.* at 330–32.

[329] *Id.* at 333.

In so holding, the court first noted that IDEA "'does not usurp [a] state's traditional role in setting educational policy.'"[330] The court found that the regulations, which were designed to ultimately eliminate all use of aversive interventions in New York, were "consistent with the IDEA's focus on positive behavioral modification methods."[331] The court reached this result as a matter of law even as the court noted that the expert opinions proffered by the plaintiffs were considerably "more comprehensive than any expert opinion proffered by the defendants."[332] Indeed, the court acknowledged that one of the defendants' own experts, Dr. Hagopian, had "conceded that 'the position that punishment should not be used is more of a philosophical based type of position,' and that it is inappropriate to completely ban aversives."[333] Thus, even with the sworn deposition testimony from one of the defendants' expert witnesses that the science of ABA did not warrant a complete ban on aversive interventions, the court nonetheless held that IDEA's language endorsing the use of positive behavioral interventions demonstrated that the defendants were entitled, as a matter of educational policy, to ban aversive interventions.[334]

However, the court denied the defendants' motion for summary judgment on the

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[330] *Id.* at 331 (quoting the IDEA).

[331] *Id.*

[332] *Id.* at 331–332.

[333] *Id.* (citing Flammia Decl., Ex. 10, Hagopian Dep. At 37-38, 130-132, 172-72, 261). Dr. Louis Hagopian is the Program Director of the Kennedy Krieger Institute's Neurobehavioral Unit. Louis Hagopian, Ph.D., KENNEDY KRIEGER INST., http://www.kennedykrieger.org/patient-care/faculty-staff/louis-hagopian (last visited Aug. 31, 2014). Dr. Hagopian is is also an Associate Professor of Psychiatry and Behavioral Sciences at the School of Medicine at Johns Hopkins University. *Id.*

[334] *Alleyne*, 691 F. Supp. 2d at 333–34..

plaintiffs' claim that the regulations, as applied to each of them individually, denied them a FAPE.[335] The court held that, on the current record, it could not determine as a matter of law that the plaintiffs had received a FAPE.[336] The court also declined "to dissolve the preliminary injunction."[337]

The *Alleyne* litigation is ongoing.[338] The preliminary injunctions remain in place and, as a result, the IEPs of those children still can include the use of aversive interventions.[339]

B. The *Bryant* Litigation

1. Factual Background

On January 10, 2010, the guardians of seven students residing at the JRC filed suit in federal district court against NYSED, the Commissioner of Education, and the New York Board of Regents seeking to enjoin NYSED from enforcing the New York regulations banning the use of aversive interventions.[340] The seven guardians who filed suit were all family members of the JRC students; six were the parents of a student and one was the aunt of a student.[341] The guardians all alleged that the students were in need of aversive interventions to control, reduce,

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[335] *Id.* at 334.

[336] *Id.*

[337] *Id.* at 338.

[338] *Alleyne v. N.Y. State Educ. Dep't.,* Civil Action No. 1:06-cv-00994-GLS (N.D.N.Y.) (docket sheet last accessed via Bloomberg Law on Apr. 14, 2014).

[339] *Alleyne*, 691 F. Supp. 2d at 337–338.

[340] Complaint filed in *Bryant, v. N.Y. State Educ. Dep't,* Civil Action No. 8:10-cv-00036 GLS-RFT, 1 (N.D.N.Y., Jan. 8, 2010) [hereinafter *Bryant* Complaint]

[341] *Bryant* Complaint, *supra* note 340 at ¶¶ 1–14.

or eliminate problematic behaviors but that none of the students would be able to receive aversive interventions if the NYSED regulations were enforced.[342]

The students in the *Bryant* litigation had been diagnosed with a variety of disorders, including autism,[343] Impulsive Control Disorder (NOS),[344] Intermittent Explosive Disorder,[345] Bipolar Disorder,[346] Oppositional Defiant Disorder,[347] Mood Disorder (NOS),[348] and other

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[342] *Id.* at ¶¶ 88–90. The children in the *Bryant* litigation had not been grandfathered in under the provisions of the New York regulations because their IEPs had not included a behavior plan that allowed the use of aversive interventions before June 30, 2009. *Id.* at ¶82.

[343] Declaration of Ava George at ¶2, Declaration of Chanin Houston-Josephat at ¶2, Declaration of Carmen Pena at ¶2, Declaration of Jamie Tam at ¶2, all attached to Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction, *Bryant v. N.Y. State Educ. Dep't.* Civil Action No. 8:10-cv-00036 GLS-RFT (N.D.N.Y. filed Jan. 25, 2010).

[344] Declaration of Ava George, *supra* note 343, at ¶2.

[345] Declaration of Charles Bryant at ¶2, attached to Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction, *Bryant v. N.Y. State Educ. Dep't.*, Civil Action No. 8:10-cv-00036 GLS-RFT (N.D.N.Y. filed January 25, 2010).

[346] Declaration of Lisa Hughes at ¶2, attached to Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction, *Bryant v. N.Y. State Educ. Dep't*, Civil Action No. 8:10-cv-00036 GLS-RFT (N.D.N.Y. filed Jan. 25, 2010).

[347] *Id.*

[348] Declaration of Vivian Presley at ¶2, attached to Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction, *Bryant v. N.Y. State Educ. Dep't.*, Civil Action No. 8:10-cv-00036 GLS-RFT (N.D.N.Y. filed Jan. 25, 2010).

behavior disorders that cause the students to engage in dangerous and disruptive behaviors.[349] Those behaviors included repeated head-banging against hard objects;[350] using a fingernail to slice open one's tongue;[351] disrobing in public;[352] pulling out one's own teeth by force;[353] destroying physical property (beds, televisions, computers, windows, walls);[354] physically attacking family members (including younger siblings);[355] setting fire to a bedroom at home;[356]

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[349] Bryant Declaration, *supra* note 345, at ¶2, George Declaration, *supra* note 343, at ¶2, Houston-Josephat Declaration, *supra* note 343, at ¶2, Pena Declaration, *supra* note 343, at ¶2, Tam Declaration, *supra* note 343, at ¶2, Hughes Declaration, *supra* note 346, at ¶2, Presley Declaration, *supra* note 348, at ¶2.

According to the complaint, each student had "a long and well-documented history of severe behavioral problems, including aggressive, self-injurious, destructive, disruptive and otherwise non-compliant behavior." *Bryant* Complaint, *supra* note 340, at ¶20.

[350] George Declaration, *supra* note 343, at ¶4; Pena Declaration, *supra* note 343,, at ¶4; Tam Declaration, *supra* note 343, at ¶4.

[351] Josephat Declaration, *supra* note 343, at ¶4.

[352] Josephat Declaration, *supra* note 343, at ¶4; Pena Declaration, *supra* note 343, at ¶4.

[353] Tam Declaration, *supra* note 343, at ¶4.

[354] Pena Declaration, *supra* note 343, at ¶4

[355] Presley Declaration, *supra* note 348, at ¶4; Tam Declaration, *supra* note 343, at ¶4. One parent testified that she "wear[s] a helmet in [her] home to protect [her] from [her son's] blows to [her] head." Pena Declaration, *supra* note 343, at ¶5. Another parent testified that her son "has pulled his sleeping brother out of bed in the middle of the night and hit him repeatedly. To keep us safe, my other son and I have slept in my room at night and locked the bedroom door." George Declaration, *supra* note 343, at ¶5.

[356] Presley Declaration, *supra* note 348, at ¶4.

and assaulting teachers and staff; resulting in broken bones, among other examples.[357] These behaviors resulted in multiple 911 calls, expulsion from public school, emergency placement in psychiatric hospitals, and other confinements in psychiatric institutions.[358]

These students also had significant history of behavioral interventions, including early autism intervention services,[359] ABA intervention,[360] speech and occupational therapy,[361] and one-to-one staffing, with a crisis professional,[362] among others.[363]

The students had received years of special education services in a variety of educational settings, both public and private.[364] Due to their behaviors, the students had not been able to remain in restricted, self-contained classrooms in a public school setting; several students were placed in psychiatric institutions before they were admitted to JRC.[365] Other students were either

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[357] Pena Declaration, *supra* note 343, at ¶4; Tam Declaration, *supra* note 343, at ¶4.

[358] Bryant Declaration, *supra* note 345, at ¶¶5, 7; George Declaration, *supra* note 343, at ¶7; Houston-Josephat Declaration, *supra* note 343, at ¶7.

[359] Tam Declaration, *supra* note 343, at ¶5.

[360] Bryant Declaration, *supra* note 345, at ¶6; Tam Declaration, *supra* note 343, at ¶5.

[361] Houston-Josephat Declaration, *supra* note 343, at ¶5; Bryant Declaration, *supra* note 345, at ¶7; Pena Declaration, *supra* note 343, at ¶6; Hughes Declaration, *supra* note 346, at ¶5.

[362] Bryant Declaration, *supra* note 345, at ¶6; George Declaration, *supra* note 343, at ¶6; Houston-Josephat Declaration, *supra* note 343, at ¶5; Pena Declaration, *supra* note 343, at ¶6.

[363] All of the students had a significant history of medical interventions to treat behavior, including taking prescription medications such as Risperdal, Seroquel, Congentin, Zoloft, Paxil, Neurotonin, Abilfy, Thorazine, Zyprexa,,and lithium carbonate. *Bryant* Complaint, *supra* note 340, at ¶¶ 21–22.

[364] Tam Declaration, *supra* note 343, at ¶ 5.

[365] Bryant Declaration, *supra* note 345, at ¶¶ 5–7; Houston-Josephat Declaration, *supra* note 343, at

refused admission or expelled from private residential facilities due to their behavior.[366]

One student's history of placements was particularly telling. The student had been placed in a private residential facility whose therapeutic approach, according to its website, encompassed "a positive approaches philosophy utilizing behavioral interventions at the micro and macro levels."[367] The facility sought to expel the student because of the severity of his behavior.[368] When the parents asked that the student remain, apparently because no other placement was available, the facility required the parents to sign a document not just releasing all claims against the facility arising from injury to the student, but also agreeing to indemnify the facility with regard to any claims made against the facility by any person who might be injured by the child.[369] The document stated that "despite every clinical intervention employed to date, including but not limited to, 24-hour, 1-to-1 supervision, the facility could not keep the child from engaging in serious self-injurious behavior.[370] The child was transferred to the JRC.[371]

¶¶ 5–8.

[366] George Declaration, *supra* note343, at ¶10; Pena Declaration, *supra* note 343, at ¶¶ 11–12; Tam Declaration, *supra* note 343, at ¶6.

[367] Tam Declaration, *supra* note 343, at ¶ 6; Devereux, *Devereux New York Services*, http://www.devereux.org/site/PageServer?pagename=ny_services#children (last visited Aug. 31, 2014).

[368] Tam Declaration, *supra* note 343, at ¶ 6.

[369] Tam Declaration, *supra* note 316, at ¶¶ 6, 9, & Exhibit 1.

[370] *See* Acknowledgement and Release, Exhibit 1 to Tam Declaration, *supra* note 343. The document stated that the facility staff had recommended that the child "be placed in a more restrictive treatment setting that can better address [the child's] treatment needs." *Id.*

[371] Tam Declaration, *supra* note 343, at ¶ 9.

For three of the seven students, the students' home school district recommended placement at the JRC as necessary to provide the student with a FAPE.[372] The guardians of three other students had placed those individuals at JRC without consent of the school district, but the guardians were able to establish in due process proceedings that placement at the JRC was necessary to provide the students with a FAPE.[373] The guardian of one student also had placed the student at JRC without prior approval of the student's public school district and no FAPE determination had yet been made in any due process proceeding.[374]

2. The District Court's Decision in Bryant

Shortly after the complaint was filed, the plaintiffs filed a motion for a preliminary injunction; the defendants both opposed the motion for preliminary injunction and filed a motion to dismiss the complaint.[375] On August 26, 2010, the federal district court issued an opinion granting the defendants' motion to dismiss and denying the plaintiffs' motion for preliminary injunction.[376]

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[372] Bryant Declaration, *supra* note 345, at ¶10; Houston-Josephat Declaration, *supra* note 343, at ¶10; Pena Declaration, *supra* note 343, at ¶12.

[373] George Declaration, *supra* note 343, at ¶10; Hughes Declaration, *supra* note 346, at ¶ 11; Presley Declaration, *supra* note 348, at ¶11.

[374] Tam Declaration, *supra* note 343, at ¶¶ 9–10.

[375] Plaintiffs' Notice of Motion And Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction, *Bryant v. N.Y. State Educ. Dep't.* Civil Action No. 8:10-cv-00036 GLS-RFT (N.D.N.Y. filed Jan. 25, 2010); Defendan's Notice of Cross-Motion, *Bryant v. N.Y. State Educ. Dep't.*, Civil Action No. 8:10-cv-00036 GLS-RFT (N.D.N.Y. filed Mar. 2, 2010) (No. 8:10-cv-0036 GLS-RFT).

[376] Bryant v. N.Y. State Educ. Dep't, No. 8:10-cv-00036 GLS-RFT slip. op. at 22 (N.D.N.Y. Aug. 26

The court first defined an "aversive" intervention in a manner that went far beyond the specific interventions identified in the New York regulations themselves. Rather, the court defined an aversive intervention as follows:

> Aversive behavior modification techniques rely on consequences that are carefully designed to decrease a problematic behavior. Aversive interventions are used on an individualized, specifically–defined basis to treat a student's problematic behaviors, including aggressive, dangerous, self–injurious, destructive, disruptive, and noncompliant behavior. The goal is effective deceleration or minimization of problematic behaviors, which in turn enables a student to receive an appropriate education, promotes the student's safety, and helps the student develop and hone the basic skills necessary for learning and daily living.[377]

Then, with no detailed discussion, "the court deem[ed] controlling the conclusions reached in *Alleyne*"—specifically the conclusion made in *Alleyne* that the New York regulations banning the use of aversive interventions did not contravene the provisions of IDEA.[378]

The court also rejected the plaintiffs' argument that the regulations deprived the children's guardians of a meaningful opportunity to participate in the drafting of each child's IEP.[379] In support of this argument, the plaintiffs primarily relied on two cases, *Deal v. Hamilton County Board of Education*,[380] and *Kalliope R. v. New York State Department of Education*.[381] In *Deal*, the Sixth Circuit Court of Appeals held that a school district violated the procedural requirements

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(2010)).

[377] *Id.* at *4, citing *Bryant* Complaint, *supra* note 340, at ¶¶ 32-34 (internal citations omitted).

[378] *Id.* at *10–11..

[379] *Id.* at *11.

[380] 392 F.3d 840 (6th Cir. 2004).

[381] 827 F. Supp. 2d 130 (E.D.N.Y. 2010).

of IDEA when it "predetermined" before an IEP team meeting that the school district would not provide ABA therapy to a child diagnosed with autism.[382] In *Kalliope,* the United States District Court for the Eastern District of New York denied NYSED's motion to dismiss a complaint, in which the plaintiffs had alleged that NYSED had predetermined the contents of children's IEPs by issuing regulations that dictated a particular student-teacher class size ratio.[383] The court in *Kalliope* ruled that the plaintiffs had stated a viable claim that the NYSED regulations might prohibit the children's IEP teams from engaging in "an individualized assessment of a given child,"[384] thus violating IDEA's procedural requirement that parents meaningfully participate in the IEP process.[385]

The federal district court in *Bryant* rejected this argument.[386] The court distinguished *Deal* and *Kalliope* on the grounds that they involved questions of permissible teaching methods and student-teacher ratios respectively, issues that the court deemed, without further explanation, to be "quite distinct"[387] from the use of aversive interventions.[388]

3. The Second Circuit's Decision in Bryant

The Second Circuit Court of Appeals affirmed the district court's ruling granting the

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[382] *Deal*, 392 F.3d at 857–59.

[383] *Kalliope*, 827 F. Supp. 2d at 141–42.

[384] *Id.* at 140 (quoting E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 (S.D.N.Y. 2009) (citing *Deal*, 392 F.3d at 857–58)).

[385] *Deal*, 392 F.3d at 859; *Kalliope*, 827 F. Supp. 2d at 141–42.

[386] 2010 WL 3418424 at *4.

[387] *Id.*

[388] *Id.*

defendants' motion to dismiss the complaint.[389] The court identified two claims raised by the plaintiffs: a procedural claim that the regulations violated the procedural requirements of IDEA in terms of parental participation in the IEP process and a substantive claim that the regulations would deprive the children of a FAPE.[390]

The court first rejected the plaintiffs' procedural claim that the regulations deprived the children's parents of a meaningful opportunity to participate in the IEP process by predetermining that certain behavioral interventions could not be implemented.[391] In so holding, the court essentially reduced the entire category of aversive interventions to a single process or method. In particular, the court stated: "[N]othing in New York's regulation prevents individualized assessment or precludes educators from considering a wide range of possible treatments. The regulation prohibits consideration of a single method of treatment without foreclosing other options."[392] Concluding that the regulations affected just "one possible method"[393] of behavioral intervention, the court found that no predetermination in violation of IDEA had taken place.[394]

The court did acknowledge, citing Section 1414(d)(3)(B)(i), that IDEA "does not prohibit alternatives such as aversives."[395] The court, however, ignored the plain text of Section

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[389] Bryant v. N.Y. State Educ. Dep't, 692 F.3d 202, 207 (2d Cir. 2012).

[390] *Id.* at 212.

[391] *Id.* at 213–14.

[392] *Id.* at 213.

[393] *Id.*

[394] *Id.* at 214.

[395] *Id.* at 213.

1414(d)(3)(B)(i), which requires the IEP team to consider both positive behavioral interventions "and other strategies" to address problem behavior.[396] Rather, the court held, without detailed discussion, that a state regulation "that relies on positive behavioral interventions only is [not] incompatible with the IDEA."[397]

The court then addressed the plaintiffs' substantive claim that the regulations violated IDEA's requirement that each child receive a FAPE.[398] The court again rejected the plaintiffs' claim, principally for two reasons. The court found that plaintiffs' insistence that the children required the use of aversive interventions amounted to a claim for an educational program that would "maximize the children's potential."[399] Citing the Supreme Court's decision in *Rowley*, the court found that the children's IEPs satisfied the *Rowley* standard even without the use of aversive interventions.[400]

The court also held that NYSED's decision to ban the use of aversive interventions was a

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[396] 20 U.S.C. §1414(d)(3)(B)(i).

[397] Bryant v. N.Y. State Educ. Dep't, 692 F.3d 202, 213 (2d Cir. 2012). Although the Second Circuit does not quote the language of Section 1414(d)(3)(B)(i), it is clear from the opinion that the majority had understood that Section 1414(d)(3)(B)(i) does allow the use of non-positive behavioral interventions. In addition to acknowledging that IDEA itself "does not prohibit alternatives such as aversives," the court also recognized that positive behavioral interventions, although a methodology that is favored by IDEA is not the "exclusive" methodology of IDEA. *Id.* at 213, 215.

[398] *Id.*at 214.

[399] *Id.* at 215 ("Aversive interventions may help maximize the children's potential, but the IDEA does not require such measures.").

[400] *Id.* at 215.

matter of "education policy,"[401] which the court was required to give deference under *Rowley*.[402] Noting that "[t]here is an ongoing debate among the experts regarding the advantages and disadvantages of aversive interventions and positive-only methods of behavioral modification,"[403] the court characterized itself as "not institutionally suited to now second guess the policy decision made by experts charged with formulating education policy in New York."[404] Rather, the court held that NYSED could opt for "positive-only methods of behavioral modification."[405]

Judge Richard Sullivan, a federal district judge sitting by designation on the Second Circuit, dissented from the majority opinion.[406] Judge Sullivan criticized the majority's finding that the regulations reflect "'a considered judgment by the State of New York regarding the education and safety of its children'"[407] on the ground that the majority had not credited the substantial debate in the psychological community about the efficacy of aversive interventions to treat severe behavior.[408] Noting that the case had been decided on a motion to dismiss the complaint and that the plaintiffs had alleged in their complaint that substantial scientific research supported the use of aversive interventions to treat severe behavior, Judge Sullivan expressed

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[401] *Id.*

[402] *Id.*

[403] *Id.*

[404] *Id.*

[405] *Id.*

[406] *Id.* at 219–21.

[407] *Id.* at 220.

[408] *Id.* at 220–221.

concern that the majority had not undertaken the "searching" review that is required to ensure compliance with IDEA.[409] Judge Sullivan contended that the case should have been remanded to the district court for the development of a fuller record, including a more detailed review of the scientific literature pertaining to the use of aversive interventions.[410]

Plaintiffs filed a petition for a writ of certiorari with the Supreme Court.[411] The Court declined to hear the case.[412]

VI. THE COURT IN BRYANT *MISINTERPRETED IDEA AND THE SUPREME COURT'S DECISION IN* ROWLEY

A. The Second Circuit Ignored Well-Settled Rules of Statutory Construction

IDEA explicitly directs a child's IEP team to consider both "positive behavioral interventions and supports" and "other strategies" to address behavior that impedes the child's learning.[413] "Clearly, IDEA does not prohibit the use of aversives."[414]

When the Second Circuit held that NYSED could promulgate regulations that banned[415] certain forms of aversive interventions, the court stated: "[I]t cannot be said that a policy that

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[409] *Id.* at 220.

[410] *Id.* at 221.

[411] Bryant v. N.Y. State Educ. Dep't., 12-932, 2013 WL 326582 (Jan. 2, 2013).

[412] Bryant v. N.Y. State Educ. Dep't., 133 S. Ct. 2022 (Apr. 29, 2013).

[413] 20 U.S.C. §1414(d)(3)(B) (2012).

[414] Turnbull, *supra* note 37, at 478.

[415] The New York State Education Department characterized the regulations as a statewide "ban" on the use of aversive interventions. Brief in Opposition to Petition for Writ of Certiorari, *supra* note 289, at *7.

relies on positive behavioral interventions only is incompatible with the IDEA."[416] In so holding, the Second Circuit essentially wrote the phrase "and other strategies" out of the statute.

Well-established rules of statutory construction dictate that whenever the courts interpret statutory language the courts should choose the interpretation that gives effect to all of the words of the statute. "A statute must, if possible, be construed in such fashion that every word has some operative effect."[417] A statute should be interpreted "so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."[418]

The Supreme Court has held that the use of the word "other" in statutory language indicates Congress's intent to add to a list of statutorily identified items. In *United States v. Powell*, the Supreme Court held that a criminal statute that prohibited the mailing of "pistols, revolvers and other firearms capable of being concealed on the person" included within the prohibited items any firearm, in addition to a pistol or revolver, so long as the firearm was capable of being concealed on a person.[419] The Court specifically rejected the argument that the term "other firearms" was limited to include only the more specific items, pistols and revolvers, already identified in the statute.[420] Similarly, the Court in *Duncan v. Walker* noted in dicta that a statute containing the words "post-conviction or other collateral review" required that the phrase

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[416] Bryant v. N.Y. State Educ. Dep't, 692 F.3d 202, 212 (2d Cir. 2012).

[417] United States v. Nordic Village Inc., 503 U.S. 30, 36 (1992).

[418] Hibbs v. Winn, 542 U.S. 88, 101 (2004) (citing N. SINGER, STATUTES AND STATUTORY CONSTRUCTION §46.06 (6th ed. 2000)); Discover Bank v. Vaden, 396 F.3d 366, 369 (4th Cir. 2005) (terms should not be rendered meaningless or superfluous).

[419] 423 U.S. 87, 89 n.3, 89–91 (1975).

[420] *Id.* at 90–91.

"other collateral review" include a form of review over and above any review identified as "post-conviction" review.[421]

Similarly, the phrase "and other strategies" in IDEA must have a meaning distinct from the phrase "positive behavioral supports and interventions." The use of the conjunction "and" clearly demonstrates that the phrase "positive behavioral interventions and supports" is not exhaustive. In holding that a policy of "positive-only interventions"[422] comports with IDEA, the *Bryant* Court simply ignored the clear words of the statute.

Even beyond the plain meaning of the statute, nothing in the legislative history of IDEA indicates Congress's intent to ban the use of aversive interventions.[423] Indeed, the U.S. Department of Education interprets IDEA to allow the use of aversive interventions. In a letter dated January 26, 2010, Education Secretary Arne Duncan stated that "[t]he IDEA emphasizes and encourages the use of positive behavioral interventions and supports, but does not prohibit the use of other measures, such as seclusion, non-emergency restraint, or aversive behavioral interventions, when appropriate to address student behavior."[424]

B. The Second Circuit Misapplied the Supreme Court's Holding in *Rowley*

The Second Circuit also determined that, under the Supreme Court's decision in *Rowley*,

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[421] 533 U.S. 167, 174 (2001).

[422] Bryant v. N.Y. State Educ. Dep't, 692 F.3d 202, 215 (2d Cir. 2012).

[423] *See supra* Part II(C)

[424] Letter from Arne Duncan, Sec'y, U.S. Dep't of Educ., to Nancy Weiss, Nat'l Leadership Consortium on Developmental Disabilities, (Jan. 26, 2010) *available at* www2.ed.gov (last visited Aug. 31, 2014). IDEA may create a "rebuttable presumption" in favor of positive behavioral interventions, but not a complete ban on the use of non-positive interventions. Turnbull, *supra* note 37, at 478.

it was required to defer to educators' choice of one side of this debate about the use of aversive interventions.[425] This determination was incorrect.

In *Rowley*, the Court discussed at some length the statutory procedural safeguards and, specifically, the rights and protections afforded to parents and guardians.[426] The Court reasoned that Congress had a specific intent when it included "elaborate and highly specific procedural safeguards"[427] in conjunction with other "general and somewhat imprecise substantive"[428] concepts such as the FAPE requirement. The Court determined that Congress had intended to "place[] every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard."[429]

The Court also clarified the appropriate role of the judiciary in reviewing educators' judgments about educational policy and teaching methods, noting that the statute granted state and local education agencies the "primary responsibility . . . for choosing the educational method most suitable to the child's needs."[430] The Court then stated that the judiciary lacks "'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'"[431] The Court stated that the judiciary must determine only whether the requirements of

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[425] *Bryant*, 692 F.3d at 215.

[426] Bd. of Educ.of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 204–07 (1982).

[427] *Id.* at 205.

[428] *Id.*

[429] *Id.* at 205–06.

[430] *Id.* at 207.

[431] *Id.* at 208 (quoting San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973)).

the Act have been met and to otherwise leave "questions of methodology" to be resolved by state educators.[432]

In articulating its view of the appropriate balance between judicial review and deference to educators, however, the Court expressly considered that the disputed methodology choice would have been the subject of an administrative due process proceeding under the statute. In particular, the Court stated:

> The Act expressly charges States with the responsibility [of] . . . 'adopting, where appropriate, promising educational practices and materials.' §1413(a)(3). In the face of such a clear statutory directive, it seems highly unlikely that Congress intended courts to overturn a State's choice of appropriate educational theories in a proceeding conducted pursuant to §1415(e)(2).[433]

Indeed, the Court reiterated that any deference is dependent upon a process that ensures parental involvement on an individual basis, including the rights of parents to initiate due process

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[432] *Id.* at 208.

[433] *Id.* at 207–08. IDEA no longer contains the language quoted by the *Rowley* court in 1983. *See* 20 U.S.C. § 1413(a)(3) (2012). However, IDEA does require the state to establish qualifications to ensure that school personnel have the appropriate training and skill. *See id.* § 1412(a)(14) ("The State educational agency has established and maintains qualifications to ensure that personnel necessary to carry out this subchapter are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities."). IDEA also allows the States to apply for funds that will assist the States in their personnel training and professional development initiatives. 20 U.S.C. § 1451(c)–(d) (2012). IDEA reserves to the federal government the responsibility to award grants that explore curricula design, instructional strategies and scientific findings, with the goal of improving services to children with disabilities. *See generally id.* § 1463 (2012) (listing "required activities" and "authorized activities").

proceedings in order to contest the proposed educational plan for the child. The Court stated that "[e]ntrusting a child's education to state and local agencies does not leave the child without protection"[434] because the Act's provisions "protect individual children by providing for parental involvement" both in the development of state plans and policy and "in the formulation of the child's individual educational program."[435] Throughout the opinion, the Court emphasized the substantial procedural rights given to parents, which allows parents both to participate in the drafting of a child's educational plan and to challenge the adequacy of any such plan.[436]

The Court thus clearly contemplated that the judiciary would accord the appropriate level of deference to methodology choices made by educators only after (a) an educational method had been selected for a single child whose parents were included in the process of formulating an IEP; and (b) the choice of educational method could have been subject to further review in an administrative proceeding. Nothing in the *Rowley* opinion suggests that the judiciary was required to defer to methodology choices made via a state agency rule-making process, a process that contains none of the procedural safeguards of the kind set forth in the Act.[437]

In the thirty years since *Rowley* was decided, the lower federal courts have applied this

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[434] Bd. of Educ.of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 208 (1982).

[435] *Id.*

[436] *Id.* at 205.

[437] Deference is inappropriate when the statutory language makes Congress's intentions clear. Roncker *ex. rel.* Roncker v. Walter, 700 F.2d 1058, 1062 (2d Cir. 1983) (courts need not defer on the issue of least restrictive environment given explicit statutory provision). Since Congress explicitly authorized consideration of strategies other than positive behavioral interventions, deference is not appropriate.

deferential review in cases involving disputes between educators and the parents of particular children.[438] The Second Circuit, for example, has cited *Rowley* repeatedly for the proposition that administrative hearing officers have primary responsibility for determining whether a proposed IEP provides a child with a FAPE.[439] While the rulings at the administrative level are subject to an "'independent' judicial review,"[440] the federal courts are expected to give due weight to the administrative proceedings. Such deference is "particularly appropriate when the state [hearing] officer's review 'has been thorough and careful.'"[441]

Other federal courts emphasize that deference is the result of educators' responsibility to "choos[e] the educational method most suitable to the child's needs."[442] While the courts do caution that the judiciary "'must be careful to avoid imposing [the court's] view of preferable education methods upon the State,'"[443] this level of deference presumes that school officials will

[438] *See, e.g.*, R.E. v. N.Y. City Dep't. of Ed., 694 F.3d 167, 184 (2d Cir. 2012).

[439] *R.E.*, 694 F.3d at 187; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 (2d Cir. 1998).

[440] *Walczak*, 142 F.3d at 129 (citing *Rowley*, 458 U.S. at 205).

[441] *R.E.*, 694 F.3d at 184 (quoting *Walczak*, 142 F.3d at 129).

[442] Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 270 (1st Cir. 2010); *see also* D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 564 (3d Cir. 2010); Ellenberg v. N.M. Military Inst., 478 F.3d 1262, 1278 (10th Cir. 2007); T.F. v. Special Sch. Dist. of St. Louis Cnty., 449 F.3d 816, 818 (8th Cir. 2006); Cnty. Sch. Bd. of Henrico Cnty., Virginia v. Z.P. *ex rel.* R.P., 399 F.3d 298, 307 (4th Cir. 2005; N.L. *ex rel.* Ms. C. v. Knox Cnty. Sch., 315 F.3d 688, 692 (6th Cir. 2003); Beth B. v. Van Clay, 282 F.3d 493, 499 (7th Cir. 2002); Walker Cnty. Sch. Dist. v. Bennett *ex rel.* Bennett, 203 F.3d 1293, 1297 (11th Cir. 2000); Spiegler v. Dist. of Columbia, 866 F.2d 461, 465 (D.C. Cir. 1989).

[443] K.S. v. Fremont Unified Sch. Dist., 426 F. App'x. 536, 538 (9th Cir. 2011) quoting (*Rowley*, 458 U.S. at 207).

"tailor an educational program to the needs of the child."[444]

However, before the *Bryant* decision, no court had extended the concept of deference to the circumstances where a state educational agency made methodology choices through administrative rulemaking rather than an individual decision made when drafting an IEP for a particular child. The reason is clear: the process by which a member of the public can influence or object to proposed agency rule-making involves participation rights that are substantially different and more curtailed than the rights of a parent to challenge the adequacy of a child's proposed IEP in an administrative proceeding.[445] The right, for example, to "comment on"[446] proposed agency rules is wholly unlike a parent's right to have an impartial hearing before a single judicial officer in which the parent can be represented by an attorney, present the testimony of an expert witness, compel the attendance of other witnesses, cross-examine witnesses, present other evidence, obtain a transcript of the full hearing at no expense, receive a

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[444] *Id.*

[445] *See, e.g.*, N.Y. A.P.A. LAW §202 (2014) (discussing the State's Administrative Procedure Act and the process for rulemaking); *see* William H. Manz, *Researching New York State Administrative Rules and Regulations*, 79 N.Y. ST. BAR J. 40 (May 2007) (providing a detailed discussion of the administrative rulemaking process in New York); *see also* CHARLES H. KOCH & RICHARD MURPHY, ADMINISTRATIVE LAW AND PRACTICE §§ 4.32, 4.33 (West 2014) (identifying the public's rights to receive "notice" and to "comment on" proposed agency rules as the common forms of public participation in the agency rule-making process).

[446] KOCH & MURPHY, *supra* note 445, at §§4.32, 4.33 (identifying the public's rights to receive "notice" and to "comment on" proposed agency rules as the common forms of public participation in the agency rule-making process).

written opinion, and have the right to appeal.[447]

Indeed, when a parent seeks to challenge the authority of an SEA to promulgate regulations in the field of education, the parent is not required to exhaust the administrative remedies available under IDEA simply because the nature of the parent's challenge is the agency's implementation of a statewide "policy, not whether a particular IEP is appropriate for a particular student."[448] Similarly, the New York regulations at issue in the *Bryant* litigation constituted a "general prohibition" and a "statewide determination made as a matter of educational policy,"[449] rather than a choice of educational method that was made with regard to any particular child.

Thus, the Second Circuit simply misapplied *Rowley*, where the Court expressly considered that the rights of parents to participate in educational decision-making and to challenge unsatisfactory choices via the administrative due process procedures were important components. In the absence of those protections available to contest a methodology choice, no deference is warranted.

C. The Second Circuit Misunderstood the Science of ABA

Finally, the Second Circuit's reasoning in *Bryant* reflects a misunderstanding of the science of applied behavior analysis and the use of behavioral interventions. In ruling that the New York regulations did not violate the provisions of IDEA, the Second Circuit characterized

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[447] 20 U.S.C. §1415(h) (2012).

[448] *Kalliope*, 827 F. Supp. 2d at 139 (exhaustion was not required to challenge NYSED regulations setting particular student-teacher class size ratio).

[449] Brief in Opposition to Petition for Writ of Certiorari, *supra* note 289, at *3, *13.

New York's policy as approving the use of "positive-only" behavioral interventions.[450] The Court determined that a ban on non-positive behavioral interventions was acceptable, describing the ban as foreclosing just a "single method of treatment" that is available among many "other options."[451] By describing a positive-only intervention policy prohibiting just one treatment option, the Court misapplied or misunderstood at least two important ABA concepts.

First, the Second Circuit apparently did not understand the concept of the least restrictive or least intrusive alternative.[452] When seeking to change behavior of a specific child, the behavior analyst is to determine which form of intervention will be the least intrusive intervention that can effectively treat the behavior.[453] Consequences-based interventions using reinforcement are considered less intrusive than consequences-based interventions that use punishment techniques and, for that reason, the behavior analyst adhering to professional standards will implement a punishment-based intervention only after less intrusive, reinforcement-based interventions have failed to produce good results.[454] The Second Circuit's characterization of non-positive interventions as one method among many appears to reflect a belief that the interventions are always equally applicable and interchangeable, when that is not the case.

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[450] Bryant v. N.Y. State Educ. Dep't, 692 F.3d 202, 215 (2d Cir. 2012).

[451] *Id.* at 213.

[452] *Supra* Part I.

[453] *Supra* Part I.

[454] Of course antecedent-based interventions are available as well but, according to the principles of the least intrusive intervention, they would be implemented well before any punishment-based interventions. *Supra* Part I.A.

The Second Circuit's position that a state can ban the category of "non-positive"[455] interventions because it is just a single method of treatment among many treatment options seems particularly nonsensical when one considers the specific history of the children who were the subject of the *Bryant* litigation. Those children had significant histories of multiple interventions that had been implemented across many different settings for years, yet their severe problem behavior persisted.[456] In essence, the Second Circuit recommended that the children continue to receive the "positive-only"[457] interventions that had been proven to be ineffective in the past.

The Second Circuit's decision also is troubling because it does not allow the behavior analyst to develop a BIP that includes components of both reinforcement-based and punishment-based interventions. The scientific research repeatedly demonstrates that better outcomes are achieved when positive reinforcement and punishment interventions are paired together.[458] If all non-positive interventions are prohibited, the behavior analyst cannot design a BIP that includes elements of both reinforcement and punishment interventions, even if the behavior analyst might determine that, under ABA principles, a multi-component approach would be most effective to treat problem behavior.

In dissenting from the majority opinion in *Bryant*, Judge Sullivan recognized that the Court lacked sufficient information about the science. Judge Sullivan clearly articulated his concern that the Court had made a judgment on the science without a complete record or in-

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[455] *Bryant*, 692 F.3d at 213.

[456] *Id.* at 208.

[457] *Id.* at 215.

[458] *Supra* Part II.B.

depth understanding of the science of behavioral interventions.[459] His concern was well founded. The most troubling aspects of the *Bryant* decision are the Court's apparent endorsement of a positive-only intervention policy as being both acceptable under scientific standards and in compliance with IDEA. In this manner, the Second Circuit truly placed at risk the fundamental tenet of IDEA—the right of each child to an individualized program designed to meet the child's unique needs.[460]

VII. PROPOSALS TO IMPROVE IDEA'S LANGUAGE REGARDING BEHAVIORAL INTERVENTIONS

This debate about the appropriateness of certain behavioral interventions to address problem behavior of disabled children is ongoing. The recent attempts to pass federal legislation that would regulate the use of seclusion, restraint, and "aversive behavioral interventions" is a strong indicator that this topic will be a key issue when Congress next amends and reauthorizes IDEA.[461] Indeed, advocacy groups for both educators and the disabled have highlighted this issue in position papers and statements regarding upcoming issues for IDEA reauthorization.[462]

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[459] *Bryant*, 692 F.3d at 221.

[460] *Id.* at 207–08.

[461] *Supra* Part III.D.

[462] *See* Nat'l Sch. Bds. Ass'n Office of Advocacy *Individuals with Disabilities Education Act (IDEA): Early Preparation for Reauthorization*, NSBA.ORG (Jan. 2013) http://www.nsba.org/sites/default/files/reports/Issue%20Brief-Individuals%20with%20Disabilities%20Education%20Act.pdf (noting the efforts to introduce legislation in Congress that would address the use of behavioral interventions along with restraint and seclusion); *See also Advocacy & Issues*, TASH.ORG http://tash.org/advocacy-issues/coalitions-partnerships/aprais/ (last visited Aug. 31, 2014) (defining the mission of APRAIS as, among other things, "to seek the elimination

Thus, this Section sets forth several steps Congress can take when it amends and reauthorizes IDEA.

A. An FBA and BIP Should Be Required Whenever Behavior Impedes Learning

The current structure of IDEA requires that an FBA be conducted and a BIP be implemented only when the child's behavior has been the subject of disciplinary proceedings under 20 U.S.C. Section 1415(k).[463] Section 1414(d)(3)(B)(i), which requires the child's IEP team to consider behavioral interventions whenever the child's behavior impedes learning, is conspicuously devoid of any reference to an FBA or BIP.[464] Congress should amend Section 1414(d)(3)(B)(i) to require that an FBA be conducted and a BIP be implemented whenever a child's IEP team determines that the child exhibits behavior that impedes learning, even if that behavior has not been the subject of disciplinary proceedings.

This addition to Section 1414(d)(3)(B)(i) is necessary for several reasons. First, among behavior analysts, it is considered standard practice to conduct an FBA whenever a child exhibits problem behavior.[465] By requiring an FBA and BIP in Section 1414(d)(3)(b)(i), Congress will ensure that each student's programming conforms to professional practices. In addition, if IDEA requires that all behavioral interventions be written in a BIP, school staff cannot unilaterally

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of the use of aversive interventions"); Jessica Butler, *How Safe is the Schoolhouse? An Analysis of State Seclusion and Restraint Laws and Policies*, AUTISM NAT'L COMM. (Jan. 2014) http://www.autcom.org/pdf/HowSafeSchoolhouse.pdf ("Abusive interventions are neither educational nor effective; they are dangerous and unjust.").

[463] CRIMMINS, *supra* note 32, at 6; *Supra*, Part II(C).

[464] 20 U.S.C. §1414(d)(3)(B)(i).

[465] CRIMMINS, *supra* note 32, at 6.

implement some inappropriate procedure in the classroom and later claim that the procedure was a form of behavioral intervention.[466] Congress will protect children against such unauthorized and inappropriate conduct by amending IDEA to require that all behavioral interventions be contained in a written BIP.

More importantly, however, early assessment in the form of an FBA and early intervention in the form of a BIP may help to reduce or eliminate problem behavior before it becomes a discipline issue. Currently IDEA's disciplinary provisions only apply when the school seeks to suspend or expel the student or move the student to a different educational setting.[467] It seems nonsensical that the statute would not require an FBA and BIP until a student's behavior has escalated to a point where suspension or expulsion is a possibility. Rather, an FBA should be conducted and, if appropriate, a BIP implemented, whenever the child's IEP team determines that the child exhibits behavior that impedes learning.[468] By including the requirement for an FBA and BIP in the statutory provisions that address the various factors that a child's IEP team must consider as part of the development of the child's IEP, the statute will ensure that problem behavior is addressed at a much earlier stage.

B. The Phrase "Positive Behavioral Interventions and Supports" Should Be Deleted from Section 1414(d)(3)(B)(i)

The meaning and emphasis of PBS has changed dramatically since the term "positive

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[466] *See, e.g.*, Osceola Cty. Sch. Bd. v. Gomez, Case No. 12-0544TTS, 2012 WL 3611805 (Fla. Div. Adm. Hrgs., Aug. 12, 2012) (teacher claimed that her action in soaking crayons in hot sauce was attempt to modify the behavior of an autistic, non-verbal student who ate crayons).

[467] 20 U.S.C. § 1415(k) (2012).

[468] *Id.* § 1414(d)(3)(B)(i).

behavioral interventions and supports" first appeared in IDEA in 1997.[469] As prominently noted on OSEP's pbis.org website, PBS is not a process to devise an appropriate BIP for a particular child; it is a framework for designing school environments to reduce problem behavior across the entire student body.[470] The reference to PBS, however, appears in the provision of IDEA that addresses the process by which a specific child's IEP team develops an IEP for that particular child.[471] It simply makes no sense that a child's IEP team must contemplate the development of a school-wide framework, or the institution of school-wide disciplinary policies or procedures, during the process of developing an IEP for a specific child. For this reason, the phrases should be stricken from Section 1414(d)(3)(B)(i).

If Congress wishes to endorse the PBS framework as a means to improve the school environment for all children and reduce disciplinary issues on a school-wide basis, it certainly can express that position in some statutory provision other than Section 1414(d)(3)(B)(i). PBS strategies, such as instituting discipline policies, safe schools initiatives, social skills training, and anti-bullying and anti-harassment efforts, are all important strategies to improve the school environment and reduce behavior issues among all students in the community.[472] Thus, the suggestion to delete the language from Section 1414(d)(3)(B)(i) should not be construed as a suggestion to abandon the PBS framework. The endorsement of PBS simply belongs elsewhere.

Currently, however, the phrase "positive behavioral interventions and supports" as

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[469] *Id.*

[470] *See SWPBIS for Beginners*, PBIS.ORG, www.pbis.org/school/swpbis-for-beginners (last visited Aug. 31, 2014) (discussing the framework of School-wide Positive Behavior Support).

[471] 20 U.S.C. §1414(d)(3)(B)(i).

[472] *Supra* Part II(D).

contained in Section 1414(d)(3)(B)(i) causes confusion. Some states have issued poorly worded statutes or regulations with the mistaken belief that IDEA prohibits any interventions that would be perceived as "negative" by the child.[473] A prime example is Pennsylvania's definition of "aversive techniques" as "[d]eliberate activities designed to establish a negative association with a specific behavior."[474] Under this definition, no child can lose a privilege as a result of engaging in problem behavior since the loss of privilege is designed to cause that "negative association"[475] to occur.

While the Pennsylvania regulations do include examples of prohibited techniques with which no one would quibble (e.g., "[t]reatment of a demeaning nature"),[476] it is quite a logical leap to say that no BIP should ever include an intervention that would cause the child to establish a negative association with a specific behavior. There are a myriad of effective punishment-based interventions that are neither demeaning nor physically painful that would cause a child to establish a negative association with a specific behavior and thereby reduce the frequency of that behavior.[477] IDEA should allow the use of appropriate behavioral interventions that would cause a child to make that negative association with the behavior, thereby hopefully reducing the frequency with which the behavior would occur in the future.

Other state statutes and regulations suffer from similar defects in terms of language used

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[473] *See supra* Part III (outlining the federal statute and legislative history).

[474] 22 PA. CODE §§ 14.133(b), 711.46(b).

[475] *Id.* § 14.133

[476] *Id.*

[477] *See supra* Part I.F. (discussing punishment based interventions like a verbal reprimand or overcorrection).

to describe "aversive interventions." Nevada's statutes require that students have a "positive behavior plan" and "positive behavioral supports."[478] Neither Nevada's statutes nor its regulations define the term "positive behavior plan," although the Nevada Administrative Code does define the term "positive behavioral supports" as a process to "promot[e] positive changes in behavior" without using "negative or aversive means."[479] These provisions, like Pennsylvania's, also seem to reach too far in prohibiting the use of any intervention that the child would perceive to be negative.

Banning interventions that cause "discomfort" to the child also may be too vague.[480] The subjective nature of measuring "discomfort" is a poor standard by which to determine whether an intervention is appropriate. Take, for example, a child who engages in hand mouthing. One possible positive punishment intervention to reduce the behavior of hand mouthing may be to require the child to wash his or her hands under cold tap water for a specified length of time after every instance of hand mouthing. The cold water or prescribed length of time that the child is required to wash hands might cause some discomfort, yet such an intervention to treat that problem behavior, which causes no pain or physical harm, should be eminently acceptable. Effective behavioral interventions that might expose the child to "immediate temporary discomfort"[481] that falls far short of any inhumane, painful, or degrading treatment should not be prohibited.

With many of these state statutes and regulations, the difficulty lies in using subjective

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[478] NEV. REV. STAT. ANN. § 388.5275 (2013)

[479] Nev. Admin. Code 388.077 (2013)

[480] *See, e.g.*, 5–42 Wyo. Code. R. §6(j)(i) (2013).

[481] Van Houten, *supra* note 55, at 383.

terms like "positive" and "aversive" to describe behavioral interventions. To eliminate this problem, Congress should simply remove the phrase "positive behavioral interventions and supports" from Section 1414(d)(3)(B)(i).

C. The United States Department of Education Should Promulgate Regulations That Define Prohibited Practices

Although Congress should remove the phrase "positive behavioral interventions and supports" from Section 1414(d)(B)(3)(i), in amending IDEA, Congress also should authorize the Department of Education to promulgate regulations that will define certain prohibited practices. Prohibited practices might include, for example, corporal punishment (e.g., hitting, slapping, pinching, hair-pulling, extreme physical exercise); treatment of a demeaning nature; withholding meals, water, sleep, clothing, shelter, or access to bathroom facilities; intentionally altering food to make it distasteful or inedible; verbal abuse, humiliation or ridicule; or deprivation of medication, among others.[482]

In issuing such regulations, the Department of Education should clearly note that these prohibited practices are not considered "interventions" or even "aversive interventions." It is important to remove the label of "intervention" from these practices in order to make clear that such practices do not conform to the professional and ethical standards and cannot be justified on the grounds that they embody some approved ABA techniques.

D. The United States Department of Education Should Provide Guidance About Behavioral Intervention Practices

In addition to issuing regulations that would identify prohibited practices, the U.S. Department of Education also should issue guidelines for implementing behavioral interventions.

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[482] *See, e.g.*, Turnbull, *supra* note 37, at 480–81 (listing suggested prohibited practices).

The Utah State Office of Education has created a comprehensive document that could serve as a good template.[483]

The Utah guidelines begin by describing the manner in which PBS principles can be implemented to set clear expectations for student behavior throughout the entire school community.[484] The guidelines stress that, when PBS strategies are implemented, the frequency of discipline and behavior issues across the school population can be greatly reduced.[485]

Yet the Utah guidelines also provide great detail about the process of conducting an FBA and implementing a BIP to address the target behavior of a specific child.[486] The Utah guidelines incorporate the principle of least restrictive interventions, stating that interventions should be chosen on the continuum so that the first interventions selected are the least intrusive.[487] The guidelines also provide recommended practices for implementing and monitoring the use of "highly intrusive interventions," including operationally defining the target behavior and an appropriate replacement behavior, collecting baseline data before implementing the interventions, training staff in the use of the intervention, collecting data, and re-evaluating if the

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[483] Utah State Office of Education, *LRBI Guidelines: Positive Behavioral Supports and Selection of Least Restrictive Behavioral Interventions*, SCHOOLS.UTAH.GOV, http://www.schools.utah.gov/sars/DOCS/resources/lrbi07-09.aspx (last visited Aug. 31, 2014) [hereinafter "Utah Guidelines"].

[484] *Id.* at 6–13.

[485] *Id.*at 6 ("The integration of early intervention reading skills and positive behavior intervention and supports programming resulted in reduced behavioral difficulties").

[486] *Id.* at 20–22.

[487] *Id.* at 22.

intervention fails to reduce the frequency of the behavior.[488]

Perhaps the most valuable information contained in the Utah guidelines is a section that uses the PBIS website pyramid to rank behavioral interventions into each of the three categories: primary, secondary, and tertiary prevention.[489] At each level, the guidelines specifically identify the pertinent behavioral interventions and, for each intervention, the guidelines describe how the intervention can be implemented, any special considerations in implementing the intervention (including any potential side effects or "downsides"), information about data collection, and outside resources and references that will provide additional information about each intervention.[490]

Included with the recommended interventions at both the secondary and tertiary levels are punishment-based interventions such as the use of verbal reprimands, time-out, and overcorrection.[491] Included within the level of tertiary prevention are interventions such as the use of intrusive substances and stimuli like water mist, taste aversion, "forceful physical guidance," mechanical restraint, inhibiting devices (e.g., a helmet).[492] The guidelines provide that for each of these interventions parental consent should be obtained and a behavioral expert should be included on the child's IEP team.[493]

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[488] *Id.* at 28–29.

[489] *Id.* at 31–32 (referring to the categories as "all" "some" and "few").

[490] *Id.* at 31–53 (primary level interventions), 54–69 (secondary level interventions), 70–82 (tertiary level interventions).

[491] *Id.* at 55.

[492] *Id.* at 71.

[493] *Id.*

If the United States Department of Education chooses to create guidelines similar to the Utah guidelines, there will be some difficult decisions to make. While some punishment-based interventions, such as the use of time-out (from reinforcement), overcorrection, response cost or response blocking may not be controversial, other punishment-based interventions, particularly the use of water mists, aromatic sprays, and contingent electric shock, will be controversial.[494] Resolution of the propriety of using highly intrusive interventions to address severe self-injurious and aggressive behavior will require extensive input from behavior analysts, educators, and parents, among others. The issue will require a thoughtful, extensive discussion that fully explores the moral, legal, and ethical considerations in order to arrive at some consensus as to procedures, if any, for the use of highly intrusive interventions. This Article does not make any specific recommendations in that regard, but offers the following thought.

It is a sobering truth that some children exhibit severe behavior that endangers their lives and isolates them from their family, even as family members miss their children terribly and mourn their children's inability to live freely in their communities. While some of the proposed interventions are difficult to contemplate, they can be effective to reduce severe self-injurious and aggressive behavior. It is for this reason that some behavior analysts consider contingent electric shock to be a permitted intervention in appropriate circumstances.[495] Whatever the outcome of the discussion, all participants should put the rhetoric aside and presume that every other participant in the discussion seeks only to find the best solution for difficult and intractable

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[494] *Id.*

[495] *See* Brown, *supra* note 139, at 217 (26.9% of ABA experts would recommend contingent electric shock); COOPER, *supra* note 21, at 334–50 (discussing contingent electric stimulation); Michaels, *supra* note 139, at 98 (9.7% of PBS experts would recommend contingent electric shock).

problems.

VIII. CONCLUSION

Treating severe behavior in disabled children is a complex task. In addressing such behavior, educators should not be constrained to select only those interventions subjectively viewed as "positive." If a particular intervention will effectively reduce the problem behavior and does not involve inhumane or undignified treatment, then the intervention should be implemented even if it involves a punishment-based consequence.

The Second Circuit's decision in *Bryant*, by erroneously interpreting IDEA to allow a state to implement a positive-only intervention scheme, only serves to complicate the process by which interventions may be deemed appropriate for any particular child's behavior. When Congress next amends and reauthorizes IDEA, it should clarify the particular statutory provisions so that children with severe behavior have access to the appropriate interventions that they need.