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THE ROAD TO PRISON IS PAVED WITH BAD EVALUATIONS: THE CASE FOR FUNCTIONAL BEHAVIORAL ASSESSMENTS AND BEHAVIOR INTERVENTION PLANS

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In 1997, Congress amended the Individuals with Disabilities Education Act ("IDEA") to include provisions meant to assist school districts in educating students with behavioral needs. These amendments required schools to use functional behavioral assessments ("FBA") and behavior intervention plans ("BIP") under certain circumstances. Congress did not, however, include a definition of or substantive requirements for either system of behavior management. As a result, although BIPs and FBAs are now federally mandated requirements, and it is clear that disregarding behavioral issues is a denial of a free appropriate public education ("FAPE"), the IDEA's adjudicative standard, there is no clear consensus as to whether a student with behavioral needs must have an FBA or a BIP or what either must include. The IDEA's lack of guidance has resulted in inconsistent and often contradictory court rulings, and the lack of specific definitions and procedures has allowed schools to develop purportedly legal but substantively deficient behavior evaluations and intervention plans for special needs students.

Despite this confusion, some courts have properly looked to the administrative record for guidance on the substantive elements of FBAs and BIPs. Deference to hearing officers, along with other provisions within the IDEA, such as Child Find and inclusion obligations, may assist courts in

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determining whether a school's failure to use an FBA and a BIP for a student with behavioral needs falls short of Board of Education v. Rowley*'s requirements for FAPE. FBAs and BIPs aim to prevent and correct student misconduct before it escalates and results in drastic disciplinary action. Given the impact punitive school discipline policies have had on students with special needs, the added procedural safeguards these proactive behavior management schemes could provide are imperative to dismantling the school-to-prison pipeline.*

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Everybody is a genius.
But if you judge a fish by its ability to climb a tree,
it will live its whole life believing that it is stupid.
– Albert Einstein[1]

INTRODUCTION

Since the 1970s, the United States has placed increasing emphasis on the importance of educating all children, regardless of their disabilities.[2] This interest fueled Congress's passage of the Education for All Handicapped Children Act of 1975[3] ("EAHCA") and its successor, the Individuals with Disabilities Education Act[4] ("IDEA" or "Act"). The modern IDEA requires that every "child with a disability"[5] receive a "free appropriate public education"[6] ("FAPE"). Despite these developments, many children with disabilities continue to fall through the cracks, and many are ultimately funneled into the

1. Valerie Strauss, *'Let's Stop Measuring Fish by How Well They Climb Trees'*, WASH. POST (May 24, 2014) (quoting Albert Einstein), https://www.washingtonpost.com/news/answer-sheet/wp/2014/05/24/lets-stop-measuring-fish-by-how-well-they-climb-trees.

2. 20 U.S.C. § 1400(c)(2) (2012) (stating that millions of children with disabilities were not receiving proper education before the enactment of the Education for All Handicapped Children Act of 1975). Educators, scholars, and the U.S. government use the terms disability, special needs, special education, behavioral needs, and behavioral disorders interchangeably. This Comment does the same.

3. Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400–45) (increasing access to education for students with disabilities, but containing fewer guidelines and standards than its current iteration, the IDEA).

4. 20 U.S.C. §§ 1400–82 (2012). Congress passed the Individuals with Disabilities Education Act's ("IDEA") predecessor, the Education for All Handicapped Children Act ("EAHCA"), in 1975. Pub. L. No. 94-142, 89 Stat. 773 (1975). Prior to that, Congress passed section 504 of the Rehabilitation Act in 1973 and Amendments to the Education of the Handicapped Act in 1974. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified at 29 U.S.C. § 794 (1988)); Education Amendments of 1974, Pub. L. No. 93-380, §§ 612–15, 88 Stat. 484, 579–83. These acts set the stage for the EAHCA in 1975. *See* Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. DAVIS L. REV. 349, 358–59 (1990) (chronicling earlier legislation that paved the way for the current protections for disabled students).

5. 20 U.S.C. § 1401(3)(A).

6. § 1401(9). Free appropriate public education ("FAPE"), as defined in the IDEA, includes "special education and related services that[:] (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title." *Id.*

juvenile justice system.[7] One solution to this issue may be found within the current IDEA; the most recent version of the Act includes methods to better support students with behavioral needs: functional behavioral assessments[8] ("FBAs") and behavior intervention plans[9] ("BIPs"). While some jurisdictions have interpreted these provisions as requiring specific procedures, the lack of which constitutes an IDEA violation,[10] others have read them as merely aspirational, granting schools wide deference in implementing BIPs with seemingly meaningless goals.[11] These unclear standards and contradictory court rulings have led to disparate results for disabled students.[12]

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7. *See, e.g.*, AMERICAN CIVIL LIBERTIES UNION, LOCATING THE SCHOOL-TO-PRISON PIPELINE (2008) [hereinafter ACLU, LOCATING THE SCHOOL-TO-PRISON PIPELINE], https://www.aclu.org/files/images/asset_upload_file966_35553.pdf (arguing that schools lacking adequate resources summarily suspend and expel students, pushing them into the juvenile justice system—a problem that significantly affects special-needs children).

8. § 1415(k)(D) (providing for functional behavioral assessments ("FBAs") for children with disabilities without defining such assessments); *see also* Erika Blood & Richard S. Neel, *From FBA to Implementation: A Look At What Is Actually Being Delivered*, 30 EDUC. & TREATMENT OF CHILD. 67, 68 (2007) (citing George Sugai et al., *Applying Positive Behavior Support and Functional Behavioral Assessment in Schools*, 2 J. POSITIVE BEHAV. INTERVENTIONS 131, 137 (2000)) (explaining that an FBA is an effective method of providing a targeted intervention based on a student's particular problem behavior and the context of that behavior).

9. § 1415(k)(F) (providing for behavioral intervention plans ("BIPs") but providing no definition); *see Behavior Intervention Plan*, PUB. SCHOOLS N.C., STATE BOARD OF EDUC., http://ec.ncpublicschools.gov/instructional-resources/behavior-support/resources/behavior-intervention-plan (last visited Dec. 1, 2015) (explaining that North Carolina Public Schools define the BIP as "a plan to support the student in order to help him or her change behavior. Effective support plans consist of multiple interventions or support strategies and are not punishment. Positive behavioral intervention plans increase the acquisition and use of new alternative skills, decrease the problem behavior and facilitate general improvements in the quality of life of the individual, his or her family, and members of the support team"); *infra* notes 31–34 and accompanying text (explaining the commonly accepted definitions of BIPs and FBAs).

10. *See, e.g.*, C.F. *ex rel.* R.F. v. N.Y.C. Dep't of Educ., 746 F.3d 68, 80 (2d Cir. 2014); Long v. District of Columbia, 780 F. Supp. 2d 49, 60–61 (D.D.C. 2011); Harris v. District of Columbia, 561 F. Supp. 2d 63, 69 (D.D.C. 2008).

11. *See, e.g.*, M.W. *ex rel.* S.W. v. N.Y.C. Dep't of Educ., 725 F.3d 131, 140 (2d Cir. 2013); Park Hill Sch. Dist. v. Dass, 655 F.3d 762, 766 (8th Cir. 2011); Alex R. *ex rel.* Beth R. v. Forrestville Valley Cmty. Unit Sch. Dist., 375 F.3d 603, 615 (7th Cir. 2004).

12. *Compare Alex R.*, 375 F.3d at 615, 618 (holding that, despite a student's continued behavioral problems, his BIP was sufficient because the IDEA lacks any substantive criteria relating to BIPs, and the school district took a "measured" approach to creating the plan), *with Harris*, 561 F. Supp. 2d at 6 (finding that the school district's failure to conduct an FBA at the plaintiff's request was a substantive violation as it undermined the IDEA's effectiveness and deprived the plaintiff of FAPE), *and* Sch. Bd. v. Brown, 769 F. Supp. 2d 928, 947 (E.D. Va. 2010) (ruling that a procedural violation

This Comment will argue that when a school does not conduct an FBA and implement a BIP for a student with behavioral needs, the school has denied that student FAPE. A failure to utilize both systems of behavior modification for a student with behavioral needs violates the procedural requirements of the IDEA and results in the child's loss of an educational benefit.

Congress's failure to provide clear procedural and substantive standards for FBAs and BIPs has caused confusion in the education realm and among the courts. Notwithstanding the vague requirements Congress created for FBAs and BIPs, other aspects of the IDEA clarify that a school's failure to assess and support special needs children in all areas of their disability using peer-reviewed techniques uniquely designed to meet a child's needs prevents an education plan from being "reasonably calculated"[13] to provide educational benefits. This Comment will argue that Congress should amend the IDEA to incorporate more specific guidance on when FBAs and BIPs are required and what elements they must contain. By amending the IDEA to include substantive requirements for FBAs and BIPs, Congress will create clearer standards for schools and, ultimately, better results for children.

This Comment proceeds in three Parts. Part I will provide a brief overview of the IDEA's history, the social strains that led to the inclusion of FBAs and BIPs in the 1997 IDEA, and the divergent methods courts have used in deciding whether a school's failure to implement either behavior modification strategy is a denial of FAPE. This Part will also detail the U.S. Supreme Court's understanding of FAPE and the ways in which the lower courts have applied this standard to FBAs and BIPs. Part II argues that looking collectively to the Court's holding in *Board of Education v. Rowley*,[14] which established the adjudicative standard for FAPE, Congress's intent in passing the IDEA, and the Act's plain language, shows that students are entitled to FBAs and BIPs not only when they incur a change in placement, but also when behavioral issues impede their access to education. This Part will consider the substantive requirements for behavior reform strategies by looking to the standards in the IDEA for FBAs and BIPs, as discussed in Part I. This Comment concludes by recommending that Congress amend the IDEA to clarify when students

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preventing meaningful access to education deprives a disabled child of FAPE).

13. Bd. of Educ. v. Rowley, 458 U.S. 176, 206–07 (1982).

14. 458 U.S. 176, 203–04 (1982).

are entitled to FBAs and BIPs and to include specific substantive standards for these behavior strategies when they are required.

I. ON THE PATH TO EQUITY: HOW THE IDEA HAS HELPED STUDENTS WITH DISABILITIES AND THE LONG JOURNEY AHEAD

Since Congress's initial passage of the IDEA in 1974, the United States has made strides in including students with disabilities in mainstream society.[15] Inclusion in general education classrooms, however, continues to be a struggle for students with behavioral needs. These students are suspended and expelled at a much higher rate than their general education-track peers, which often leads to incarceration.[16] These outcomes substantially limit the IDEA's goals of inclusion and self-sufficiency.[17]

Congress has amended and reauthorized the IDEA many times, codifying greater procedural safeguards for students and their parents.[18] The most recent authorization of the IDEA, passed in 2004, includes many of the 1997 Act's provisions geared toward supporting students with behavioral needs and addressing the

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15. 20 U.S.C. § 1400(c)(3) (2012) (finding that "[s]ince the enactment and implementation of the Education for All Handicapped Children Act of 1975, this chapter has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities").

16. AMERICAN CIVIL LIBERTIES UNION, TALKING POINTS: THE SCHOOL-TO-PRISON PIPELINE [hereinafter ACLU, TALKING POINTS], https://www.aclu.org/files/assets/stpp_talkingpoints.pdf (explaining that children with special learning or behavioral needs are more likely to be forced from regular school programs and into the criminal justice system); *see also* ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 16 (2005) [hereinafter EDUCATION ON LOCKDOWN], http://www.ywcamadison.org/atf/cf/%7B2487BD0F-90C7-49BC-858D-CC50637ECE23%7D/SchooltoPrison_Education_Lockdown_reduced.pdf (arguing that high rates of recidivism among suspended students demonstrate the ineffectiveness of out-of-school and unsupervised suspensions).

17. *See* § 1400(c)(1) (describing the IDEA's aspirational goal of self-sufficiency for special needs students).

18. *See* §§ 1414(d)(1)(B), 1415(b)(1) (providing that a parent has the right to participate in all meetings concerning the child's education, examine the child's school records, and obtain an independent educational evaluation); § 1415(c)(1) (requiring a school to notify a parent whenever the school proposes changes to certain aspects of the child's education); § 1415(f)(1)(A) (stating that a parent may challenge a school's educational decisions regarding the child and require an "impartial due process hearing" conducted by an unbiased hearing officer); § 1415(f)–(g) (allowing an educational rights holder to appeal a hearing officer's decision to the local education agency ("LEA")); § 1415(i)(2) (explaining that, if a party does not have the right to appeal under § 1415(f)–(g), it can bring a civil action in state or federal district court).

precarious subject of school discipline.[19] These provisions, which encourage the use of FBAs and BIPs, have nebulous standards.[20] This uncertainty has led to an inconsistent implementation of FBAs and BIPs in schools and capricious interpretations in the judicial system.[21] Courts have attempted to apply FBAs and BIPs to the standard for FAPE the Supreme Court announced in *Rowley*,[22] but have failed to identify a coherent, uniform standard in the absence of a statutory definition.[23] Despite this confusion, courts have properly looked to the administrative record for guidance on the substantive elements of FBAs and BIPs.[24] Deference to hearing officers, along with other provisions within the IDEA, such as Child Find and inclusion obligations, may assist courts in determining whether a school's failure to utilize an FBA and BIP for a student with behavioral needs falls short of *Rowley*'s standard for FAPE.

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19. *See* ALLAN G. OSBORNE, JR. & CHARLES J. RUSSO, SPECIAL EDUCATION AND THE LAW: A GUIDE FOR PRACTITIONERS 162 (3d ed. 2014) (explaining that after facing "pressure from advocates for both school boards and students with disabilities, Congress added disciplinary provisions to the IDEA in 1997").

20. *See, e.g.*, Susan C. Bon & Allan G. Osborne, Jr., *Does the Failure to Conduct an FBA or Develop a BIP Result in a Denial of a FAPE Under the IDEA?*, 307 EDUC. L. REP. 581, 586–87 (2014) (stating that the IDEA largely provides unclear legal standards for FBAs and BIPs); Mickey L. Losinski et al., *Recent Case Law Regarding Functional Behavioral Assessments: Implications for Practice*, 49 INTERVENTION SCH. & CLINIC 251, 252 (2013) (lamenting the lack of federal regulations and guidance regarding FBAs and BIPs).

21. *See* discussion *infra* notes 155–79 and accompanying text (exploring courts' differing interpretations of the lack of an FBA and BIP).

22. 458 U.S. 176, 203–04 (1982) (holding that a state satisfies FAPE as required by the IDEA when the child receives personalized instruction with support services that allow the child to benefit educationally and the state provides these services at public expense, meet the educational standards set by the state for regular education, and are in accordance with the child's individualized education program ("IEP")).

23. *See* Perry A. Zirkel, *Case Law for Functional Behavior Assessments and Behavior Intervention Plans: An Empirical Analysis*, 35 SEATTLE U. L. REV. 175, 203 (2011) [hereinafter Zirkel, *Empirical Analysis*] (discussing how the lack of definitions in the IDEA for both FBAs and BIPs have left courts to evaluate whether a student has received FAPE based on evidentiary and reasonable benefit standards).

24. *See, e.g.*, S. Kingston Sch. Comm. v. Joanna S. *ex rel.* P.J.S., 773 F.3d 344, 349 (1st Cir. 2014) (explaining that the proper level of district court review "falls somewhere between the highly deferential clear-error standard and the non-deferential de novo standard" (quoting Sebastian M. v. King Philip Reg'l Sch. Dist., 685 F.3d 79, 84 (1st Cir. 2012))).

A. *Students with Disabilities and the School-to-Prison Pipeline: Addressing Student Behavior in the IDEA*

Although the IDEA has been a catalyst for improving the lives of students with disabilities,[25] school policies aimed at maintaining safety have prevented the realization of the IDEA's full potential.[26] In particular, school behavioral policies have disproportionately impacted students with behavioral disorders, resulting in increased suspensions and expulsions for these populations compared to students with different disabilities.[27] The effects these school discipline policies have had on special needs students—what is referred to as the school-to-prison pipeline[28]—contributed to Congress's revision of the IDEA in 1997, which added better supports for students with behavioral needs in an effort to temper the surge of disabled students into the juvenile justice system.[29]

This step toward better social and educational outcomes for students came in the form of two relatively unused systems in the special education field: FBAs and BIPs.[30] Though the IDEA and applicable regulations provide little guidance on what an FBA or BIP

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25. *See* OFFICE OF SPECIAL EDUCATION PROGRAMS, U.S. DEP'T OF EDUC., TWENTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA (2007), http://www.ed.gov/policy/speced/leg/idea/history.pdf (detailing advances in the provision of effective programs and services for early intervention, education in local public schools, and improved rates of graduation and post-graduate employment for special needs children).

26. *See generally* ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW "ZERO TOLERANCE" AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE (2010) [hereinafter TEST, PUNISH, AND PUSH OUT], http://www.advancementproject.org/resources/entry/test-punish-and-push-out-how-zero-tolerance-and-high-stakes-testing-funnel (providing research suggesting that school policies meant to increase safety, such as zero-tolerance policies, fail to create a safer learning environment).

27. Michael P. Krezmien et al., *Suspension, Race, and Disability: Analysis of Statewide Practices and Reporting*, 14 J. EMOTIONAL & BEHAV. DISORDERS 217, 218 (2006); *see* ACLU, TALKING POINTS, *supra* note 16 (explaining that students with disabilities represent 8.6% of the school-age population but "are represented in jail at a rate nearly four times that" (footnote omitted)).

28. *See* ACLU, TALKING POINTS, *supra* note 16 (explaining that the school-to-prison pipeline refers to the "national trend of criminalizing, rather than educating, our nation's children" through the use of zero-tolerance discipline, in-school arrests, and increased suspension and expulsion, which work to deny education to at-risk youth).

29. Antonis Katsiyannis et al., *Reflections on the 25th Anniversary of the Individuals with Disabilities Education Act*, 22 REMEDIAL & SPECIAL EDUC. 324, 331 (2001).

30. *See* J. Ron Nelson et al., *Has Public Policy Exceeded Our Knowledge Base? A Review of the Functional Behavioral Assessment Literature*, 24 BEHAV. DISORDERS 169, 170–71 (1999) (noting that in the past, educators did not evaluate "the internal and external determinants of problem behavior when developing intervention or treatment plans").

is and are silent on what they must contain,[31] educators have established generally accepted definitions for both FBAs and BIPs. FBAs "include[] the full range of procedures used by researchers and other professionals to identify internal and external events related to the occurrence of a target behavior."[32] A BIP, moreover, is "[b]ased on the foundation provided by [an] FBA[] . . . [and] is a concrete plan of action for reducing problem behaviors, dictated by the particular needs of the student exhibiting the behaviors."[33] Indeed, many states have codified requirements of FBAs and BIPs based on these generally accepted definitions to fill the gaps in the federal Act.[34]

Since Congress required FBAs and BIPs, however, the amendment's shortcomings have become apparent: though it created a vague procedural requirement that schools conduct FBAs and implement BIPs, Congress failed to promulgate specific standards for schools to follow, leaving educators and courts to flesh out definitions of FBAs and BIPs without congressional guidance.[35] This deficiency has prevented FBAs and BIPs from having a meaningful impact in the fight to dismantle the school-to-prison pipeline.[36]

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31. U.S. Department of Education guidance on the regulations offers two explanations for FBAs: "[a]n FBA focuses on identifying the function or purpose behind a child's behavior. Typically, the process involves looking closely at a wide range of child-specific factors (e.g., social, affective, environmental). Knowing why a child misbehaves is directly helpful to the IEP Team in developing a BIP that will reduce or eliminate the misbehavior[;]" and that "[t]he FBA process is frequently used to determine the nature and extent of the special education and related services that the child needs, including the need for a BIP." U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON DISCIPLINE PROCEDURES 14–15 (2009), http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CQaCorner%2C7%2C.

32. Nelson et al., *supra* note 30, at 169–70 (detailing the FBA's goal of hypothesis-driven treatment, skill building, positive outcomes, and program maintenance, and examining the effectiveness of the FBA's intensive assessments as compared to less rigorous review).

33. Zirkel, *Empirical Analysis*, *supra* note 23, at 175.

34. *See, e.g.*, ILL. ADMIN. CODE tit. 23, § 226.75 (2015) (creating guidelines for FBAs); 511 IND. ADMIN. CODE 7-32-41 (2015) (defining FBA); MINN. R. 3525.0850 (2013) (creating guidelines for BIPs); N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1(r) (2015) (listing requirements for, and defining, an FBA).

35. John W. Maag & Antonis Katsiyannis, *Behavioral Intervention Plans: Legal and Practical Considerations for Students with Emotional and Behavioral Disorders*, 31 BEHAV. DISORDERS 348, 348, 352, 356–57 (2006).

36. *See* discussion *infra* notes 77–91 and accompanying text.

1. The IDEA's origins and background

Before 1960, society held a negative perception of disabled children, often leaving them ostracized from mainstream society.[37] Government actors encouraged this trend by "categorically exclud[ing] [disabled children] from public schools."[38] Against this backdrop, Congress passed the first iteration of the IDEA, the EAHCA, in 1975[39] after the nation acknowledged the damaging effects systematically excluding students with disabilities from the education system had on the United States as a whole.[40]

Congress's express purpose for passing the 2004 IDEA was to ensure that every special needs child has access to FAPE "that emphasizes special education and related services designed to meet [the student's] unique needs and prepare [the student] for . . . employment, and independent living."[41] To support that goal, the current IDEA places an affirmative obligation on states accepting federal funds known as "Child Find." This provision requires participating states to identify and serve "[a]ll children with disabilities . . . who are in need of special education and related services."[42] To that end, once a child is suspected of having a disability, the local educational agency ("LEA")[43] must ensure that the student is evaluated in every area in which he is suspected of

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37. *See* Keith Greiner, Comment, *Judicial Imprimatur Required: Raising the Standard for Awards of Attorneys' Fees Under the IDEA in* Smith v. Fitchburg Public Schools, 41 NEW ENG. L. REV. 711, 713 (2007) ("At the turn of the twentieth century, 'leading medical authorities and others began to portray the "feebleminded" as a "menace to society and civilization . . . responsible in a large degree for many, if not all, of our social problems." (quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 462 (1985) (Marshall, J., concurring in part and dissenting in part))); Justin D. Kumpulanian, Note, *Special Education/Civil Procedure—The IDEA of Fairness: Allowing Parent-Attorneys to Recover Their Attorneys' Fees Under the Individuals with Disabilities Education Act*, 31 W. NEW ENG. L. REV. 203, 205 (2009) (explaining that, prior to the 1970s, disabled children were denied an equal right to education and systemically excluded from public school systems).

38. *City of Cleburne*, 473 U.S. at 462–63 (Marshall, J., concurring in part & dissenting in part) (discussing the extreme nature of the state-mandated segregation targeted towards the disabled).

39. EAHCA, Pub. L. No. 94-142, 89 Stat. 773 (1975).

40. *See* Greiner, *supra* note 37, at 714–16.

41. 20 U.S.C. § 1400(d)(1)(A) (2012).

42. *Id.* § 1412(a)(3)(A) (including in the provision children who are homeless, who are wards of the state, or who attend private schools).

43. LEAs are responsible for implementing the IDEA's requirements and are subject to state educational agency ("SEA") oversight. *Id.* § 1412(a). SEAs receive and distribute funding available under the IDEA and are also tasked with monitoring compliance under the Act. *Id.*

having a disability.[44] This duty extends to children who are simply *suspected* of being in need of special education services and applies even if the student is advancing from grade to grade.[45] An LEA is deemed to have knowledge that the child may have a disability: (1) where a parent expresses suspicion that her child is a student with a disability;[46] (2) when a parent specifically requests that her child be evaluated for special education services;[47] or (3) when a teacher or other administrative personnel expresses concerns about the child's behavior.[48]

To be effective, the evaluation of the child suspected of having a disability must take a holistic approach to addressing the child's needs.[49] The IDEA mandates that trained evaluators use an assortment of assessments to glean the proper supports and strategies the child needs to obtain an appropriate education.[50] These evaluations must assess any relevant cognitive, physical, and behavioral factors.[51]

Once it has identified and evaluated the child for services, the school must provide the child—if he or she is found to be in need of special education services[52]—with an individualized education program ("IEP").[53] An IEP is a document that identifies the accommodations,[54] related services,[55] and instruction[56] the child

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44. *Id.* § 1414(b)(3)(B).

45. 34 C.F.R. § 300.111(c)(1) (2014).

46. Parents must express their concerns in writing to supervisory or administrative personnel or their child's teacher. *See* 20 U.S.C. § 1415(k)(5)(B).

47. *Id.*

48. *Id.*

49. Harris v. District of Columbia, 561 F. Supp. 2d 63, 67 (D.D.C. 2008).

50. H.D. *ex rel.* A.S. v. Cent. Bucks Sch. Dist., 902 F. Supp. 2d 614, 627 (E.D. Pa. 2012) (citing 20 U.S.C. § 1414(b)).

51. *Id.*

52. An intermediate step a school may take before concluding that a student is in need of special education services—specifically for a student suspected of having "specific learning disabilities"—is to utilize a method called response to intervention ("RTI"). *See* § 1414(b)(6); 34 C.F.R. §§ 300.307, 300.309, 300.311 (2015) (enabling a school to use less intrusive instructional interventions to address a child's particular identified needs); *see also* U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON RESPONSE TO INTERVENTION (RTI) AND EARLY INTERVENING SERVICES (EIS) 2, 6 (2007), http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CQaCorner%2C8%2C (discussing how RTIs are used as a tool immediately after a child's special needs are determined and before deciding if a more specific evaluation and plan is needed).

53. An IEP is a written plan documenting how the school intends to provide the student with FAPE. *See* 20 U.S.C. §§ 1400(d)(1)(A), 1414(d). The IEP must set out both short-term and long-term goals. *Id.* § 1414(d).

54. *Id.* § 1414(d)(1)(A)(i)(VI)(aa).

55. *Id.* § 1401(26).

56. *Id.* § 1401(29).

requires[57] in order to receive meaningful educational benefits.[58] Further, it is reasonably calculated to provide a meaningful educational benefit, the adjudicative standard for FAPE, where:

> (1) the program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key "stakeholders"; and (4) positive academic and non-academic benefits are demonstrated.[59]

The IDEA requires a school district to educate disabled students alongside their non-disabled peers to the greatest practicable extent.[60] Accordingly, the IDEA obligates schools to establish procedures that facilitate inclusive learning by providing any aides and special education services needed to ensure a disabled student's success,[61] emphasizing the need for special needs children to have "access to the general education curriculum in the regular classroom[] *to the maximum extent possible.*"[62]

A student's IEP team, which consists of a partnership between educators and the student's parents,[63] is required to periodically review the student's IEP, updating it yearly at a minimum. During its review, the IEP team must determine whether the student is adequately progressing or whether the team needs to modify the IEP.[64]

The IDEA has greatly benefitted special education students, but students with disabilities—particularly those with behavioral needs—continue to fall behind their peers.[65]

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57. 30 C.F.R. § 300.324(b)(1)(i) (2015) (requiring an IEP team to review the child's IEP at least annually to determine if the child is on track to meet the IEP's goals).

58. Bd. of Educ. v. Rowley, 458 U.S. 176, 203–04 (1982) (defining the elements of FAPE).

59. Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 253 (5th Cir. 1997).

60. 20 U.S.C. § 1412(a)(5)(A); S.H. *ex rel.* I.H. v. State-Operated Sch. Dist. of Newark, 336 F.3d 260, 265 (3d Cir. 2003) (stating that students should only be removed from the general education environment if their disabilities significantly encumber instruction and only after they were given supplementary aides and services); OSBORNE & RUSSO, *supra* note 19, at 36.

61. *See* G.B. & L.B. *ex rel.* N.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 572 (S.D.N.Y. 2010).

62. § 1400(c)(5) (emphasis added).

63. An IEP team is a group comprised of the student's parents and teachers, a curriculum specialist from the local school district and, if requested, a person with special knowledge or expertise regarding the student, who must collaborate to develop the student's IEP. *Id.* § 1414(d)(1)(B).

64. *Id.*; 30 C.F.R. § 300.324(b)(1) (2015).

65. Marilyn Elias, *The School-to-Prison Pipeline: Policies and Practices that Favor Incarceration Over Education Do Us All A Grave Injustice*, TEACHING TOLERANCE, Spring 2013, at 39, 40, http://www.tolerance.org/sites/default/files/general/School-to-Prison.pdf (demonstrating that students with disabilities are still disproportionately

2. Zero-tolerance, school resource officers, and jail time

Although the IDEA has ended the systematic exclusion of special needs students from public schools, these students do not always receive an adequate education.[66] Bending to societal pressure to mitigate a perceived increase in school violence,[67] many schools created systems of behavior management that have been especially detrimental to students with special needs and have contributed to the mass incarceration of disabled students.[68]

Congress included FBAs and BIPs in the IDEA in an effort to counteract these negative consequences.[69] Congress's failure to include proper guidance on when and how to implement the two techniques, however, has stymied its efforts to support students with behavioral needs.[70] Without clarification, special education students continue to fall prey to the school-to-prison pipeline.

The school-to-prison pipeline refers to the relationship between school suspensions and subsequent incarceration. This term captures

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represented in the school-to-prison pipeline and that teachers need increased classroom support and training to effect the behavior changes needed to keep students out of the juvenile justice system).

66. 20 U.S.C. § 1400(c)(3)–(4) (finding that although the Act ensures FAPE and has improved education for students with disabilities, an insufficient focus on applying proven research methods has resulted in hampered implementation and, therefore, inadequate education for some).

67. *See* TONY FABELO ET AL., COUNS. ST. GOV'T JUST. CTR., BREAKING SCHOOLS' RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT 2 (2011) ("Commensurate with the trend to be 'tough on crime' in the late 1980s and early 1990s to increase public safety in the community (including a focus on perceived 'hardened' juveniles), was a change that took hold to make schools safer as well.").

68. *See* TEST, PUNISH, AND PUSH OUT, *supra* note 26, at 9 ("The rise of zero-tolerance school discipline is directly tied to the law enforcement strategies that have led to the extraordinary increase in the number of Americans behind bars in recent years."); Am. Psychol. Ass'n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCHOL. 852, 854–55 (2008), http://www.apa.org/pubs/info/reports/zero-tolerance.pdf ("[S]tudents with disabilities, especially those with emotional and behavioral disorders, appear to be suspended and expelled at rates disproportionate to their representation in the population."); *see also* U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION: DATA SNAPSHOT: SCHOOL DISCIPLINE 1 (2014) [hereinafter *DOE SNAPSHOT*], http://www.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf ("With the exception of Latino and Asian-American students, more than one out of four boys of color with disabilities (served by IDEA)—and nearly one in five girls of color with disabilities—receives an out-of-school suspension.").

69. Katsiyannis et al., *supra* note 29, at 331.

70. *See* discussion *infra* notes 295–303 and accompanying text (recommending how and when to most effectively implement FBAs and BIPs).

anecdotal evidence and supporting data[71] in one succinct phrase, explaining that, for many children, school teaches them that they are "bad."[72] Thus, a self-fulfilling prophecy begins: students misbehave and are either incarcerated while still in school or after they leave. For the last fifteen years, despite evidence that school violence is on the decline,[73] the number of police officers in schools has increased.[74] The swell of school resource officers correlates with the amplification of the "tough on crime" rhetoric from the 1990s[75] and manifests itself in a punitive theory of school discipline: zero-tolerance.[76]

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71. *See, e.g.*, FABELO ET AL., *supra* note 67, at ix–xiii (discussing a recent study of the effect of suspensions and expulsions on Texas public school students, and finding—among other conclusions—that when suspended or expelled, a student's likelihood of becoming involved in the juvenile justice system significantly increased).

72. *This American Life: Is This Working?*, CHI. PUB. RADIO (Oct. 17, 2014), http://www.thisamericanlife.org/radio-archives/episode/538/is-this-working [hereinafter *Is This Working?*] (explaining that, when "[y]ou suspend a kid, he misses school, he finds it hard to catch up, he feels frustrated, falls behind. And maybe just as important, he learns he is bad. Because he feels bad when he's in school, he acts bad").

73. *See, e.g.*, EDUCATION ON LOCKDOWN, *supra* note 16, at 11 ("[B]etween 1992 and 2002, nationwide violent crimes at schools against students aged [twelve] to [eighteen] dropped by [fifty percent], and schools remain the safest places for children. In addition, between 1994 and 2002, the youth arrest rate for violent crimes has declined [forty-seven percent] nationally." (footnote omitted)); SECURING OUR CHILDREN'S FUTURE: NEW APPROACHES TO JUVENILE JUSTICE AND YOUTH VIOLENCE 2 (Gary S. Katzmann ed., 2002) (explaining that juvenile violence has decreased since 1993).

74. Jason B. Langberg & Barbara A. Fedders, *How Juvenile Defenders Can Help Dismantle the School-to-Prison Pipeline: A Primer on Educational Advocacy and Incorporating Clients' Education Histories and Records into Delinquency Representation*, 42 J.L. & EDUC. 653, 656 (2013) (explaining that "[a]rmed police officers now can be found in public schools around the country in drastically increased numbers" and an estimated "17,000 law enforcement officers—often termed 'school resource officers' (SROs)—are assigned permanently to schools"); Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. CRIM. JUST. 280, 280–81 (2009) (estimating that more than 20,000 law enforcement officers are present in schools in the United States); *see also* Kristin D. Eisenbraun, *Violence in Schools: Prevalence, Prediction, and Prevention*, 12 AGGRESSION & VIOLENT BEHAV. 459, 465 (2007) (referencing a study that suggests that over-dependence on law enforcement in schools will cause teachers to focus on only students with severe behavioral problems and students to think that teachers are not authority figures).

75. *See* FABELO ET AL., *supra* note 67, at 2 ("Commensurate with the trend to be 'tough on crime' in the late 1980s and early 1990s to increase public safety in the community (including a focus on perceived 'hardened' juveniles), was a change that took hold to make schools safer as well.").

76. AM. PSYCHOL. ASS'N ZERO TOLERANCE TASK FORCE, ARE ZERO TOLERANCE POLICIES EFFECTIVE IN THE SCHOOLS? AN EVIDENTIARY REVIEW AND RECOMMENDATIONS 2 (2006), http://www.apa.org/pubs/info/reports/zero-tolerance-report.pdf (explaining that zero-tolerance policies, which mandate harsh consequences regardless of the gravity or context of the behavior, gained momentum in schools at the start of the 1990s).

With the advent of zero-tolerance policies came a drastic increase in the number of suspensions and expulsions.[77] Incidents that traditionally would have been "teachable moments" between teachers and students now routinely involve police officers.[78] These once-minor incidents that, prior to the hyper-policing of students would not have ended in criminal sanctions, now routinely result in arrests.[79] These policies are particularly exacting for students with disabilities: although students served by the IDEA represent only twelve percent of the national school population, students receiving special education services make up twenty-five percent of those arrested or referred to law enforcement.[80] Indeed, one of the best indicators of whether a student will be suspended from school is his special education status.[81] Children who are suspended or expelled are more likely to be incarcerated as adults.[82] Zero-tolerance policies, immense police presence, and the use of corporal punishment and restraint[83] have exacerbated the mass incarceration of students with

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77. *See* EDUCATION ON LOCKDOWN, *supra* note 16, at 23 (providing that, following the implementation of zero-tolerance policies in Denver Public Schools, the number of suspensions during the 2003–04 school year reached 13,423, up from 9846 during the 2000–01 school year); Langberg & Fedders, *supra* note 74, at 654–55 (asserting that the zero-tolerance policies requiring "automatic and often highly severe punishments" for student offenses dramatically increased incidences of suspensions and expulsions).

78. *See* JOHANNA WALD & LISA THURAU, CHARLES HAMILTON HOUSTON INST. FOR RACE & JUST., FIRST, DO NO HARM: HOW EDUCATORS AND POLICE CAN WORK TOGETHER MORE EFFECTIVELY TO PRESERVE SCHOOL SAFETY AND PROTECT VULNERABLE STUDENTS 2, 12 (2010); *see also* EDUCATION ON LOCKDOWN, *supra* note 16, at 8 (explaining that Denver Public Schools witnessed a seventy-one percent increase in students referred to law enforcement, most for non-violent offenses like "bullying and use of obscenities"); ACLU, TALKING POINTS, *supra* note 16 (listing offenses for which students have been arrested, including "throwing an eraser at a teacher, breaking a pencil, and having rap lyrics in a locker").

79. *See* Theriot, *supra* note 74, at 285 (stating that schools with SROs have increased rates of arrest); *see also* EDUCATION ON LOCKDOWN, *supra* note 16, at 13 (describing students being arrested for nonviolent, "disorderly conduct" and "breach of peace").

80. DOE SNAP SHOT, *supra* note 68, at 1.

81. *See id.* (explaining that students with disabilities are suspended more than twice as often as students without disabilities). During an average school year in the United States, more than one in every four boys of color with a disability is suspended. *Id.* Students, once involved with the juvenile justice system, face several obstacles in their re-entry to traditional schools. *See* ACLU, LOCATING THE SCHOOL-TO-PRISON PIPELINE, *supra* note 7.

82. *Black Preschoolers Far More Likely to Be Suspended*, NPR (Mar. 21, 2014, 3:39 PM), http://www.npr.org/blogs/codeswitch/2014/03/21/292456211/black-preschoolers-far-more-likely-to-be-suspended.

83. Corporal punishment is legal in twenty states and is most often used on students with disabilities. Maureen Costello, *Twenty States Still Use the Paddle,*

disabilities, despite being largely ineffective in enforcing school discipline.[84] While some districts have begun reconsidering zero tolerance,[85] many of its vestiges remain, including the presence of police officers in schools[86] and the existence of status offenses, such as truancy, running away, and ungovernability.[87]

Notwithstanding these damaging school discipline policies, the IDEA and its amendments have been indispensable for disabled children,[88] and in 1997, "in an attempt to balance school officials' obligation to ensure that schools are safe and orderly environments that are conducive to learning and the school's obligation to ensure that students with disabilities receive [] FAPE,"[89] Congress amended the Act to include provisions addressing student misbehavior.[90] FBAs and BIPs

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TEACHING TOLERANCE (May 5, 2010), http://www.tolerance.org/blog/twenty-states-still-use-paddle; *Black Preschoolers Far More Likely to Be Suspended*, *supra* note 82 (explaining that students with disabilities make up three-quarters of all students restrained at school but only twelve percent of the overall student population). Generally, this type of discipline takes the form of paddling: "hit[ting a child] on the buttocks several times with a wooden board resembling a shaved-down baseball bat." HUMAN RIGHTS WATCH, IMPAIRING EDUCATION: CORPORAL PUNISHMENT OF STUDENTS WITH DISABILITIES IN US PUBLIC SCHOOLS 3 (2009) [hereinafter IMPAIRING EDUCATION], https://www.aclu.org/sites/default/files/pdfs/humanrights/impairingeducation.pdf.

84. *See* IMPAIRING EDUCATION, *supra* note 83, at 4 (asserting that corporal punishment does not reform students' violent behavior, but makes them more reluctant to learn and less engaged in school); Deborah N. Archer, *Introduction: Challenging the School-to-Prison Pipeline*, 54 N.Y.L. SCH. L. REV. 867, 869 (2009–10) (finding that zero-tolerance policies demoralize students but do not correct their misbehavior). The use of these methods should be reformed, but an in-depth analysis of such reforms is beyond the scope of this paper. For a thoughtful discussion on corporal punishment, see generally Mary Kate Kearney, *Substantive Due Process and Parental Corporal Punishment: Democracy and the Excluded Child*, 32 SAN DIEGO L. REV. 1 (1995) and Kathryn R. Urbonya, *Determining Reasonableness Under the Fourth Amendment: Physical Force to Control and Punish Students*, 10 CORNELL J.L. & PUB. POL'Y 397 (2001).

85. Stephanie Francis Ward, *Schools Start to Rethink Zero Tolerance Policies*, A.B.A. J. (Aug. 1, 2014, 10:30 AM), http://www.abajournal.com/magazine/article/schools_start_to_rethink_zero_tolerance_policies.

86. *Id.*

87. Joseph B. Tulman & Douglas M. Weck, *Shutting Off the School-to-Prison Pipeline for Status Offenders with Education-Related Disabilities*, 54 N.Y.L. SCH. L. REV. 875, 876 n.3, 879 (2009–10) (defining status offenses as offenses that are only criminal when committed by children, as opposed to delinquency offenses, which are criminal regardless of age).

88. Katsiyannis et al., *supra* note 29, at 324 ("The EAHCA . . . has resulted in numerous accomplishments and changes in the ways in which we serve students with disabilities.").

89. *Id.* at 331.

90. *See* OSBORNE & RUSSO, *supra* note 19, at 153–54. Although the Supreme Court addressed school discipline in *Honig v. Doe*, 484 U.S. 305, 322–26 (1988), until the 1997 amendments, the IDEA did not include any statutory guidance on the subject.

aim to prevent and correct student misconduct before it escalates and results in drastic disciplinary action.[91] Given the impact punitive policies have had on students with special needs, the added procedural safeguards these proactive behavior management schemes could provide are imperative to dismantling the school-to-prison pipeline.

3. BIPs and FBAs: The 1997 and 2004 amendments to the IDEA and the corresponding regulations

While the 1997 amendments included references to FBAs and BIPs, the amendments did not expressly require LEAs to monitor their implementation.[92] Indeed, prior to the 2004 amendments, the IDEA did not contain *any* LEA requirements regarding the behavior management programs.[93] Thereafter, the 2004 amendments established that if a school determines a student's misbehavior was a manifestation of his disability, the school must "conduct a functional behavioral assessment, and implement a [BIP] for such child."[94]

Where Congress provided more particular guidance, however, was in the 2004 IDEA's preamble.[95] Here, Congress stressed that the instruction and related services included in a student's IEP must derive from "peer-reviewed research to the extent practicable."[96] Indeed, some commentators have found these revisions to be "one of the potentially most significant changes made to IDEA."[97] Thus, when including

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OSBORNE & RUSSO, *supra* note 19, at 153–54.

91. *See* Kevin M. Jones & Katherine F. Wickstrom, *Using Functional Assessment to Select Behavioral Interventions*, *in* PRACTICAL HANDBOOK OF SCHOOL PSYCHOLOGY: EFFECTIVE PRACTICES FOR THE 21ST CENTURY 192, 192–93 (Gretchen Gimpel Peacock et al. eds., 2010).

92. *See* Zirkel, *Empirical Analysis*, *supra* note 23, at 185–86.

93. *Id.* at 185–86.

94. 20 U.S.C. § 1415 (k)(1)(F)(i) (2012).

95. Andrea Blau, *The IDEA and the Right to an "Appropriate" Education*, 2007 BYU EDUC. & L.J. 1, 3–4 (discussing 2004 IDEA's enhanced procedural due process, accountability, and more precise definitions).

96. 20 U.S.C. § 1414(d)(1)(A)(i)(IV). In the IDEA context, peer-reviewed research is defined by an element of the No Child Left Behind Act's ("NCLB") definition of a similar term—"scientifically based research"—that the IDEA incorporates by reference. 34 C.F.R. § 300.35 (2007). The Department of Education has explained that peer-reviewed research "generally refers to research that is reviewed by qualified and independent reviewers to ensure that the quality of the information meets the standards of the field before the research is published." Education Assistance and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,540, 46,664 (Aug. 14, 2006).

97. BARBARA D. BATEMAN & MARY ANNE LINDEN, BETTER IEPS: HOW TO DEVELOP LEGALLY CORRECT AND EDUCATIONALLY USEFUL PROGRAMS 63 (2006); *see also*, Perry A. Zirkel, *Have the Amendments to the Individuals with Disabilities Education Act Razed* Rowley *and Raised the Substantive Standard for "Free Appropriate Public Education?"*, 28 J.

services and supports in a student's IEP, an IEP team should utilize effective, peer-reviewed techniques whenever possible.[98]

The 2006 regulations did not provide much clarity on FBAs and BIPs, reiterating only that if a student with a disability misbehaves and is suspended, the IEP team must determine whether the behavior was a manifestation of the child's disability,[99] but only when the suspension will last more than ten days.[100] Moreover, the regulations explained that if the IEP team determines the behavior was not a manifestation of the student's disability, the school may suspend the student as it would his or her non-disabled peers.[101] If, however, the misbehavior involved weapons[102] or drugs, or the student has "inflicted serious bodily injury upon another person,"[103] the school may suspend the child for "not more than [forty-five] school days without regard to whether the behavior is determined to be a manifestation of the child's disability."[104] Irrespective of the manifestation determination's outcome, the student must "receive, *as appropriate*, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur."[105] The appropriateness of the FBA and BIP, however, are at the school's discretion.[106]

NAT'L ASS'N OF ADMIN. L. JUDICIARY 397, 410 (2008) [hereinafter Zirkel, *Razing Rowley*]. *But see* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17–19 (1981) (holding that congressional findings are precatory and thus, although they may help in interpreting other provisions, they are not directly enforceable).

98. Education Assistance and Preschool Grants for Children with Disabilities, 71 Fed. Reg. at 46,665.

99. 20 U.S.C. § 1415(k)(1)(E)(i).

100. 34 C.F.R. §§ 300.530(e), 300.536 (providing that a removal from school "for more than [ten] consecutive school days," or "a series of removals" for substantially similar behavior "tota[ling] more than [ten] school days in a school year," results in a "change of placement").

101. *Id.* § 1415(k)(1)(B)–(C).

102. *See* AM. PSYCHOL. ASS'N ZERO TOLERANCE TASK FORCE, *supra* note 76, at 27–28 (observing that a weapon is defined very broadly and at the school's discretion); OSBORNE & RUSSO, *supra* note 19, at 165 (explaining that the IDEA adopts a definition of "weapon" that is broader than the definition in the Gun-Free Schools Act).

103. 20 U.S.C. § 1415(k)(1)(G)(i)–(iii).

104. *Id.* § 1415(k)(1)(G). Should the parent disagree with the suspension, the parent can file for a so-called "stay put," which triggers a due process hearing and requires that the student remain in his present placement while appeals are pending, *see id.* § 1415(f)(1)(A), unless the parent agrees with the new placement or the hearing officer determines that keeping the child in his current placement is "substantially likely to result in injury to the child or to others." *See id.* §§ 1415(j), 1415(k)(3)(a).

105. *Id.* § 1415(k)(1)(D)(ii) (emphasis added); *see cf.* U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON DISCIPLINE PROCEDURES 14 (2009),

Although BIPs and FBAs are federally mandated requirements,[107] and it is clear that disregarding behavioral issues is a denial of FAPE,[108] there is no clear guidance as to whether a student with behavioral needs must have an FBA or a BIP or what either must include.[109] The IDEA's lack of guidance has resulted in inconsistent and often contradictory court rulings, and the lack of specific definitions and procedures has allowed schools to develop purportedly legal but substantively deficient behavior evaluations and intervention plans for special needs students.[110]

4. Generally accepted definitions of FBAs and BIPs

When Congress initially included FBAs and BIPs in the IDEA, many practitioners were unaware of how school districts were supposed to use them.[111] In 1997, while FBAs were not a new concept among education scholars,[112] educators themselves did not commonly use them in practice.[113] This knowledge gap, in large part, led to a lack of uniform application of FBAs and BIPs in the field of special

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http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CQaCorner%2C7%2C (explaining that the 2006 regulations require that LEAs conduct both an FBA and a BIP only after the conduct is determined to have been a manifestation of the child's disability and the child will have a change in placement, but that under the regulations, schools *may* conduct an FBA and BIP if the IEP team deems it appropriate for the child).

106. Assuming that the corresponding state has not promulgated substantive requirements for FBAs or BIPs.

107. *But see* Education Assistance and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,540, 46,629 (Aug. 14, 2006) (stating that FBAs and BIPs "are not required components of an IEP" unless state law provides otherwise).

108. It is, however, unclear how meaningfully the IEP team must address a student's misbehavior for a hearing officer or court to find the school had provided FAPE. *See id.*; Losinski et al., *supra* note 20, at 252.

109. *See* Losinski et al., *supra* note 20, at 253; *see also* Alex R. *ex rel* Beth R. v. Forrestville Valley Cmty. Unit Sch. Dist., 375 F.3d 603, 615 (7th Cir. 2004) (stating that neither Congress nor the U.S. Department of Education created requirements for BIPs). As previously mentioned, the words *as necessary* also add to the confusion of when an FBA or BIP must be conducted.

110. Maag, *supra* note 35, at 356; *see* Losinski et al., *supra* note 20, at 252 (contrasting two New York state court decisions reaching opposite conclusions about whether failing to provide an FBA to a student with disabilities constituted a denial of FAPE).

111. Kimberly P. Weber et al., *The Status of Functional Behavioral Assessment (FBA): Adherence to Standard Practice in FBA Methodology*, 42 PSYCHOL. IN THE SCHS. 737, 738 (2005).

112. *See* Frank M. Gresham et al., *Methodological Issues in Functional Analysis: Generalizability to Other Disability Groups*, 24 BEHAV. DISORDERS 180, 180 (1999) (explaining that much of the research on functional analysis and assessment performed prior to 1997 was conducted outside of school settings).

113. *See* Nelson, *supra* note 30, at 170.

education.[114] Schools knew neither *when* to implement these behavior interventions nor *what* they needed to include if such behavior techniques were needed.[115] The IDEA's 1997 amendments were a catalyst for the literature and teacher-training courses regarding FBAs and BIPs.[116] Currently, there is a generally accepted definition of both FBAs and BIPs amongst education scholars presumably *because* Congress included the term in the 1997 statute.[117] While special educators generally agree on the definitions of FBAs and BIPs, courts and other educational stakeholders have struggled to determine whether the failure to implement either scheme violates *Rowley*'s standard for providing FAPE.

B. Defining FAPE: The Rowley *Standard*

In 1982, seven years after Congress passed the first iteration of the IDEA, the Supreme Court interpreted the adjudicative standard for FAPE, finding that a school must provide each special education student with a "basic floor of opportunity."[118] To determine whether a school has provided a student with that opportunity, the Court announced a two-prong test, evaluating whether a school's failure to adhere to the IDEA's procedural requirements resulted in a loss of educational benefit.[119]

1. Enabling children to achieve passing marks

In 1980, the parents of a deaf kindergartener alleged that the school's failure to provide their child with a sign-language interpreter constituted a denial of FAPE.[120] The trial court's ruling in favor of

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114. *See id.* at 169–70; *see also* Heidi von Ravensberg & Tary J. Tobin, IDEA 2004: The Reauthorized FBA 3 (June 25, 2008) (unpublished manuscript), http://ssrn.com/abstract=1151394.

115. *See* Nelson, *supra* note 30, at 169–70, 173–74; Cynthia A. Dieterich & Christine J. Villani, *Functional Behavioral Assessment: Process Without Procedure*, 2000 BYU EDUC. & L.J. 209, 218–19.

116. *See* Dieterich & Villani, *supra* note 115, at 218–19; *cf.* von Ravensberg & Tobin, *supra* note 114, at 3 (explaining that unfamiliarity with FBAs created a knowledge gap).

117. *See* von Ravensberg & Tobin, *supra* note 114, at 3 (explaining that, following the passage of the 1997 IDEA, school and legal administrators who lacked familiarity with behavioral concepts had to "play[] catch-up" to determine how to incorporate FBAs into a school setting); *see also* Dieterich & Villani, *supra* note 115, at 209–10 (explaining that after the 1997 Amendments, school districts were left with more questions than answers).

118. Bd. of Educ. v. Rowley, 458 U.S. 176, 200–01 (1982).

119. *Id.* at 206–07 (holding that a state meets its obligations under the Act when it has "complied with the procedures set forth in the Act" and when its "individualized educational program developed through the Act's procedures [is] reasonably calculated to enable the child to receive educational benefits").

120. Rowley v. Bd. of Educ., 483 F. Supp. 528, 529 (S.D.N.Y. 1980), *aff'd per curiam*, 632

the child's parents found that FAPE required disabled children to have the "opportunity to achieve [their] full potential commensurate with the opportunity provided to other children,"[121] a standard that the appellate court affirmed.[122] Overturning the judgment of the lower courts and finding that the student was adequately progressing without the assistance of an interpreter, the Court held that a school has provided FAPE to a child when services are "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade"[123]—a standard much lower than one requiring a school to foster a child's full potential.[124] In so concluding, the Court relied heavily on the Act's findings section,[125] determining that a substantive standard for FAPE was "[i]mplicit in the congressional purpose of providing access to a 'free appropriate public education.'"[126] Determining that the lower courts had erred in requiring schools to maximize educational benefits for special needs students, the Court reasoned that

> the Act was designed to . . . provide a "basic floor of opportunity" consistent with equal protection[, but that] neither the Act nor its history persuasively demonstrates that Congress thought that equal protection required anything more than equal access. Therefore, Congress'[s] desire to provide specialized educational services, even in furtherance of "equality," cannot be read as imposing any particular substantive educational standard upon the States.[127]

Although the Court found that Congress's definition of FAPE was "cryptic," it nevertheless derived a definition based on Congress's stated intent and the words of the IDEA itself.[128] Thus, *Rowley*

F.2d 945 (2d Cir. 1980), *rev'd*, 458 U.S. 176 (1982).

121. *Id.* at 534.

122. *Rowley*, 632 F.2d at 945.

123. *Rowley*, 485 U.S. at 204.

124. *See id.* at 215 (White, J., dissenting) (suggesting that, for the plaintiff, "a teacher with a loud voice" would satisfy the Court's standard (citations omitted)). *But see id.* at 211–12 (Blackmun, J., concurring) (countering that the school board provided the student "more than 'a teacher with a loud voice'" and stating that the relevant inquiry is whether the student's IEP "offered her an educational opportunity substantially equal to that provided her non-handicapped classmates") (citations omitted)).

125. *Id.* at 192 ("By passing the Act, Congress sought primarily to make public education available to handicapped children."). Since the Court's 1982 holding in *Rowley*, Congress has amended the IDEA and added more specific language to the IDEA's findings section. This heightened language may have led to a heightened standard for evaluations of FAPE. *See infra* Part II.A.1 (discussing how some courts have found that the lack of an FBA and a BIP denies students FAPE).

126. *Rowley*, 458 U.S. at 200.

127. *Id.*

128. *Id.* at 188–89.

announced a two-prong evaluation for IDEA fulfillment: (1) did the school comply with the Act's procedural mandates, and (2) is the IEP likely to provide the student with "some educational benefit"?[129] Congress has since codified these substantive requirements of FAPE,[130] including both prongs of *Rowley* and a third element addressing parents' right to be involved in a child's education.[131] These provisions established that a school has not denied FAPE to a student who is receiving "some educational benefit,"[132] even if the school has committed a procedural violation of the IDEA.[133]

Seemingly in response to the Court's interpretation of FAPE as one of equal access rather than equal opportunity, Congress amended the IDEA's findings section, reasoning that "the implementation of [the IDEA] ha[d] been impeded by . . . an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities."[134] Many commentators have interpreted this revision as raising the bar for what constitutes FAPE.[135] In

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129. *Id.* at 200, 206–07.

130. *See* 20 U.S.C. § 1415(f)(3)(E)(ii) (2012).

131. *Id.* § 1415(f)(3)(E)(ii)(II) (providing that a "hearing officer may find that a child did not receive a [FAPE] only if the procedural inadequacies . . . significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a [FAPE] to the parents' child").

132. *Rowley*, 458 U.S. at 200 (finding that the standard of "confer[ring] some educational benefit" is implicit in Congress's purpose of providing FAPE to students with disabilities).

133. *See infra* Part II.B.2 (explaining that to comply with procedures established in the IDEA, a school must evaluate every student suspected of having a disability, create a responsive IEP, and provide support so the student may learn alongside non-disabled peers in the general education classroom).

134. 20 U.S.C. § 1400(c)(4).

135. *See, e.g.*, Philip T.K. Daniel & Jill Meinhardt, *Valuing the Education of Students with Disabilities: Has Government Legislation Caused a Reinterpretation of A Free Appropriate Public Education?*, 222 EDUC. L. REP. 515, 531 (2007) (arguing that the 1997 amendments heightened the IDEA's standards from "merely provid[ing] students with access to an education" to "requir[ing] results and academic achievement"); Tara L. Eyer, Commentary, *Greater Expectations: How the 1997 IDEA Amendments Raise the Basic Floor of Opportunity for Children with Disabilities*, 126 EDUC. L. REP. 1, 17 (1998) (concluding that the 1997 amendments "suggest that the *Rowley* standard should be preserved, but that the 'basic floor of opportunity' has been elevated from access to meaningful progress" (citations omitted)); Mitchell L. Yell et al., *Reflections on the 25th Anniversary of the U.S. Supreme Court's Decision in* Board of Education v. Rowley, 39 FOCUS ON EXCEPTIONAL CHILD. 1, 8–9 (2007) (arguing that the amendments to the IDEA will cause a "fundamental alteration in the ways in which the courts view [] FAPE"); DIXIE SNOW HUEFNER, GETTING COMFORTABLE WITH SPECIAL EDUCATION LAW: A FRAMEWORK FOR WORKING WITH CHILDREN WITH DISABILITIES 252 (2006) (predicting that the requirement of "meaningful progress" will become the new standard for FAPE).

support of their views, commentators point to the text of the IDEA, which incorporates No Child Left Behind's ("NCLB") "adequate yearly progress" provision,[136] stresses the importance of self-sufficiency, and emphasizes that designed instruction and related services be based on "peer-reviewed research to the extent practicable."[137] In amending the IDEA, moreover, Congress underscored the need to maximize a disabled child's inclusion in the general education classroom.[138] Indeed, since *Rowley*, lower courts have retreated from the Court's seemingly deflated standard for FAPE.[139]

2. *Deprivation of educational opportunity versus a mere technical contravention of the IDEA*

The *Rowley* test requires that a court first find a substantive flouting of the IDEA before concluding that a school's actions denied a student FAPE. In making this evaluation, a court considers whether the IEP complies with the IDEA's procedural requirements and whether, at the time the IEP was written, it was reasonably calculated to confer educational benefits.

An adequate IEP must respond to the child's strengths; the guardian's concerns; the results of any evaluations; the child's academic, developmental, and functional needs; and, where the behavior impedes the child's learning and that of others, "the use of positive behavioral interventions and supports, and other strategies, to address that behavior."[140] The reviewing court must analyze whether the IEP was appropriate at the time it was written, rather than whether the plan *actually* conferred an educational benefit.[141]

To allege deficiencies in an IEP, educational rights-holders[142] must file a due process complaint.[143] When a school does violate the IDEA,

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136. *See* Zirkel, *Razing Rowley*, *supra* note 97, at 405.

137. 20 U.S.C. § 1414(d)(1)(A)(i)(IV) (2012); *see supra* notes 95–98 and accompanying text.

138. 20 U.S.C. § 1400(c)(5).

139. *See* Weber, *supra* note 4, at 434–36. Weber contends that this raised standard of *Rowley* may be predicated on the fact that Amy Rowley, the hearing-disabled plaintiff in the case, was not as severely or intellectually disabled as many of the children served by the IDEA. *Id.* at 379–86.

140. Sch. Bd. v. Brown, 769 F. Supp. 2d 928, 941 (E.D. Va. 2010) (quoting 20 U.S.C. § 1414 (d)(3)(B)(i)).

141. OSBORNE & RUSSO, *supra* note 19, at 35.

142. Until children reach the age of the majority (as determined by state law), their legal guardians hold their educational rights. *See* 34 C.F.R. § 300.520(a)–(b) (2015).

143. 20 U.S.C. § 1415 (b)(7)(A). Parents often seek various kinds of relief, including compensatory education, changes in placement, and private school tuition reimbursement. Though the kind of relief the educational rights-holder seeks is

the reviewing body must look to whether the school's conduct was merely a technical contravention of the IDEA's procedural requirements or whether its action directly caused the student's deprivation of educational opportunity.[144] In its examination, a court must first determine whether the LEA complied with the procedures set forth in the IDEA.[145]

C. Applying Rowley*'s First Prong to FBAs and BIPs: Procedural Requirements Within the IDEA and Enforcement Mechanisms—When a School Must Provide a Student with an FBA and BIP*

With little guidance, courts continue to grapple with the procedural elements of FBAs and BIPs and whether the failure to implement either is a denial of FAPE.[146] While it is clear that disciplinary changes in placement—such as a suspension lasting ten or more school days[147]—trigger FBAs and BIPs, it is unclear whether a student who has not yet incurred a change in placement[148] is similarly required to have an FBA or a BIP.

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crucial to a court's evaluation of the merits, this Comment focuses solely on whether a school's failure to conduct an FBA and implement a BIP is a relevant consideration when evaluating whether a school has provided a child with FAPE. Thereafter, under the IDEA, any party dissatisfied by an administrative decision "shall have the right to bring a civil action . . . in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy." *Id.* § 1415(i)(2)(A).

144. Bd. of Educ. v. Rowley, 458 U.S. 176, 203–04 (1982) (detailing the elements of FAPE); C.H. *ex rel.* Hayes v. Cape Henlopen Sch. Dist., 606 F.3d 59, 68 (3d Cir. 2010) (explaining that whether a school deprived a student of educational opportunity requires an evaluation of the case's particular circumstances).

145. This is *Rowley*'s first prong. *See Rowley*, 458 U.S. at 206–07.

146. *See* Dennis Fan, Note, *No IDEA What the Future Holds: The Retrospective Evidence Dilemma*, 114 COLUM. L. REV. 1503, 1505 (2014); Jeffrey A. Knight, Comment, *When Close Enough Doesn't Cut It: Why Courts Should Want to Steer Clear of Determining What Is—and What Is Not—Material in a Child's Individual Education Program*, 41 U. TOL. L. REV. 375, 375 (2010) ("As a relatively new field, special-education law is terrain not yet fully explored."). *Compare* Alex R. *ex rel.* Beth R. v. Forrestville Valley Cmty. Unit. Sch. Dist., 375 F.3d 603, 609, 611, 618 (7th Cir. 2004) (holding that the student-plaintiff was not denied FAPE because his IEPs were tailored to his needs each year and allowed him to progress from grade to grade), *with* Banks v. District of Columbia, 720 F. Supp. 2d 83, 92 (holding that the record was insufficient to determine whether the school's implementation of only some services in the student's IEP constituted a denial of FAPE), *and* Long v. District of Columbia, 780 F. Supp. 2d 49, 59–61 (D.D.C. 2011) (holding that the school's failure to complete a BIP and FBA was a denial of FAPE).

147. 34 C.F.R. § 300.536(a) (2008).

148. OSBORNE & RUSSO, *supra* note 19, at 137 (arguing that determining "whether a change is likely to affect a student's learning in a significant way" is an important factor when evaluating whether a change in placement has occurred).

1. Disciplinary changes in placement

Courts agree that when a school disciplines students with disabilities by removing them from their current placements for ten school days or more, it must conduct an FBA and implement a BIP or update them if they already exist.[149] Although courts generally agree that in this situation schools are required to conduct an FBA and implement a BIP, courts have diverged on whether a school's failure to do so constitutes a denial of FAPE.[150]

2. When a student's behavior deprives him of educational benefits

A more contentious issue arises when a school has not yet suspended the student. In this instance, the IEP team must *consider* conducting an FBA when a child's behavior impedes his or her classmate's learning and when an IEP team has a reason to believe that a student is likely to have behavioral issues.[151] The 1997 amendments also allowed an IEP team to "consider" conducting an FBA or implementing a BIP "when appropriate."[152] The 2004 amendments removed the "when appropriate" language but left the requirement that schools only "consider" the strategies,[153] "[t]he operant verb [being 'consider',] not 'to develop or implement,' and—more importantly—the object[] [being] interventions, supports, and strategies, not specifically FBAs or BIPs."[154] This lack of guidance has led to a notable divide in court rulings applying it.

D. Rowley*'s Second Prong: A Judiciary Divided*

Courts agree that if a school's response to a student's learning disabilities does not meet *Rowley*'s second prong, the school has deprived that student of FAPE.[155] While a court may invalidate an IEP that blatantly disregards the IDEA's basic requirements, it must also look to whether these procedural errors have deprived the

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149. *See Alex R.*, 375 F.3d at 614; *see also* 20 U.S.C. § 1415(k)(1)(D)(ii); 34 C.F.R. § 300.530(f)(1) (2012). If, however, after a manifestation determination, the IEP team concludes the misbehavior was not due to the student's disability, the team must only *consider* FBAs and BIPs to reduce the recurrence of the misbehavior. 20 U.S.C. § 1415(k)(1)(D)(ii); 34 C.F.R. § 300.530(c), (d)(ii).

150. *See, e.g.*, Maag & Katsiyannis, *supra* note 35, at 348, 352. *See generally* Bon & Osborne, *supra* note 20.

151. 34 C.F.R. pt. 300 app. A, at 115 (2004).

152. Individuals with Disabilities Education Act Amendments for 1997, Pub. L. No. 105–17 § 614(d)(3)(B)(i), 111 Stat. 37, 86.

153. 20 U.S.C. § 1414(d)(3)(B)(i).

154. Zirkel, *Empirical Analysis*, *supra*, note 23, at 186.

155. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 206–07 (1982).

student of an educational benefit.[156] Much of the case law regarding FBAs and BIPs revolves around access to education in the absence of an FBA or a BIP, the FBA's or BIP's appropriateness, and its implementation.[157] In his 2011 study, Perry A. Zirkel, professor of law and education at Lehigh University, found that from 1998–2010, courts heard 173 cases involving FBAs, BIPs, or both.[158] Professor Zirkel's study revealed that hearing officers tended to rule on a "rather ad hoc and often cryptic [basis], explicitly or implicitly [relying] on the evidence in the case, whereas the courts tended to cite and apply the standard under the IDEA, or if there was one, the standard under state law . . . [and] tended to be much stricter."[159] Moreover, some adjudicators found that the *Rowley* standard should apply, while others did not even mention it, resulting in a standard that "was not at all clear."[160]

1. Courts finding that the lack of an FBA and a BIP is a denial of FAPE

Despite the IDEA's uncertainty, several courts have found that the lack of an FBA and BIP for a student with behavioral needs denies that student FAPE. In *School Board v. Brown*,[161] the U.S. District Court for the Eastern District of Virginia held that a school failed to provide a student with FAPE when school personnel did not conduct an FBA or implement a BIP after "several behavioral incidents."[162] The court noted that the student's repeated misconduct "placed the School Board on notice that [the] Student's current disability . . . warranted a[n FBA]."[163] Notwithstanding the IDEA's "consider" language, the court found that the school's failure to conduct an FBA violated the school's responsibilities under the Child Find[164] component of the Act.[165] Noting that the student's lack of a behavioral evaluation and

156. *See* OSBORNE & RUSSO, *supra* note 19, at 100.

157. *See* Zirkel, *Empirical Analysis*, *supra*, note 23, at 191–92.

158. *Id.* at 196 (stating that hearing or review officers heard 125 cases while courts heard the remaining forty-eight).

159. *Id.* at 202.

160. *Id.* at 203.

161. 769 F. Supp. 2d 928 (E.D. Va. 2010).

162. *Id.* at 934, 943 (explaining that the student left three threatening messages on the principal's voicemail).

163. *Id.* at 943.

164. 20 U.S.C. § 1414(b)(3)(B) (requiring that the LEA ensure that "the child is assessed in all areas of suspected disability"); *see* discussion *infra* notes 226–79 (arguing that schools must evaluate the child in every suspected area of disability, including behavior).

165. *Brown*, 769 F. Supp. 2d at 943. This reasoning has also persuaded courts in New York, which, relying on the IDEA's plain language, found that a school was required to provide an autistic child who was hyperactive and easily distracted with

an intervention plan led to his suspension and loss of educational benefit, the court found the school had denied the student FAPE.[166] Similarly relying on the school's Child Find obligations, the U.S. District Court for the District of Columbia held in *Long v. District of Columbia*[167] that because teachers observed a decline in the student's behavior and did not conduct an FBA or implement a BIP, the student was denied FAPE.[168] Each court found that the student's behavior substantially affected his academic performance and that the school's failure to evaluate and address the student constituted a procedural and substantive violation of the IDEA.[169]

2. Courts finding that the lack of an FBA and a BIP is not a denial of FAPE

In contrast, the U.S. Courts of Appeals for the Second, Seventh, and Eighth Circuits have found that a school's failure to provide a student with behavioral needs with an FBA and a BIP is not a denial of FAPE.[170] In *Park Hill School District v. Dass*,[171] the Eighth Circuit acknowledged that it "typically" reviewed an IEP prospectively.[172] In *Dass*, however, the court found that such an evaluation would be unwarranted, given that the school, after the parents filed their due process complaint, had the opportunity to address the problem.[173] The court reasoned that because school district representatives acknowledged that the student had behavioral needs and testified

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an FBA, despite the "consider" language. C.F. *ex rel.* R.F. v. N.Y.C. Dep't of Educ., 746 F.3d 68, 73, 80–81 (2d Cir. 2014). *But see* M.W. *ex rel.* S.W. v. N.Y.C. Dep't of Educ., 725 F.3d 131, 140 (2d Cir. 2013) (finding that the failure to conduct an FBA does not invalidate an IEP, as long as an adequate BIP is included).

166. *Brown*, 769 F. Supp. 2d at 943, 945.

167. 780 F. Supp. 2d 49 (D.D.C. 2011).

168. *Id.* at 59–61.

169. *Id.* at 61; *Brown*, 769 F. Supp. 2d at 943, 945; *see also* Student v. Redlands Unified Sch. Dist., Off. Admin. Hearings, Special Educ. Division, Case Nos. N2006100159, N2007031009 (Mar. 17, 2008), http://www.documents.dgs.ca.gov/oah/seho_decisions/2006100159-2007031009.pdf. Here, the California State Educational Agency found that the school district committed a procedural violation when it failed to provide an autistic student with an FBA and positive BIP. *Id.* at 29. The court ultimately concluded that the procedural violation amounted to a substantive denial of FAPE because the deprivation divested the student of an educational benefit, even though the school implemented other unsuccessful behavior interventions. *Id.*

170. *M.W. ex rel. S.W.*, 725 F.3d at 140; Park Hill Sch. Dist. v. Dass, 655 F.3d 762, 764 (8th Cir. 2011); Alex R. *ex rel.* Beth R. v. Forrestville Valley Cmty. Unit. Sch. Dist., 375 F.3d 603, 618 (7th Cir. 2004).

171. 655 F.3d 762 (8th Cir. 2011).

172. *Id.* at 767.

173. *Id.* (citing 20 U.S.C. § 1415(f)(1)(B)(i)(IV)).

during the administrative hearing that the school planned to use behavior intervention strategies that had been successful for other autistic students, the absence of a plan to address the student's challenge behavior was merely a procedural violation of the IDEA.[174] Similarly, in *School Board of Independent School District No. 11 v. Renollett*,[175] the Eighth Circuit found that a BIP does not need to be in writing for it to be sufficient.[176]

The Second Circuit, which is somewhat consistent with the Eighth Circuit in this particular instance, has held that when the IEP identifies the student's behavioral issues and creates strategies to prevent that behavior, an FBA is not required.[177] In the Second Circuit's estimation, the lack of a written FBA does not prevent "meaningful decision[ ]making" when creating an IEP.[178] The Seventh Circuit used slightly different reasoning to come to a similar conclusion, declaring that it "may not create out of whole cloth" substantive requirements for a BIP, and concluding that a BIP cannot "fall[] short of substantive criteria that do not exist," and thus a school's failure to implement one cannot constitute a denial of FAPE.[179]

3. Deference to administrative determinations of the facts

Despite the Seventh Circuit's reasoning, however, "[m]any statutes leave key terms ambiguous, often intentionally, and thereby delegate rulemaking authority to [the] courts."[180] Several courts—including the Supreme Court—have been tasked with exploring the elements

174. *Id.* (reasoning that "requesting a due process hearing [puts] the school district on notice of a perceived problem," but by contemplating behavior intervention strategies, the school already had notice).

175. 440 F.3d 1007 (8th Cir. 2006).

176. *Id.* at 1011 (noting that "neither [state law] nor federal law require a written BIP").

177. M.W. *ex rel.* S.W. v. N.Y.C. Dep't of Educ., 725 F.3d 131, 140 (2d Cir. 2013).

178. *Id.*

179. Alex R. *ex rel.* Beth R. v. Forrestville Valley Cmty. Unit. Sch. Dist., 375 F.3d 603, 615 (7th Cir. 2004); *see Renolett*, 440 F.3d at 1011 ("Although the parties intended to attach a written BIP to [the student's] IEP, neither Minnesota nor federal law require a written BIP."); Bon & Osborne, *supra* note 20, at 582 (reviewing the litigation and noting that some circuits have held that failing to implement a BIP does not constitute a denial of FAPE). *But see* Zirkel, *Empirical Analysis*, *supra* note 23, at 177 (noting that "since *Rowley*, the Supreme Court has addressed various other IDEA issues, but not FBAs or BIPs, and Congress has codified a modified procedural standard for FAPE." (footnotes omitted)).

180. WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 832 (4th ed. 2012).

of undefined terms within statutes and have, through that process, created substantive elements of those terms.[181]

With the exception of matters of law, judges must give deference to hearing officer determinations.[182] Like many other federal statutes, the IDEA "points out a mode of procedure which must be followed before there can be a resort to the courts."[183] Thus, the administrative process serves as a "preliminary sifting process"[184] done by persons with expert knowledge who are better equipped to deal with the subject's technical complexity,[185] and "by no means [should] courts . . . substitute their own notions of sound educational policy" for those of the experts.[186] Instead, "the appropriate level of review . . . [is] 'involved oversight,' a standard which 'falls somewhere between the highly deferential clear-error standard and the non-deferential de novo standard.'"[187] With these provisions in mind, courts determining the sufficiency of FBAs and BIPs routinely defer to the testimony presented in the administrative record.[188]

Although courts remain in conflict in determining whether the failure to provide a student with an FBA and BIP is a denial of FAPE, looking collectively to the administrative record, expert testimony, and the IDEA's stated purpose and procedural requirements provides courts with a coherent way to determine the sufficiency of a school's response to a student with behavioral needs. Ultimately, when a special education student puts a school on notice that he or she is a

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181. *See generally, e.g.*, Integrity Staffing Sols., Inc. v. Busk, 135 S. Ct. 513 (2014) (determining whether screening procedures were an "integral" part of job); Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001) (interpreting the term "navigable waters"); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) (defining "waters of the United States").

182. A.C. *ex rel.* M.C. v. Bd. of Educ., 553 F.3d 165, 172–73 (2d Cir. 2009) (finding that deference was "particularly warranted" because the district court based its decision only on the administrative record); Bd. of Educ. v. Benton, 406 F. Supp. 2d 1248, 1269–70 (S.D. Ala. 2005) (explaining that the hearing officer's conclusion "does not constitute improper second-guessing"); OSBORNE & RUSSO, *supra* note 19, at 168 (noting several cases in which the court agreed with the hearing officer).

183. United States v. Sing Tuck, 194 U.S. 161, 167 (1904) (explaining that to act substantively on the statute at issue, a question of procedure had to be addressed first—similar to the IDEA); *see* 20 U.S.C. § 1415(i)(2)(A) (explaining that an aggrieved party may bring a civil suit in a federal court).

184. *Sing Tuck*, 194 U.S. at 170.

185. Raoul Berger, *Exhaustion of Administrative Remedies*, 48 YALE L.J. 981, 984 (1939).

186. Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982).

187. S. Kingston Sch. Comm. v. Joanna S. ex rel. P.J.S., 773 F.3d 344, 349 (1st Cir. 2014) (quoting Sebastian M. v. King Phillip Reg'l Sch. Dist., 685 F.3d 79, 84 (1st Cir. 2012)).

188. *See, e.g.*, C.F. *ex rel.* R.F. v. N.Y.C. Dep't of Educ., 746 F.3d 68, 80 (2d Cir. 2014).

student whose behavior impedes his or her access to education, schools must respond with an FBA and BIP.[189]

II. A SCHOOL'S FAILURE TO CONDUCT AN FBA AND IMPLEMENT A BIP FOR A STUDENT WITH SPECIAL NEEDS IS A DENIAL OF FAPE

The IDEA requires that an IEP team create an IEP that is uniquely tailored to address the specific needs of the student.[190] An IEP's adequacy is judged not on a standard of actual benefit, but rather on whether it is likely to confer on the student a meaningful educational benefit at the time it is written.[191] To fulfill these obligations, a school must first evaluate a student in every area of suspected disability using peer-reviewed techniques and then use the results of those evaluations to create the student's IEP.[192] This requires the use of an FBA and a BIP for a student with demonstrated behavioral challenges. The IEP must also ensure that the student is educated with his nondisabled peers to the greatest extent possible.[193] When a student's behavior frequently causes him or her to be removed from the classroom, the school must address it.

Ultimately, the IEP team for a student with behavioral needs must, at a minimum, identify his problem behaviors and create an intervention plan that addresses those specific behaviors. A one-size-fits-all behavioral intervention, without evidence that the intervention will actually support the child's behavioral needs, does not fulfill this obligation.

A. Regardless of What it Is Called, a School's Failure to Evaluate the Function of a Student's Misbehavior and Subsequently Implement a Plan Reasonably Calculated to Intervene in the Child's Misbehavior Results in a Denial of FAPE

A school's use of a peer-reviewed technique to assess the function of a student's misbehavior, whether or not it is called an FBA, satisfies the IDEA's procedural requirements. Similarly, a school's reasonably-calculated plan to address and correct a student's misbehavior, whether or not it is formalized in a written BIP, complies with the Act. Many of the courts that have held that a school's failure to implement an FBA and a BIP did not result in the denial of FAPE relied primarily on the fact that the school, despite

189. *See* discussion *infra* Part II.A.

190. *See* 20 U.S.C. § 1400(d)(1)(A) (2012); Bd. of Educ. v. Benton, 406 F. Supp. 2d 1248, 1268 (S.D. Al. 2005) (noting that the IEP "should be designed specifically for [the student]").

191. *See* OSBORNE & RUSSO, *supra* note 19, at 35.

192. *See* 20 U.S.C. § 1414(b)(3)(B).

193. *See id.* § 1400(c)(5)(A).

not calling the process FBA and BIP, attempted to understand the function of the student's misbehavior and created a plan that was reasonably designed to interrupt those misbehaviors.[194]

1. Would a rose by any other name smell as sweet? Using FBAs and BIPs or their substantive equivalents when evaluating and addressing behavior

So long as a school attempts to determine the root causes of a student's misbehavior using peer-reviewed procedures and creates a plan that aims at mitigating those behaviors, the school's action is not a per se denial of FAPE simply because it did not refer to this process as conducting an "FBA" and implementing a "BIP." The IDEA provides that when a student's misbehavior leads to suspension, the school must identify the function of the misbehavior and create a corrective action plan.[195]

Although the IDEA does not define FBA and BIP, it sets a low bar procedural requirement for using an FBA to create a BIP: so long as the BIP does not become deficient in the absence of an FBA, no substantive violation occurs. When a school does not conduct an FBA, however, a reviewing court must take "particular care" in deciding whether the IEP adequately addresses the child's problem behaviors.[196] An "IEP [that does not] adequately identif[y the] student's behavioral impediments and implement[] strategies to address that behavior" constitutes a substantive violation.[197]

An evaluation that follows those guidelines, however, appears to be an FBA in spirit, if not in name. For example, courts that have found a school's failure to create an IEP that incorporates data from an FBA did not deny the student FAPE—including the Seventh Circuit in *Alex R. ex rel. Beth R. v. Forrestville Valley Community Unit School District*[198] and the Second Circuit in *M.W. ex rel. S.W. v. New York City Department of Education*[199]—based their conclusions on findings that the school utilized other means to discern the causes of the student's misbehavior and created a BIP or an IEP in accordance with those

194. *See, e.g.*, Alex R. *ex rel.* Beth R. v. Forrestville Valley Cmty. Unit. Sch. Dist., 375 F.3d 603, 609, 611, 613 (7th Cir. 2004) (emphasizing that officials did not act in good faith when they considered a student's disability and its associated effects on the classroom).

195. 20 U.S.C. § 1415(k)(1)(D)(ii); 34 C.F.R. § 300.530(f)(1).

196. R.E. *ex rel.* J.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167, 190 (2d Cir. 2012).

197. M.W. *ex rel* S.W. v. N.Y.C. Dep't of Educ., 725 F.3d 131, 140 (2d Cir. 2013).

198. 375 F.3d 603, 613–14 (7th Cir. 2004).

199. 725 F.3d 131, 141 (2d Cir. 2013) (finding that a BIP describing the student's "behaviors that interfered with learning" based on reports and in-class observations was sufficient).

findings[200]: the functional equivalent of conducting an FBA.[201] Thus, the school's failure to refer to the system of behavior evaluation used when creating a BIP as specifically an FBA is not a per se denial of FAPE; rather, the failure to offer adequate equivalent benefits denies a student with behavioral needs FAPE.[202] Similarly, a plan that does not consider and address the root causes of a student's misbehaviors violates the IDEA, as it does not consider the unique needs of the child.[203] When a child has behavioral issues, a plan must address those needs to ensure FAPE, regardless of its name.[204]

The Second Circuit applied similar reasoning when it held in *M.W. ex rel. S.W.* that a BIP may be incorporated in a child's IEP.[205] If a school creates a BIP within the IEP, instead of in a separate document, it has created a plan to intervene in a child's misbehaviors and thus complies with the IDEA's requirements.[206] In *M.W. ex rel. S.W.*, the court, by concluding that the IEP created a plan that would likely intervene in the student's behavior, determined that the IEP not only created benchmarks, but that it also established a plan that allowed for collaboration between the IEP team and teachers and included the methods by which these stakeholders would implement it.[207]

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200. *See id.* at 140–41; C.F. *ex rel.* R.F. v. N.Y.C. Dep't of Educ., 746 F.3d 68, 74, 80 (2d Cir. 2014) (concluding that a BIP based on "McCarton reports," which identified the student's behavior impediments and their causes, might have provided the student FAPE if the behavioral strategies were adequately created and implemented); A.C. *ex rel* M.C. v. Bd. of Educ., 553 F.3d 165, 170, 172–73 (2d Cir. 2009) (holding that supplying the student with a personal aide was an appropriate substitute for an FBA); D.N. *ex rel.* G.N. v. N.Y.C. Dep't of Educ., No. 14 Civ. 2526, 2015 WL 925968, at *10 (S.D.N.Y. Mar. 3, 2015) (stating that "in devising the BIP, the CSE considered numerous behavioral reports," and "the resulting BIP . . . identifie[d the student's] behavioral challenges and suggest[ed] detailed methods to address those challenges"). *But see* Red Clay Consol. Sch. Dist. v. T.S. *ex rel.* R.S., 893 F. Supp. 2d 643, 651 (D. Del. 2012) (finding that the school's omission of baseline historical data—*i.e.*, the student's previously mastered skills—from the IEP did not deny the student FAPE).

201. *See* discussion *supra* Part I.F.

202. R.K. *ex rel.* R.K. v. N.Y.C. Dep't of Educ., No. 09-CV-4478, 2011 WL 1131492, at *19 (E.D.N.Y. Jan. 21, 2011), *aff'd*, 694 F.3d 167 (2nd Cir. 2012) (explaining that a plan should do more than "[m]erely describ[e] problematic behavior and lis[t] several goals for improvement" to be a sufficient substitute for an FBA and/or a BIP).

203. *See* 20 U.S.C. § 1400(d)(1)(A) (2012); Sch. Bd. v. Brown, 769 F. Supp. 2d 928, 945 (E.D. Va. 2010) (holding that because the student's IEP was not "specially designed to meet [his] unique needs with regard to his behavioral issues," the school denied FAPE).

204. *See* 20 U.S.C. § 1414(b)(3)(B); *Brown*, 769 F. Supp. 2d at 942.

205. 725 F.3d 131, 140, 141, 147 (2d Cir. 2013).

206. Compliance is achieved so long as the IEP details strategies for intervention and not just benchmarks.

207. 725 F.3d at 141.

In *Park Hill School District v. Dass*,[208] the Eighth Circuit failed to consider these elements of the IDEA when it summarily reversed the judgments of the administrative hearing officer and district court below.[209] Although it is true that a school district has the opportunity to address parents' complaints, this provision should only affect the court's analysis if the district actually took the opportunity to remedy the issue. In this case, the district merely testified that it *planned* on using strategies that worked with other students who were also autistic, thus both failing to have an actual, written plan in place and to address the unique needs of the child—not all autistic children are alike.[210] The Eighth Circuit's precedent tests the validity of that statement and ignores the clear requirements of the IDEA.

B. When a Child's Behavior Impedes Access to Education, the School Is Required to Conduct an FBA and Implement a Positive BIP

When a child's behavior deprives him of an educational benefit, thus violating *Rowley*'s standard for FAPE, the school must evaluate (or reevaluate) the misbehavior's causes and create a plan that is likely to support the student's behavioral needs and confer an educational benefit. The IDEA's "most fundamental concern" is ensuring that each special needs student obtains a quality education.[211] Part of that goal requires that schools use "positive behavioral interventions to address the conduct of children with disabilities that impedes their learning or that of others in the classroom."[212]

School officials cannot ignore a suspicion that a child may have a disability.[213] Delays in evaluating a student can result in a denial of FAPE[214] and drastically lower educational outcomes for disabled

208. 655 F.3d 762 (8th Cir. 2011).

209. *Id.* at 766–69 (holding that the lack of provisions in an IEP addressing behavioral and transition issues constituted "at most a procedural, not a substantive error" and did not deny the child FAPE).

210. *See* Amanda J. *ex rel.* Annette J. v. Clark Cty. Sch. Dist., 267 F.3d 877, 894 (9th Cir. 2001) (stating that "each child [with autism] has different needs, different skills, and a different time frame for effective treatment"); Sch. Bd. v. Brown, 769 F. Supp. 2d 928, 941 (E.D. Va. 2010) (noting that disabilities have different levels of severity and that each disabled child has unique needs).

211. 150 CONG. REC. S24275 (daily ed. Nov. 19, 2004) (statement of Sen. Gregg).

212. 150 CONG. REC. S24276 (daily ed. Nov. 19, 2004) (statement of Sen. Reed).

213. OSBORNE & RUSSO, *supra* note 19, at 47 (citing N.G. v. District of Columbia, 556 F. Supp. 2d 11, 16 (D.D.C. 2008)) (explaining that school districts have an obligation under the IDEA to evaluate children recognized as possibly being disabled).

214. *See* G.D. *ex rel.* G.D. v. Wissahickon Sch. Dist., 832 F. Supp. 2d 455, 467 (E.D. Pa. 2011) (determining that if the school district properly reevaluated the student, it would not have denied the student FAPE); D.B. v. Sch. Bd., 708 F. Supp. 2d 564,

students—a situation that propels special needs children into the school-to-prison pipeline. Once the child is suspected of having a disability, he must be evaluated in all areas of suspected disability.[215] Thus, when a student's behavior becomes an impediment to his education—whether it be by way of suspension or frequent removal from the classroom—it places school officials on notice that the student may have a behavior-affecting disability.[216] Consequently, the school must conduct an FBA and implement a BIP if less intrusive remedial strategies do not produce results.[217]

1. The procedural denial: Dealing with the "consider" language

The IDEA's "consider" language has been particularly troublesome in evaluating whether an IEP without an FBA or BIP provides a student with FAPE.[218] Initially, it might seem that a school can avoid violating the IDEA by simply proving that it "consider[ed]" conducting an FBA and implementing a BIP, but simply chose not to. Courts, however, have taken a more critical view, weighing the statute's "consider" language against its clear demand that schools address student misbehavior.[219]

Before it considers implementing an FBA or BIP, the IEP team must first have determined that a student's behavior is currently or likely will be an impediment to his receiving an educational benefit.[220] Such a finding is paramount to the team's obligation "to

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584–87 (W.D. Va. 2010) (citing inadequate evaluation as a key reason plaintiff was denied FAPE); El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 951–52 (W.D. Tex. 2008), *aff'd in part & vacated in part by* 591 F.3d 417 (5th Cir. 2009) (finding that the child was denied FAPE when the school district did not evaluate the child in a reasonable amount of time after the district had notice that the child may have been learning disabled).

215. *See* 20 U.S.C. § 1414(b)(3)(B) (2012); Sch. Bd. v. Brown, 769 F. Supp. 2d 928, 942 (E.D. Va. 2010).

216. *See Brown*, 769 F. Supp. 2d at 943; *see also* W.B. v. Matula, 67 F.3d 484, 501 (3d Cir. 1995), *abrogated on other grounds by* A.W. v. Jersey City Pub. Schs., 486 F.3d 791 (3d Cir. 2007).

217. OSBORNE & RUSSO, *supra* note 19, at 47.

218. *See* 20 U.S.C. § 1414(d)(3)(B)(i).

219. *See id.* § 1415(k)(1)(D)(ii); 34 C.F.R. § 300.530(d)(ii) (2014); Long v. District of Columbia, 780 F. Supp. 2d 49, 61 (D.D.C. 2011) (noting the need to intervene given behavioral needs); *Brown*, 769 F. Supp. 2d at 943 (same); Shelton v. Maya Angelou Pub. Charter Sch., 578 F. Supp. 2d 83, 99 (D.D.C. 2008) (same); *see also* 34 C.F.R. pt. 300, app. A, at 115; Losinski et al., *Implications for Practice*, *supra* note 20 (noting circumstances where FBAs must be done, such as when a student is transferred to another facility because he or she had a weapon, had or used drugs, or seriously hurt someone).

220. *See Long*, 780 F. Supp. 2d at 60 (providing that where "a child's behavior impedes his or her learning or that of others, the IEP team must consider . . .

ensure . . . the academic achievement and functional performance of [the student], [by] us[ing] scientifically based instructional practices, to the maximum extent possible."[221] Once the IEP team determines behavior is an issue, the use of an FBA and BIP fulfills its obligation to use scientifically based instructional practices through a procedure specifically identified within the IDEA.[222]

Looking at the IDEA's requirements collectively reveals that after an IEP team considers an FBA and BIP, the evaluation does not end. Instead, the focus shifts to the efficacy of the BIP in addressing behavioral issues. In this way, *Rowley* is inverted and the second, substantive prong becomes dispositive.[223] Given the IDEA's directive that an IEP team respond when an IEP's strategies are not working and the Act's clear preference for conducting an FBA and implementing a BIP over other behavior management schemes,[224] simply noting that the team "considered" the strategies, without more, violates the IDEA's procedural requirements.[225]

2. *Child Find*

The IDEA recognizes that the quality of a child's education is "inextricably linked" to his behavior.[226] Therefore, when a school has

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strategies . . . to address that behavior" (citing 20 U.S.C. § 1414(d)(3)(B)(i)).

221. 20 U.S.C. § 1400(c)(5)(E).

222. FBAs and BIPs fall under the peer-reviewed category as interpreted under the IDEA. *See generally* Zirkel, *Razing Rowley*, *supra* note 97, at 400, 410–11.

223. *See, e.g.*, *Long*, 780 F. Supp. 2d at 61 ("In light of [the student's] obvious behavioral issues . . . DCPS's failure to complete a BIP/FBA constitutes a denial of [] FAPE."); *Brown*, 769 F. Supp. 2d at 943 ("[S]everal behavioral incidents leading up to Student's February 2009 suspension . . . warranted a[n] [FBA] and, potentially, the development of a BIP."); *A.C. ex rel. M.C.*, 553 F.3d at 172 (holding that the IDEA does not require an FBA where the IEP provides other effective strategies for addressing the child's behavioral issues); *Shelton*, 578 F. Supp. 2d at 99 ("[T]he number of suspensions and the student's behavior . . . should have [warranted] an FBA and BIP . . . .").

224. *Long*, 780 F. Supp. 2d at 61 ("[T]he IDEA . . . recognizes that the quality of a child's education is inextricably linked to that child's behavior," and "[an] FBA is essential to addressing a child's behavioral difficulties, and, as such, it plays an integral role in the development of an IEP." (quoting Harris v. District of Columbia, 561 F. Supp. 2d 63, 68 (D.D.C. 2008))).

225. *Shelton*, 578 F. Supp. 2d at 99 (finding the school personnel's testimony that it considered an FBA or BIP insufficient, because it did not present "evidence that a FBA and/or BIP, designed to address the student's behavior violation so that it did not recur, was inappropriate or unwarranted"); Danielle G. *ex rel.* Alexander G. v. N.Y.C. Dep't of Educ., No. 06-CV-2152, 2008 WL 3286579, at *10–11, *15 (E.D.N.Y. Aug. 7, 2008) (finding that because the student's behaviors continued to impede her learning, an FBA was required).

226. Harris v. District of Columbia, 561 F. Supp. 2d 63, 68 (D.D.C. 2008) (stating that "an effective educational evaluation must identify behavioral problems").

notice of a child's behavioral issues, it must conduct an FBA.[227] Failing to conduct an FBA contravenes Congress's intent that the Act support all students with special needs by identifying them early and providing them with all necessary services.[228] Furthermore, the school must conduct the FBA promptly[229]: unnecessary delay in evaluating the student will deny the student FAPE and can lead to suspension or other irreparable psychological harm.[230] Thus, an FBA is central to the creation of an IEP for a student with behavioral needs.[231] Consequently, a school cannot provide FAPE without appropriate evaluation; for a child with behavioral challenges, this includes an FBA.[232] A school failing to conduct an FBA disregards the IDEA's mandate to conduct an evaluation of the student in all areas of suspected disability.[233] Without the results of an FBA, a

227. *See* 34 C.F.R. pt. 300, app. A, at 115 ("A failure to . . . consider and address [behaviors impeding learning] in developing and implementing the child's IEP would constitute a denial of FAPE to the child."); Lauren P. *ex rel.* David P. v. Wissahickon Sch. Dist., No. 05-5196, 2007 WL 1810671, *9–10 (E.D. Pa. June 20, 2007) (ordering reimbursement of tuition where the failure to create a BIP constituted denial of FAPE), *aff'd in part, rev'd in part on other grounds by* 310 F. App'x 552 (3d Cir. 2009); Danielle G. v. N.Y.C. Dep't of Educ., No. 06-CV-2152, 2008 WL 3286579, at *10–11, *15 (E.D.N.Y. Aug. 7, 2008) (declaring that the school should have addressed the student's known behavioral problems to allow the student to achieve at a higher level); *see also, e.g.*, Student v. Redlands Unified Sch. Dist., Off. Admin. Hearings, Special Educ. Division, Case Nos. N2006100159, N2007031009 (Mar. 17, 2008), http://www.documents.dgs.ca.gov/oah/seho_decisions/2006100159-2007031009.pdf.

228. *See* 20 U.S.C. § 1401(26); *see also* Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 245 (2009), *aff'd*, 638 F.3d 1234 (9th Cir. 2011) ("A reading of the [IDEA] that left parents without an adequate remedy when a school district unreasonably failed to identify a child with disabilities would not comport with Congress' acknowledgment of the paramount importance of properly identifying each child eligible for services.").

229. 20 U.S.C. § 1414(b)(3)(B) (stating that once a child is suspected of being a child with a disability, "the child [must be] assessed in *all* areas of [the] suspected disability") (emphasis added); OSBORNE & RUSSO, *supra* note 19, at 47.

230. D.B. v. Sch. Bd., 708 F. Supp. 2d 564, 584–87 (W.D. Va. 2010) (emphasizing that IEPs must be tailored to the specific student and disability to ensure realistic goals).

231. Harris v. District of Columbia, 561 F. Supp. 2d 63, 68 (D.D.C. 2008). *But see* M.W. *ex rel.* S.W. v. N.Y.C. Dep't of Educ., 725 F.3d 131, 140 (2d Cir. 2013) ("Failure to conduct an FBA . . . does not render an IEP legally inadequate under the IDEA . . . ."); Park Hill Sch. Dist. v. Dass, 655 F.3d 762, 766 (8th Cir. 2011) (holding that the IDEA does not require behavioral assessment in all circumstances); Alex R. *ex rel.* Beth R. v. Forrestville Valley Cmty. Unit Sch. Dist., 375 F.3d 603, 614 (7th Cir. 2004) (explaining that the IDEA only requires that a school district *consider* behavioral interventions and other strategies when dealing with a disabled student whose behavior is an impediment to his learning and to the learning of those around him).

232. Long v. District of Columbia, 780 F. Supp. 2d 49, 60–61 (D.D.C. 2011).

233. 20 U.S.C. § 1414(b).

school district is incapable of creating an IEP that is uniquely tailored to meet the student's specific needs, which, in turn, prevents the IEP from being reasonably calculated to enable him to receive educational benefits.[234] Behavior, oftentimes, is the greatest impediment to a child's education.[235] Thus, to ignore this component of a child's disability ignores the root causes of the greatest barrier to that student's achievement.

3. Snapshot view

A court evaluating the sufficiency of an IEP must focus on whether the IEP would confer FAPE at the time it is written.[236] The question is speculative and is not based on whether the student actually benefitted from the plan.[237] The IEP, at the time it is written, must include all the services and supports necessary to adequately meet the student's needs.[238]

Although an appropriate education—as contemplated by the IDEA—is a basic floor upon which schools must build,[239] an IEP must nevertheless contain all of the services a school district is otherwise obligated to provide.[240] An FBA is essential to mitigating a student's behavioral problems and serves an "integral role" in creating an IEP.[241] Given that an FBA is an educational evaluation under the IDEA,[242] it must be done for students with behavioral needs to ensure that the IEP will confer an educational benefit to the student. An IEP for a student with identified behavioral needs that does not include a key evaluation and a plan to address misbehavior fails to provide the benefits *Rowley* requires.

4. Least restrictive environment

The IDEA directs a school to educate each special needs student alongside non-disabled peers to the greatest extent possible. To achieve this goal, the IDEA mandates that a school provide each

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234. *Long*, 780 F. Supp. 2d at 60–61 (concluding that an FBA is needed to "fashion a legally compliant and educationally beneficial program").

235. *See, e.g.*, *Is This Working?*, *supra* note 72 ("[Y]ou . . . have to nail discipline before [a teacher] can do anything else in a classroom.").

236. *See* OSBORNE & RUSSO, *supra* note 19, at 35.

237. *Id.*

238. *Id.*; *see* C.F. *ex rel.* R.F. v. N.Y.C. Dep't of Educ., 746 F.3d 68, 79 (2d Cir. 2014) (rejecting the use of "retrospective evidence").

239. Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 195 (2d Cir. 2005) (citing Bd. of Educ. v. Rowley, 458 U.S. 176, 201 (1982)).

240. 20 U.S.C. § 1414(d)(1)(A)(i)(IV) (2012).

241. Harris v. District of Columbia, 561 F. Supp. 2d 63, 68 (D.D.C. 2008).

242. *Id.*

student with the supports and accommodations required to foster the student's inclusion in the general education classroom.[243] Given this mandate, students who engage in challenging behaviors need the support that BIPs provide, particularly if those behaviors would otherwise lead to the student's frequent removal from the classroom.[244] Normally, an IEP alone will not adequately address the student's behavioral impediments to receiving an educational benefit; therefore, a school's failure to also provide a BIP will be both a technical and substantive violation of the IDEA. Instead, the school must provide a BIP and maximize the student's chance of inclusion in the general education classroom, as the IDEA requires.[245]

Looking to the Child Find requirements, prospective IEP evaluations, and least restrictive environment provisions collectively, it is clear that to fulfill *Rowley*'s second prong, a school must create an IEP that evaluates and responds to every feature of disability that impacts either the student's behavior or academic performance.[246] To adequately ensure that the student's behavior is evaluated and properly addressed at the time the IEP is written, schools must conduct an FBA and create a BIP that accounts for the student's unique behavioral needs.[247] If the IEP team does not conduct an FBA, it will not have an adequate foundation upon which to build the BIP and it will not fulfill its obligations under the IDEA.[248]

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243. 20 U.S.C. § 1400(c)(5).

244. Though it is difficult to determine the frequency of this issue, some school districts appear to be gaming the system by underreporting the number of suspensions they serve in a given school year to avoid federal and public scrutiny. *See, e.g.*, Jim McLaughlin, *MPS Reported Incorrect Suspension Data*, JOURNAL SENTINEL (Sept. 2, 2012), http://www.jsonline.com/news/education/mps-reported-incorrect-suspension-data-7e6lvdk-168336126.html.

245. 20 U.S.C. § 1400(c)(5).

246. C.J.N. *ex rel.* S.K.N. v. Minneapolis Pub. Schs., 323 F.3d 630, 642 (8th Cir. 2003) ("We believe . . . that the student's IEP must be responsive to the student's specific disabilities, whether academic or behavioral.").

247. *See* 20 U.S.C. § 1400(d)(1)(A); Sch. Bd. v. Brown, 769 F. Supp. 2d 928, 944–45 (E.D. Va. 2010) (explaining that the school did not conduct an FBA or implement a BIP, failed to create an IEP that was specifically tailored to the student's specific behavioral issues, and denied the student FAPE).

248. Even if the behavior is "typical" of the student's disability, schools must nevertheless include an FBA and BIP in the student's IEP. *See, e.g.*, Bd. of Educ. v. Benton, 406 F. Supp. 2d 1248, 1268, 1273 (S.D. Ala. 2005).

5. When a school does not support a student with behavioral struggles with an FBA and a BIP, that student is reasonably likely to be deprived of educational benefit and thus be denied FAPE

When a child's behavior hinders learning, the IEP team is obligated to update the student's IEP to address those misbehaviors. Strategies such as time-outs, detention, and restricted privileges, when used sparingly, may help to curb a student's misbehavior.[249] Alternatively, these approaches, when used frequently, involve the consistent removal of a child from the classroom; in this case, the student's behavior is preventing him from being in the classroom and learning with other, non-disabled students.[250] A school's failure to address this issue with an FBA and BIP is a denial of FAPE.[251]

Similarly, when a school suspends a student for ten or more consecutive or cumulative[252] schooldays and concludes that the misbehavior that led to the suspension was a manifestation of the student's disability, the school, if it has not already, must conduct an FBA.[253] On this point there is little to debate. Although the lack of an FBA and BIP in this situation is a clear procedural violation, the

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249. *See* Honig v. Doe, 484 U.S. 305, 325 (1988) (approving these strategies); Timothy J. Landrum et al., *Classroom Misbehavior Is Predictable and Preventable*, PHI DELTA KAPPAN, Oct. 2011, at 30, 32–33; Michael J. Palardy, *Dealing with Misbehavior: Two Approaches*, 22 J. OF INSTRUCTIONAL PSYCHOL. 135 (1995).

250. 20 U.S.C. § 1412(a)(5) (2012); *see* Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 (2d Cir. 2007) (emphasizing the IDEA's "strong preference" for educating disabled students with non-disabled students); Lillbask v. Conn. Dep't of Educ., 397 F.3d 77, 81 (2d Cir. 2005) (same); *Danielle G.*, 2008 WL 3286579, at *4 (same). These kinds of short-term removals also do not amount to a change in placement that would automatically trigger the need for an FBA and BIP. *See* Hayes v. Unified Sch. Dist. No. 377, 877 F.2d 809, 813 (10th Cir. 1989) (noting that short-term disciplinary measures do not constitute changes in placement).

251. Lauren P. *ex rel.* David P. v. Wissahickon Sch. Dist., No. 05-5196, 2007 WL 1810671, at *6 (E.D. Pa. June 20, 2007) (finding that the school failed to provide FAPE when student behavior worsened and it did not respond with FBA or BIP), *aff'd in part, rev'd in part on other grounds by* 310 F. App'x 552 (3d Cir. 2009).

252. This provision of the IDEA is based on the Supreme Court's holding in *Honig v. Doe*, 484 U.S. 305 (1988), which specified that a ten-day suspension constituted a change in placement. 484 U.S. at 325–26 n.8, 328. The Court, however, did not specify whether its judgment was based on ten consecutive or cumulative days. Lower courts have since found that ten *cumulative* days constitute a change in placement that triggers a school's obligations under 20 U.S.C. § 1415(k)(1)(D)(ii). *See, e.g.*, Manchester Sch. Dist. v. Charles M.F., No. 92-609-M, 1994 WL 485754, at *10 (D.N.H. Aug. 31, 1994).

253. 20 U.S.C. § 1415(k)(1)(D)(ii); 34 C.F.R. § 300.530(d)(ii) (2014). Recall, however, that if the school concludes that the misconduct was *not* a manifestation of the student's disability, it need only "consider" conducting an FBA. *See* 20 U.S.C. § 1415(k)(1)(A), (D).

issue of whether it is also deprives a student of educational benefit continues to plague the judiciary.

6. The substantive denial: Students who are suspended must receive an updated IEP that incorporates strategies to prevent and correct the behaviors that led to their suspensions using FBAs and BIPs

An IEP must provide a student with more than a trivial benefit; otherwise, the school deprives the student FAPE.[254] Therefore, if the school suspends a student, it must use an FBA and BIP to reevaluate the IEP and make "modifications . . . designed to address the behavior so that it does not recur."[255] The student's suspension makes it evident that the current IEP is not appropriate. Arguably, had the student's behavior been escalating, the school should have already provided the student with an FBA and a BIP.[256] An extreme disciplinary action requires a more intrusive intervention—one that ensures that the IEP is reasonably calculated to afford the child an educational benefit in the least restrictive environment.

A satisfactory IEP must provide the child with an opportunity for "significant learning" and "confer meaningful benefit."[257] An IEP plays a central role in affording a student with a disability a quality education.[258] To that end, the IDEA includes provisions requiring a school to monitor a student's progress frequently and thoroughly. Thus, should the student begin to fall behind, the IEP team must revise that student's IEP.[259] These updates include "positive behavioral interventions and supports."[260]

To comply with the IDEA, a school must provide all services that a student needs to derive a meaningful educational benefit.[261] In considering which programs to include in a student's IEP, a school must factor in the student's progress toward his annual goals and

254. *See, e.g.*, Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182 (3d Cir. 1988) (asserting that "states must provide [disabled students] some sort of meaningful education—more than mere access to the schoolhouse door"); Penn Trafford Sch. Dist. v. C.F. *ex rel.* M.F., No. 04-1395, 2006 WL 840334, at *9 (W.D. Pa. Mar. 28, 2006) (citing M.C. *ex rel.* J.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 396 (3d Cir. 1996)) (explaining that where an IEP confers only *de minimis* benefits, the student has been denied FAPE).

255. 20 U.S.C. § 1415(k)(1)(D)(ii).

256. *See supra* Part II.B (arguing that a school district denies a disabled student FAPE when it fails to provide an FBA and BIP to address the student's behavioral issues).

257. *Polk*, 853 F.2d at 182, 184.

258. Harris v. District of Columbia, 561 F. Supp. 2d 63, 65 (D.D.C. 2008).

259. *Id.*

260. 20 U.S.C. § 1414(d)(3)(B)(i).

261. 20 U.S.C. §§ 1400(c)(5)(D), (d)(1)(A), 1401(3)(A)(ii).

reevaluation information, including "anticipated needs [and] special factors."[262] If the student's IEP proves to be inadequate, as in the case of a suspension, the IEP team should address the IEP's deficiencies.[263] Once it updates the IEP, the IEP team should ensure that the IEP is "likely to produce progress, not regression or trivial educational advancement."[264] Using an FBA and a BIP provides that assurance.

Schools have an affirmative obligation to evaluate all students suspected of having a disability in every area in which they are suspected of being disabled.[265] This includes evaluations of a student's behavior. Once the student has been evaluated, the IEP team must create an IEP that reflects the findings of the student's evaluations and provides any supports and related services necessary to include the student in the general education classroom while providing him FAPE.[266] If challenged, a court will review the student's IEP prospectively.[267] Thus, should the IEP team fail to fulfill its Child Find obligations and incorporate plans and supports that will enable the student to gain educational benefits within the general education setting to the degree it is possible, the IEP team has denied the student FAPE. This denial makes the school more likely to suspend the student and cause him to be susceptible to the school-to-prison pipeline.[268]

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262. OSBORNE & RUSSO, *supra* note 19, at 102.

263. M.C. *ex rel.* J.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 397 (3d Cir. 1996) ("[A] child's entitlement to special education should not depend upon the vigilance of the parents . . . ."); *id.* ("[A] school district that knows or should know that a child has an inappropriate IEP or is not receiving more than a *de minimis* educational benefit must correct the situation.").

264. Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 248 (5th Cir. 1997) (quoting Bd. of Educ. v. Diamond, 808 F.2d 987, 991 (3d Cir. 1986)); *accord* Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 (2d Cir. 1998).

265. 20 U.S.C. § 1414(b).

266. *Id.* § 1412(a)(5)(A).

267. *See* OSBORNE & RUSSO, *supra* note 19, at 35 (explaining that a court considers "whether [an IEP was] reasonably calculated to confer educational benefit at the time [it was] proposed").

268. *See* ACLU, LOCATING THE SCHOOL-TO-PRISON PIPELINE, *supra* note 7 (explaining that harsh disciplinary policies in schools often push students into the juvenile justice system); *Black Preschoolers Far More Likely to Be Suspended*, *supra* note 82 (pointing out that students of color are far more likely to face suspension or expulsion than their white counterparts committing the same infractions).

C. A BIP Must Incorporate the Findings of an FBA and Provide Teachers with Uniform Strategies to Support the Student's Behavioral Challenges

A school must implement a BIP uniformly throughout the school day. Determining whether the BIP allows for uniform implementation requires that it be written. Before challenging the sufficiency of the BIP or IEP generally, a parent must first exhaust the available administrative remedies available. This requirement ensures that by the time the case reaches the trial court, the issue has been fully briefed and comes with a complete record to which the court may—and in some instances must—defer. These procedures avoid the need for a court to create definitions for FBAs and BIPs and spares a judge from evaluating the sufficiency of either system without guidance.

1. Because a BIP must be uniformly implemented, it must be in writing

A school's failure to uniformly implement a student's BIP is a denial of FAPE.[269] Disjointed implementation of a BIP obstructs the success of the student whom the school—given its decision to create a BIP for the student—has already recognized as a student with behavioral issues.[270] When dealing with students with special needs, behavior interventions must be implemented in a "very systematic[] and . . . structured fashion for [them] to work."[271] Therefore, educators must implement a BIP "consistently across all school settings by all teachers . . . ."[272] Failing to provide a consistent policy for handling behavior issues denies a student with a disability meaningful educational benefits and defeats the purpose of the BIP.[273]

Despite the Eighth Circuit's holding in *Renollett*[274] and although "federal law [does not expressly] require a written BIP,"[275] to hold that it is not a necessary component of proper execution would lead

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269. M.W. v. Bd. of Educ., Special Educ. No. 06-19, Dep't of Educ. of Alabama, at 83 ("[T]he failure to appropriately implement the Petitioner's [BIP] must be deemed a denial of Petitioner's right to a [FAPE].") (on file with author).

270. *See id.* at 82.

271. *Id.*

272. Lauren P. *ex rel.* David P. v. Wissahickon Sch. Dist., No. 05-5196, 2007 WL 1810671, at *6 (E.D. Pa. June 20, 2007), *aff'd in part, rev'd in part on other grounds by* 310 F. App'x 552 (3d Cir. 2009).

273. *Id.* at *7 (finding that a student with a disability needs more than just "substantial accommodations;" rather, a consistent response to behavioral issues is appropriate).

274. Sch. Bd. v. Renollett, 440 F.3d 1007, 1012 (8th Cir. 2006) (holding that the school district's failure to include a written BIP for a disabled student did not deny a student FAPE).

275. *Id.* at 1011.

to an absurd result.[276] Teachers cannot be expected to implement a plan consistently and uniformly when it is not written down for their reference. For example, if the school hires a new teacher or engages a long-term substitute in the middle of the year, that individual will be practically incapable of implementing the child's BIP uniformly unless it is written. A school must write the BIP to ensure that each member of the IEP team and the student's teachers are all on the same proverbial and literal page.[277]

This argument, however, does not hold the same weight for an FBA. It stands to reason that educators would create an FBA from multiple documents, among other things, which would, in turn, inform the IEP team on the necessary elements of the BIP. Though "school officials would be well advised that the safest course of action is to put [the] FBA[] and [the] BIP[] in writing,"[278] the failure to encapsulate the findings of the FBA into one succinct document may not necessarily lead to a denial of FAPE or an arbitrary implementation of a BIP. Thus, the lack of a written FBA is only relevant to the extent that it leads to an insufficient BIP.[279]

2. *Creating a definition out of "whole cloth": Getting by with a little help from their administrative friends*

By the time an IDEA case gets to a trial court judge, it has gone through an exhaustive administrative process that creates a full record, including testimony from the parties. It most likely also contains a statement of the substantive requirements of a BIP or FBA and an

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276. In addition to using the plain meaning of a particular term, courts look to whether that particular interpretation is consistent with both "commonsense" and the intent of the act as a whole. Rapanos v. United States, 547 U.S. 715, 733–34 (2006); *see also id.* at 734 ("[I]t is one thing to give a word limited effect and quite another to give it no effect whatever."); Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 98 (2007) (emphasizing that courts should not read "statutory language" in a way "that ignores its basic purpose and history"). Courts also construe statutes to avoid absurd results. *But see* Rodriguez v. United States, 480 U.S. 522, 525–26 (1987) (contending that "no legislation pursues its purposes at all costs," and that "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law"). *See generally* Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127, 128 (1994).

277. Courts, moreover, will be hard-pressed to evaluate the sufficiency of the IEP if it is not written.

278. OSBORNE & RUSSO, *supra* note 19, at 167.

279. C.F. *ex rel.* R.F. v. N.Y.C. Dep't of Educ., 746 F.3d 68, 80 (2d Cir. 2014).

administrative judge's or hearing officer's findings on the sufficiency of an FBA and a BIP.[280] A judge is required to give these findings deference.[281]

Looking to the way in which courts interpret similarly undefined terms in statutes reveals that when there is a generally accepted concept of what the term means within the professional field affected by the regulation, that interpretation can set the adjudicative standard.[282] Courts also look to the general intent of the statute to create a commonsense interpretation of the undefined term.[283]

FBA and BIP are terms known in the education field, and the standards for the terms are generally accepted.[284] The IDEA, moreover, has a general intent of inclusion and incorporates *Rowley*'s definition of FAPE.[285] Courts, therefore, should evaluate the sufficiency of FBAs and BIPs according to their generally accepted definitions and *Rowley*'s standard for FAPE in a way that fulfills the IDEA's requirement that evaluations be based on peer-reviewed research and furthers the Act's stated purpose of ensuring equal opportunity, meaningful participation, and self-reliance for students with special needs.[286] It is clear that schools may not arbitrarily use behavior intervention strategies that are not supported by research in the field;[287] indeed, "[a]n IEP which relies on behavioral interventions which are not supported by, or are contrary to, the relevant research may be such that it is not 'reasonably calculated' to

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280. Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982) (explaining that district court review is not "an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review").

281. *See, e.g., id.*; S. Kingston Sch. Comm. v. Joanna S. ex rel. P.J.S., 773 F.3d 344, 349 (1st Cir. 2014) (explaining that the proper level of district court review "falls somewhere between the highly deferential clear-error standard and the non-deferential de novo standard").

282. Chevron U.S.A., Inc. v. Natural Res. Def. Council Inc., 467 U.S. 837, 843–44 (1984).

283. *See supra* note 276 (illustrating various approaches courts take in interpreting statutory language); *see also supra* notes 125–28 and accompanying text (noting that in *Rowley* the court used Congress's intent in passing the IDEA to formulate a definition of FAPE).

284. *See supra* notes 111–17 and accompanying text (explaining that educators developed generally accepted definitions for FBAs and BIPs following the 1997 amendments to the IDEA).

285. *See* 20 U.S.C. §§ 1400(c)(1), 1415(f)(3)(E)(ii)(II) (2012).

286. 20 U.S.C. § 1400(c)(1); *see also* Hall v. Florida, 134 S. Ct. 1986, 2000–01 (2014) (relying on relevant professional organizations' views in finding that Florida's statute, which created a bright-line rule that allowed for the execution of individuals whose IQs were above seventy, was unconstitutional).

287. *See, e.g.*, Sch. Bd. v. Brown, 769 F. Supp. 2d 928, 945 (E.D. Va. 2010) (holding that because the student's IEP was not "specially designed to meet [his] unique needs with regard to his behavioral issues," the school denied him FAPE).

provide an educational benefit."[288] Thus, the Act provides standards for FBAs and BIPs that courts must enforce.

Although courts may not be able to construct "out of whole cloth"[289] specific standards for FBAs and BIPs, courts may look to the generally accepted characteristics of the terms in practice. This practice might require the use of experts, a procedure allowed under the IDEA. In fact, in his 2011 study[290] Professor Zirkel noted that expert witnesses play a notable role in cases where adjudicators determine an IEP's appropriateness.[291]

Moreover, *Rowley* reveals that courts may properly look to the purpose of the Act and the generally accepted meaning of the terms to create a commonsense definition. At a minimum, however, courts can look to the terms themselves to find an adjudicative standard. Though it may be a low bar, it is a minimum standard nonetheless: (1) did the school assess the function the student's misbehavior serves?, and (2) did the school create a plan that intervened in the student's misbehaviors? By fulfilling these obligations, schools can adhere to the IDEA's mandate.

Despite the tools available to it, the Seventh Circuit in *Alex R. ex rel. Beth R.* erred when it announced that a BIP cannot "fall[] short of substantive criteria that do not exist."[292] Here, despite the summary conclusion its holding suggests, the court analyzed the BIP's sufficiency, finding that the school continually evaluated and updated the student's IEP, worked with the student's mother to implement it, and collected data to create the plan it eventually implemented.[293] Although the plan was futile,[294] at the time it was written, it was reasonable to expect it would be successful in supporting the student's needs. Although the court's holding here ultimately came to a result with which this Comment can agree, it sets a dangerous precedent for the future that, without congressional intervention, may lead to deficient results for future plaintiffs.

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288. Waukee Cmty. Sch. Dist. v. Douglas L. *ex rel.* Isabel L., 51 Individuals with Disabilities Educ. L. Rep. (IDELR) No. 15, at 82, 90 n.20 (S.D. Iowa, Aug. 7, 2008).

289. Alex R. *ex rel.* Beth R. v. Forrestville Valley Cmty. Unit. Sch. Dist., 375 F.3d 603, 615 (7th Cir. 2004) (declining to fabricate specific substantive criteria for BIPs absent congressional or agency direction).

290. *See supra* notes 93–100 and accompanying text.

291. Zirkel, *Empirical Analysis*, *supra* note 23, at 203.

292. 375 F.3d 603, 615 (2004).

293. *Id.* at 615–16.

294. *Id.* at 609 (despite the BIP, Alex ran away from school and, "[a]fter a three-hour search involving both fixed-wing and rotary aircraft, as well as searchers on the ground, rescuers found [nine-year-old] Alex stuck in the muddy banks of the Leaf River").

D. Recommendations

1. Making the case for FBAs and BIPs

When an IEP team intervenes early, a BIP can be crucial in preventing the problem behavior from becoming a chronic issue.[295] A BIP reduces misbehavior so that punishment is no longer necessary.[296] To develop a meaningful BIP, it is vital that stakeholders first understand why the student is misbehaving.[297] According to the IDEA, the best way to understand the function of a student's behavior is to conduct an FBA.[298]

An FBA is a method of behavior analysis that gives legal guardians and school officials the opportunity to understand what the student is seeking to gain from defiance.[299] Misbehaviors are often context-related, and an FBA helps stakeholders anticipate what situations cause a student to act out.[300] With this information, a student's IEP team is able to collectively and proactively respond to the student's problem behaviors with a targeted, uniform BIP calibrated to that child's unique needs.[301]

Many case studies have shown overwhelmingly positive results when BIPs emphasize positive interventions that create supportive classroom environments.[302] For example, one case study by Joe

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295. Timothy R. Vollmer & John Northup, *Some Implications of Functional Analysis for School Psychology*, 11 SCH. PSYCHOL. Q. 76, 81–82 (1996).

296. Suzanne Zimmerman, *Eliminating Argumentative Behavior in a Young Student: A Single Subject Case Study and Intervention Plan* (2012) (unpublished Ph.D. dissertation, Martin Luther College) 13–15, https://www.mlc-wels.edu/library/search-find-2/special-collections/pdf-files/Suzi_ZimmermanField_Project.pdf (noting that since the use of positive reinforcement helps to change the targeted behavior, praising students is the most effective method in fostering desired behaviors).

297. *Id.*

298. Kim Killu, *Developing Effective Behavior Intervention Plans: Suggestions for School Personnel*, 43 INTERVENTION IN SCH. & CLINIC 140, 140–41 (2008) (noting that when Congress reauthorized the IDEA in 2004, it required that an FBA be conducted prior to the development of a BIP).

299. *Id.*

300. *Id.* at 142.

301. *Id.* at 141–42, 144–46.

302. *See, e.g.*, Carol Ann Davis & Joe Reichle, *Variant and Invariant High-Probability Requests: Increasing Appropriate Behaviors in Children with Emotional-Behavioral Disorders*, 29 J. OF APPLIED BEHAV. ANALYSIS 471, 476, 479–80 (1996) (noting an increase in compliant behavior improving from nineteen percent to eighty-nine percent of the time); Pamela R. Dodge, *Managing School Behavior: A Qualitative Case Study* 2, 12, 14, 16, 36 (2011) (published Ph.D. dissertation, Iowa State University), http://lib.dr.iastate.edu/cgi/viewcontent.cgi?article=3016&context=etd; Glen Dunlap et al., *The Effects of Multi-component, Assessment-Based Curricular Modifications on the Classroom Behavior of Children with Emotional and Behavioral Disorders*, 6 J. OF APPLIED BEHAV. EDUC. 481, 495 (1996) (noting an increase in assessment accuracy from thirty-one percent to 100 percent); Anne Todd et al., *Teaching Recess: Low Cost Efforts*

Reichle, Professor of Educational Psychology at the University of Minnesota, found that after implementing a positive BIP based on a comprehensive FBA, a student's behavior improved from being compliant nineteen percent of the time to eighty-nine percent of the time.[303] Ultimately, the positive results BIPs can facilitate provide greater opportunities for learning and better educational outcomes for students with behavioral needs. Overall, this means fewer students succumbing to the school-to-prison pipeline.

To provide the greatest benefits for students, BIPs should emphasize the use of positive, inclusive, and least restrictive approaches to improving student behavior.[304] Educators and parents must have the support and resources they need to understand and implement their role in the plan.[305] Similarly, the plan should involve the student as an equal partner: "[p]roviding clear expectations for [a] studen[t] is [an] essential part [of a BIP]."[306] Creating clear expectations that incorporate best practices and ensuring that students and teachers use common language to describe behaviors and consequences will require that Congress define the necessary components of both FBAs and BIPs.[307]

2. Amending the IDEA: Clarity, clarity, clarity

The 2004 amendments to the IDEA, while bringing greater clarity to the realm of discipline, have nevertheless made it difficult for educational rights-holders to find attorneys to represent them.[308] Although the amended Act retained its predecessor's fee-shifting

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Producing Effective Results, 4 J. OF POSITIVE BEHAV. INTERVENTIONS 46, 50 (2002) (noting an eighty percent decrease in disciplinary referrals after completion of training and implementation of the school-wide plan).

303. Davis & Reichle, *supra* note 302, at 476–78.

304. *See* JAMES P. CLARK, NAT'L ASS'N OF SOCIAL WORKERS, FUNCTIONAL BEHAVIORAL ASSESSMENT AND BEHAVIORAL INTERVENTION PLANS: IMPLEMENTING THE STUDENT DISCIPLINE PROVISIONS OF IDEA '97: A TECHNICAL ASSISTANCE GUIDE FOR SCHOOL SOCIAL WORKERS 6–7 (1998), http://eric.ed.gov/?id=ED455632 (arguing that these positive restrictive provisions are intended to expand the responses and resources available to schools in handling students with problematic behavior).

305. *See id.* at 5 (noting that an FBA provides parents and educators with additional information that should be used in the development of behavioral intervention plans).

306. Zimmerman, *supra* note 296, at 13.

307. Evaluating the best practices for conducting FBAs and implementing BIPs is beyond the scope of this paper. For a discussion of possible requirements, see Rikki K. Wheatley et al., *Improving Behavior through Differential Reinforcement: A Praise Note System for Elementary School Students*, 32 EDUC. & TREATMENT OF CHILD. 551, 556 (2009).

308. *See* Alex J. Hurder, *Left Behind with No "IDEA": Children with Disabilities Without Means*, 34 B.C. J. L. & SOC. JUST. 283, 303 (2014).

provision, special education attorneys are more hesitant to represent parents without being paid up front.[309] Overall, since the 2004 IDEA amendments, the outcome of FBA and BIP cases has shifted from being more favorable to parents to being more favorable to school districts.[310]

In her article *Bidding (Fair)well to Due Process: The Need for a Fairer Final Stage in Special Education Dispute Resolution*, Cali Cope-Kasten, then-law student at the University of Michigan, found that "during a ten-year period across two states, [Wisconsin and Minnesota,] *no parent* was able to prevail over a school district if the parent did not have an attorney."[311] Given that two-thirds of the six million children protected by the IDEA live in households with incomes of $50,000 or less,[312] children with special needs are more likely to live in poverty than their peers,[313] and minority students are disproportionately classified as having special needs,[314] the students *most* affected by the school-to-prison pipeline are the *least* likely to be represented by an attorney.

If the family is able to retain counsel, or if they decide to pursue legal action without it, the party challenging the appropriateness of the IEP bears the burden of proof in a due process hearing.[315] Regardless of whether the parent is without counsel, school districts will always be equipped with a legal representative.[316] Compounding this issue is the Supreme Court's 2006 ruling that a school need not provide the cost of experts to prevailing parents.[317] Without better guidance on what must be included in an FBA or a BIP, parents and students bringing due process complaints will routinely rely on the testimony of experts[318] to opine on whether the student's FBA and BIP

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309. *See* Elisa Hyman et al., *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 AM. U. J. GENDER SOC. POL'Y & L. 107, 113–15, 127, 141–42 (2011).

310. Zirkel, *Empirical Analysis*, *supra* note 23, at 205.

311. Cali Cope-Kasten, *Bidding (Fair)well to Due Process: The Need for a Fairer Final Stage in Special Education Dispute Resolution*, 42 J. L. & EDUC. 501, 528 (2013) (emphasis added).

312. Hyman, *supra* note 309, at 112–13.

313. *See id.* (explaining that two million children with disabilities protected by the IDEA live below the poverty line).

314. *See* Yael Cannon, *A Solution Hiding in Plain Sight: Special Education and Better Outcomes for Students with Social Emotional and Behavioral Challenges*, 41 FORDHAM URB. L.J. 403, 410 (2013).

315. Schaffer v. Weast, 546 U.S. 49, 57–59 (2005).

316. Susan Boswell, *Parents May Self-Represent in IDEA Cases*, THE ASHA LEADER (June 19, 2007) at 1, http://leader.pubs.asha.org/article.aspx?articleid=2278168. *But see* 34 C.F.R. § 300.510(a)(ii) (2007) (explaining that during a mediation session, a school district may not bring an attorney unless the parent is represented).

317. Bd. of Educ. v. Murphy, 548 U.S. 291, 293–94 (2006).

318. *See* Zirkel, *Empirical Analysis*, *supra* note 23, at 203.

comply with peer-reviewed research[319] or to cross-examine school districts' witnesses, a service many parents simply cannot afford. For many students, that means their rights under the IDEA go unenforced.

Overall, because Congress has failed to promulgate explicit requirements of when a student is entitled to an FBA and a BIP and has not outlined specific substantive requirements for either behavior modification technique, courts have struggled to develop and implement uniform standards. The courts' confusion has led to ambiguous standards for schools and ultimately lower standards for students. To provide courts and schools with greater clarity, Congress should amend the IDEA to include the baseline elements of what is required when a school decides to provide a student with an FBA or BIP.

Several states have filled that definitional gap[320] and Congress should look to these standards for guidance when creating federal definitions. To that end, Congress should mandate that an FBA clearly identify and define a student's problem behaviors. An FBA can complete this task by using concrete examples of the specific contextual factors contributing to the student's misbehavior. The analysis would then formulate a theory as to the behavior's function and the consequences that serve to maintain them.[321] A BIP, moreover, should be based on the findings of an FBA and articulate strategies to address the unique needs of the student and specifically address the ways in which the student's stakeholders will uniformly implement the plan. In many ways, this simply codifies standards courts have already upheld.[322]

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319. *See supra* notes 96–98 and accompanying text (highlighting the significance of peer-reviewed techniques in a student's IEP).

320. *See, e.g.*, ILL. ADMIN. CODE tit. 23, § 226.75 (2015) (defining and creating guidelines for FBAs); 511 IND. ADMIN. CODE 7-32-41 (2015) (defining FBAs); MINN. R. 3525.0850 (2015) (creating guidelines for BIPs); N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1(r) (2015) (defining requirements of FBAs).

321. This definition is based on the New York statute. *See* N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1(r) (2015) (defining requirements of FBAs). Perry A. Zirkel offers these criteria when using an FBA or BIP for a student with behavioral issues:

> special education experts recommend FBAs as the foundational steps of a two-pronged strategy that should include the following core components and culminate in a BIP: (1) operational definitions of problem behaviors; (2) descriptions of the assessment conditions that may reliably predict the occurrence and nonoccurrence of problem behaviors; (3) descriptions of the consequence events that maintain problem behaviors; (4) direct observation of the problem behaviors across the assessment conditions; and (5) a BIP based on the analysis of this information.

Zirkel, *supra* note 23, at 179–80.

322. *See supra* notes 196–202 and accompanying text (discussing the courts' tendency to

Finally, Congress should purify the brackish water that the "consider" language has created regarding FBAs and BIPs by removing the term and delineating three situations in which FBAs and BIPs are required in its place. The first situation is when a student is suspended: the FBA and BIP should be completed when the behavior is determined to be a manifestation of the student's disability. The second situation would arise when a team reconvenes to review or update a student's IEP. During its review of the IEP, the team must determine whether a student has behavioral issues, and whether those issues are impairing the student's access to education. If the IEP team answers both questions in the affirmative, an FB A and a BIP should be required. Alternatively, should the team determine an FBA and a BIP are not needed, the Act should require that the team briefly justify its determination. This procedure would still allow an IEP team to "consider" a student's behavior but would remove the guesswork currently involved in the evaluation. Finally, because an FBA is considered an evaluation under the IDEA,[323] the third situation in which an FBA and a BIP should be required is whenever a parent, teacher or educational rights-holder requests one, or when the student's misbehaviors puts the school on notice that he or she is a student with a behavioral disability.[324] This amendment would put FBAs and BIPs expressly in line with other evaluations required under the IDEA's Child Find provisions, placing an affirmative obligation on schools to identify and assess students with behavioral needs and furthering the Act's objectives of ensuring that each child with a disability experiences success and self-sufficiency in school and beyond.

3. Securing adequate funding

The IDEA mandates that trained and knowledgeable personnel conduct evaluations.[325] Given the realities of funding for schools,[326]

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find no IDEA violation where schools rely on an adequate FBA substitute to create an IEP).

323. *See supra* notes 241–42 and accompanying text.

324. A parent can already request an evaluation pursuant to 20 U.S.C. § 1414(a)(1)(B); the proposed amendment would simply clarify that a parent may request an FBA pursuant to that provision.

325. 20 U.S.C. § 1414(b)(3)(A)(iv) (2012).

326. *See* 150 Cong. Rec. 2126 (2004) (statement of Rep. Schakowsky) ("I would like to express my disappointment that [the IDEA] still does not force us to live up to our funding promises for IDEA. Ever since IDEA's initial enactment in 1975, the law has included a commitment to pay [forty] percent of the average per student cost for every special education student. The federal government currently pays for about [nineteen] percent of the cost of educating a child with disabilities and at the current rate of increase we will never reach that promised level of funding."); *see also*

however—and although the most qualified person to conduct an FBA and create a BIP would be a school psychologist—teachers, with the support and input of the IEP team, are also capable of creating substantively appropriate BIPs and FBAs.[327] The student's teachers and stakeholders likely know the student best. Through the use of various surveys and other data, a student's school will be able to discern the likely causes of the student's misbehavior.

As a supplement, Congress should task the U.S. Department of Education, through a partnership with trained school psychologists, with creating a template to use when conducting an FBA.[328] This template would support teachers tasked with conducting FBAs by removing some of the burdens associated with overseeing evaluations and allowing Congress and the Department of Education to set peer-reviewed standards to consider when evaluating children's behavioral impediments. This would support teachers who are already busy by creating a template they can use and reassuring them that the process is adequate to meet the requirements of the IDEA.

CONCLUSION

Schools are required to provide students with special needs plans that are reasonably likely to provide the student with an educational benefit at the time it is written. To ensure this requirement is satisfied, schools must evaluate the function of a student's misbehavior and create a plan to intervene in those misbehaviors based on that data. In this way, the school complies with the IDEA by fostering the students' ability to be taught alongside their nondisabled peers. By ensuring that FBAs and BIPs are in place and uniformly implemented for students with special needs, schools can be at the forefront of ending the school-to-prison pipeline.

The nationwide implementation of zero-tolerance policies, increased police presence in schools, and corporal punishment and restraint have exacerbated the mass incarceration of students with disabilities. These systems of behavior modification and punishment

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Pub. L. No. 94-142, 89 Stat. 773, 777 (codified as amended at 20 U.S.C. §§ 1400–48 (1975)) (providing that the federal government will pay forty percent of the average per pupil expenditure of both public elementary and secondary school education).

327. *See* 20 U.S.C. § 1401(10) (noting that the IDEA requires that teachers be "highly qualified").

328. For example, the template could detail specific questions the person conducting the FBA should ask regarding the student's behavior and include a list of stakeholders to whom the questions should be posed.

have proven largely unsuccessful.[329] The *Rowley* standard, though it establishes a low threshold, requires that schools give all students, regardless of disability, an equal chance at achieving educational success. For students with behavioral needs, that means FBAs and BIPs. Proactively addressing student misbehavior can support students and teachers by preventing the need for physical discipline and restraint, thus breaking the cycle of misbehavior and punishment. Courts have recognized these systems' "fundamental connection to the quality of a disabled child's education" and their role in "formulating an IEP tailored to the needs of individual disabled children."[330] This sentiment is not echoed in the legal realm, however. As a result, to fully realize the potential benefits of these programs, Congress must strengthen and clarify their requirements. By implementing substantive standards for FBAs and BIPs—procedures that are essential to assisting a child whose behavior affects his and his classmates' access to education[331]—policymakers can level the playing field for special needs children while raising the bar for all students, ensuring educational results[332] and closing off the school-to-prison pipeline.

329. *See* IMPAIRING EDUCATION, *supra* note 83, at 4 ("[C]orporal punishment is rarely effective in teaching students to refrain from violent behavior, and . . . it causes students to become disengaged and reluctant to learn."); *see also* Archer, *supra* note 84, at 869 ("Indeed, policies such as policing in schools and zero tolerance have been shown to be ineffective as corrective measures and instead serve to demoralize our children."). The use of these methods should be reformed, but an in-depth analysis of such reforms is beyond the scope of this Article. For a thoughtful discussion on corporal punishment, see generally Kearney, *supra* note 84, and Urbonya, *supra* note 84, at 400, 417–18.

330. Harris v. District of Columbia, 561 F. Supp. 2d 63, 68 (D.D.C. 2008).

331. *Id.* at 67–68.

332. 20 U.S.C. § 1400(c)(1).

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