

# Dealing with Challenging Student Behaviors and Post-Pandemic Employee Issues: How to Thrive, Not Just Survive

ConnCASE Legal Conference  
March 9, 2023

Presented by: Deanna Arivett, Esq.  
Arivett Law, PLLC



1

## Agenda

- ◆ Free Appropriate Public Education (FAPE)
- ◆ Legal Requirements for FBAs & BIPs
- ◆ Determining whether FBAs and BIPs are Needed
- ◆ Legally Defensible FBAs
- ◆ Legally Defensible BIPs
- ◆ Implementation, Data Collection, & Fidelity
- ◆ Navigating Post-Pandemic Employee Issues related to Student Behavior

*Disclaimer: The information in this handout and presentation is for the purpose of providing general information and is not intended to provide legal advice or substitute for the legal advice of counsel.*

2

## Student Behavior in the Post-Pandemic Error

- ◆ Schools across the country are facing teacher and staff shortages.
- ◆ But, IDEA's FAPE requirements remain the same.
- ◆ Since the Pandemic...
  - ◆ Many schools are seeing an increase in overall student behavior.
  - ◆ Increase in intensity of challenging behaviors.
  - ◆ Decrease in staff resiliency and retention.

3

Free Appropriate Public Education  
(FAPE)



4

## IDEA's FAPE Requirement

- ◆ What is a free appropriate public education under the IDEA?
- ◆ FAPE is defined in the IDEA regulations as special education and related services that:
  - ◆ (a) are provided at public expense, under public supervision and direction, and without charge;
  - ◆ (b) meet the state (and IDEA) requirements;
  - ◆ (c) include an appropriate preschool, elementary school, or secondary school education in the state involved; and
  - ◆ (d) are provided in conformity with an appropriate IEP. 34 C.F.R. §300.17.

5

## IDEA's FAPE Requirement

- ◆ What is a free appropriate public education under the IDEA?
- ◆ *Endrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174, 137 S.Ct. 988 (2017).
  - ◆ A school must offer an IEP that is reasonably calculated to enable a child to make progress “appropriate in light of the child’s circumstances.”
  - ◆ When a child is “fully integrated” into a regular classroom, providing FAPE that meets the unique needs of a child with a disability typically means providing a level of instruction reasonably calculated to permit advancement through the general curriculum (*Rowley Standard*).
  - ◆ If progressing smoothly through the general curriculum is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement but must be “appropriately ambitious in light of his circumstances.”
  - ◆ This standard is markedly more demanding than a ‘merely more than de minimis’ test for educational benefit.

6

## Legal Requirement for FBAs & BIPs



7

## FBA & BIP Requirement under the IDEA

Are FBA's and BIP's required by the IDEA?

- ◆ The IDEA only specifically mentions FBA's and BIP's in the context of a disciplinary change of placement.
  - ◆ If the conduct was a manifestation of the student's disability, the district must conduct an FBA and implement a BIP (if FBA/BIP already done, review the BIP and modify as necessary) to address the behavior. 34 C.F.R. § 300.530(f)(1).
  - ◆ If the conduct was not a manifestation of the student's disability, the district must provide, as appropriate, an FBA and BIP designed to address the behavior violation so that it does not recur. 34 C.F.R. § 300.530(d)(1)(ii).

8

## FBA & BIP Requirement under the IDEA

So, what does the IDEA say about the provision of behavioral services?

- ◆ The IEP team must consider the use of positive behavioral interventions and supports, and other strategies to address the behavior of a student whose behavior impedes his or her learning or the learning of others.  
34 C.F.R. § 300.324(a)(2)(i).

9

## Determining whether FBAs & BIPs are Needed



10

## Need for FBA & BIP

How do you know when an FBA and BIP are needed for a student to receive FAPE under the IDEA or Section 504?

- ◆ What does your data show?
  - ◆ Progress monitoring towards IEP goals?
  - ◆ Grades, discipline records, and test scores?
- ◆ Do you have enough data?
  - ◆ Or does it need to be more formal/systematic/frequently collected to know whether the student is making progress towards IEP goals (IDEA) or accessing their education comparable to peers (Section 504)?

11

## Behavior Services & FAPE

If data indicates lack of progress towards IEP goals (IDEA) or lack of access comparable to peers (Section 504), additional supports or strategies are needed.

- ◆ Do you need to...
  - ◆ Add accommodations?
  - ◆ Add special education or related services?
  - ◆ Add behavioral strategies- reinforcement, token board?
  - ◆ Provide staff training?
  - ◆ Conduct an FBA and develop a BIP?

12

## BIP Required when Student Suspended from Bus?

**Enterprise City Bd. of Educ. v. S.S. and J.S. ex rel. S.S., 76 IDELR 295 (M.D. Ala. June 12, 2020).**

- ◆ The district argued that “the IDEA only requires the development of a BIP when the district seeks to discipline the student.”
  - ◆ The court noted that the district had disciplined the student by suspending him from the school bus due to his behaviors. The Court explained, “the IDEA requires the IEP team to consider behavioral interventions and strategies where the student's behaviors interfere with his learning or that of others.”
- ◆ To remedy this FAPE violation, the district was ordered to conduct an FBA, develop a BIP, assign a BCBA, and provide the student with counseling.

13

## Did Failure to Develop BIP Deny FAPE?

**Enterprise City Bd. of Educ. v. S.S. and J.S. ex rel. S.S., 76 IDELR 295 (M.D. Ala. June 12, 2020), (Cont.).**

- ◆ In this case the student “frequently presented dangerous behaviors -- including hitting, biting, pulling hair, pica, eloping, and self-harming behaviors -- that prevented his receipt of services.
- ◆ The Court noted that “the student's behaviors escalated so much that his one-to-one aide requested assistance and subsequently resigned;” yet, the district still failed to incorporate any positive interventions in the IEP or develop a BIP.
- ◆ The District Court held that the IEP failed to appropriately address the student’s severe behaviors, which resulted in the student’s regression in academic skills and behaviors over the course of two school years.

**Cont.**

14

## FBA Required when Student Behavior Continued?

**S.S. v. Board of Educ. of Harford County, 120 LRP 32989 (D.C. Md., Oct. 27, 2020).**

- ◆ The Court explained that a failure to conduct an FBA is not a denial of FAPE so long as the IEP adequately manages the student's behaviors.
- ◆ Unfortunately, the IEP did not improve the behaviors that it addressed and resulted in a lack of educational progress.
- ◆ The Court held that the district denied the student a FAPE due to the child's continued noncompliance and self-hitting behaviors after an FBA and BIP were included in her IEP.
- ◆ The Court also ordered the district to reimburse the parents for the unilateral private placement.

15

## Does Lack of formal BIP Deny FAPE?

**Colonial Sch. Dist. v. N.S., 76 IDELR 127 (E.D. Penn. March 27, 2020).**

- ◆ Because an elementary school student with disabilities made little to no behavioral progress under the "motivational behavioral plan," the district erred in continuing that plan the following school year.
- ◆ IDEA requires an IEP team to consider positive behavioral interventions and supports for a student whose behaviors impede her own learning or the learning of others.
- ◆ The district attempted to employ several "informal behavioral initiatives" which included the use of a behavioral chart tallying points for good behavior and the student's participation in a "lunch bunch" social skills group.
  - ◆ However, these initiatives did not meet that standard because they "were never modified, even after the district expressed continued or new concerns over the student's behavior."
- ◆ Thus, the Court held the district's failure to develop a BIP to address the student's ongoing difficulties with focus, aggression, and sexually inappropriate conduct amounted to a denial of FAPE.

16



## Does Lack of an FBA deny FAPE?

**Butte Sch. Dist. No. 1 v. C.S. by McCarvel., 76 IDELR 204 (9<sup>th</sup> Circ. 2020).**

- ◆ C.S. alleged the district failed to provide FAPE when it failed to adequately assess his behaviors and develop an appropriate BIP.
- ◆ The district provided evidence showing that the IEP team considered C.S.'s problem behaviors and took appropriate steps to correct them.
- ◆ The Circuit Court held that C.S. was arguing for an "ideal" IEP and FBA when the IDEA only requires reasonableness and thus, C.S. failed to show he was denied FAPE.
- ◆ The Circuit Court explained that the district had no obligation to conduct an FBA because the student was not removed from his placement due to behavioral issues.

17

## FBA & BIPs for Students with Challenging Behavior

- ◆ How do provide FAPE (decrease challenging behavior) for students with the most significant challenging behaviors?
  - ◆ Conduct Legally Defensible FBAs
  - ◆ Develop Legally Defensible BIPs
  - ◆ Implement Legally Defensible BIPs
    - ◆ Implementation, Data Collection, & Fidelity
  - ◆ Address Employee Issues Impacting BIP Implementation

18

## Legally Defensible FBAs



19

## FBA Legally Defensible?

- ◆ The IDEA does not define the term “functional behavior assessment.”
- ◆ When in dispute, the adequateness of an FBA will likely be determined through the use of expert opinions.
  - ◆ Parents typically use BCBA's as “experts” in behavior analysis.

20

## Developing Legally Defensible FBAs

- ◆ Since the IDEA does not define an FBA, what components are required for evaluation.
- ◆ Know if you have any state law requirements.
- ◆ Some courts may compare to IDEA evaluation requirements.
  - ◆ Such as use of multiple sources of data to make decisions and use of qualified evaluator.
- ◆ Hallmark behavioral analysis components on which BCBA's or School Psychologists are trained.

21

## Evaluator for FBAs

Who can conduct an FBA?

- ◆ Know your state law.
- ◆ If not specified in state law, the Office of Special Education and Rehabilitative Services has advised that a BCBA is not required. Letter to Janssen, 51 IDELR 253 (OSERS 2008).
- ◆ However, districts need to ensure that whoever conducts FBAs are adequately trained.

22

## Developing Legally Defensible FBAs

- ◆ Hallmark components of FBAs:
  - ◆ Identification & Definition of the Target Behaviors;
  - ◆ ABC (Antecedent-Behavior-Consequence) Data Collection;
  - ◆ Measurement Data (Frequency, Duration, etc.);
  - ◆ Observations & Data Collection in Multiple Settings (including all areas of problem behavior such as the bus);
  - ◆ Interviews/Input from teachers, parent, and student (when appropriate);
  - ◆ Analysis of data & Determination of Function of Behavior;
  - ◆ Reinforcement Inventories;
  - ◆ Identification of Setting Events or Skill Deficits Contributing to Behavior.

23

## Tips for Developing Legally Defensible FBAs

- ◆ **Summary Statement/Hypothesis of Challenging Behaviors:**
  - ◆ A statement which summarizes the conditions which the challenging behavior(s) occur (setting events, antecedents, consequence) as well as providing the hypothesis of the function of the challenging behavior.

24

## FBA Deficits Amount to Denial of FAPE

**L.M. by M.M. and M.M. v. Henry County Bd. of Educ., 119 LRP 36720 (E.D.KY. 2019).**

- ◆ “The district attempted to gather information about problem behaviors” but failed to identify specific behaviors and failed to require more “details about each incident, hinder[ing] ability to develop appropriate behavioral interventions.”
- ◆ The Court affirmed administrative decision holding such defects in FBA amounted to FAPE denial but did not order new FBA due to child’s enrollment in private school.
  - ◆ The Court explained that there are two key parts to FBA: (1) the “district must specify which behaviors the FBA will address,” and (2) “teachers and other personnel must collect data relating to those behaviors.”
- ◆ District Court Judge determined that the district failed to satisfy both requirements due to only providing broad definitions of behaviors in the FBA.

25

## Dispute over Appropriateness of District’s FBA

How to legally defend the district’s FBA:

- ◆ Listen to the concerns of the parent/private BCBA
- ◆ Self-analyze—Do you have a solid, legally defensible FBA?
  - ◆ Is it comprehensive and clearly defined to be able to identify the challenging behaviors and identify environmental triggers?
  - ◆ Is it based on data?
  - ◆ Is the function determined for each challenging behavior?
  - ◆ Does it give you enough information to write a solid BIP?

26

## Legally Defensible BIPs



27

## What is a BIP?

- ◆ The IDEA does not define the term “behavior intervention plan” (BIP).
- ◆ The purpose of a BIP is to decrease target behaviors and increase positive replacement behaviors.
  - ◆ A BIP based upon an FBA is more legally defensible because it uses behavioral science to determine behavioral needs/strategies (as opposed to guessing).
- ◆ When in dispute, the adequateness of a BIP will likely be determined through the use of expert opinions.
  - ◆ Again, parents typically use BCBAs as “experts” in behavior analysis.

28

## What is a BIP?

Federal Guidance:

- ◆ A BIP is generally understood to mean a component of the IEP that addresses behaviors that interfere with the child's learning or that of others and that are inconsistent with school expectations. Q&A: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions, 81 IDELR 138 (OSERS 2022).
- ◆ A BIP describes the positive behavioral strategies to be implemented to increase positive behaviors and reduce behavior that interferes with the child's learning and that of others. Q&A: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions, 81 IDELR 138 (OSERS 2022).

29

## Can Behavioral Strategies Needed for FAPE be in a BIP, as opposed to IEP?

**B.D. by Davis v. District of Columbia, 77 IDELR 124 (D.C. Sept. 28, 2020).**

- ◆ Here, Student exhibits several anxious and obsessive behaviors such as sucking on an object and hitting himself.
- ◆ The IEP team recommended that his BIP place an emphasis on redirecting his attention back to the lesson instead of focusing on stopping his behaviors; ignoring his acting out and instead focusing on prompting or redirecting his attention; and using positive praise and positive redirection instead of negative directions.
- ◆ Despite the team's development of the BIP the parents claim the IEP failed to address B.D.'s behaviors. However, the Court explained that "the student's BIP is a component of his IEP," which did address the behavioral issues.
- ◆ The Court held the IEP addressed all of the student's identified needs and thus, the district undermined the parents' claim that it denied the student FAPE.

30

## Did recommendation for placement in behavioral program mean district's BIP was inappropriate?

**Whitaker v. Board of Educ. for Prince George's County Pub. Schs., 77 IDELR 64 (D. Md. Aug. 25, 2020).**

- ◆ The Court noted that “the positive behavioral interventions required by the BIP assisted the student with problem-solving” and behavior issues, including fighting, eloping, use of profanity and other acts of aggression.
- ◆ After the IEP team held a MDR and determined the suspensions (amounting to 16 days) were the result of behaviors that were a manifestation of his disability, the team revised the Student's IEP to include four 30-minute sessions for academic support (mathematics and IEP goals support) and two 30-minute sessions for counseling support (social/emotional and behavioral support).
- ◆ The Court held that the district appropriately requested consent to conduct an FBA for the purpose of revising the student's annual behavior goals.
- ◆ The Court dismissed the parent's IDEA suit “because the IEP was reasonably tailored to the student's unique needs and enabled him to improve his academic performance and behaviors,” the court held that the IEP offered him FAPE.

31

## Legally Defensible BIPs

- ◆ Tips for Developing Legally Defensible BIPs:
  - ◆ BIP strategies are consistent with the function/ hypothesis statement identified in the FBA.
  - ◆ Environmental strategies are identified to modify the antecedent events from FBA.
  - ◆ At least one replacement behavior is identified and will be taught to the student.
  - ◆ There is a strategy to eliminate the maintaining consequence (what to do if student engages in target behavior).

32



## Crisis Intervention Plans

- ◆ If a student's behavior escalates, then a crisis intervention plan may need to be created.
- ◆ The purpose of a crisis plan is different than the BIP.
  - ◆ The primary goal is to keep the student and others safe.
  - ◆ A crisis plan focuses on de-escalation strategies once the student is already escalated/engaging in target behavior.
- ◆ The crisis plan identifies the stages of escalation and how staff should respond at each stage of escalation.

33

## Implementation, Data Collection, & Fidelity



34

## Implementation & Fidelity Checks

- ◆ Implementation/fidelity checks tell us if the BIP is being implemented as written.
- ◆ The higher the percentage the better.
- ◆ The BIP should identify:
  - ◆ Who will conduct implementation/fidelity checks.
  - ◆ How often the implementation/fidelity checks will occur.

35

## Did IEP Implementation Failures Result in Denial of FAPE?

**E.C. by W.C. & K.C. v. U.S.D. 385 Andover, 76 IDELR 212 (D. Kan. May 27, 2020).**

- ◆ The District Court held, while the parents were correct that an administrator violated the BIP by entering a seclusion room before the student was calm, such deviation from the BIP did not amount to a violation because “the student's teacher had followed the BIP up until that point.”
- ◆ The teacher also failed to restrain the student as required by the BIP when the student began banging his head in the seclusion room.
  - ◆ However, the Court held that the teacher expressed valid concerns that the student would become more violent if restrained and the student eventually did calm down and his actions did not result in any long-term harm.
- ◆ The district deviated from the BIP on a third occasion when the “school principal verbally engaged with the student while he was pulling limbs off a tree--an action that contradicted the BIP.” Fortunately, the principal was able to eventually calm the student down.
- ◆ The Court concluded that the deviations from the BIP were not material because the student continued to make progress on his goals.

36

## Staff Training

- ◆ Everyone who interacts with the student needs to be trained on the BIP (including administrators who might have to implement part of the plan).
- ◆ Documentation should be completed after training, documenting who was trained and the topic/purpose of training.
- ◆ Initial training should include the review of the FBA/BIP, followed by hands on training/modeling in the classroom.
- ◆ Training should ensure staff understand their responsibilities (implementation, data collection, crisis response team) related to the BIP.

37

## Data Collection

- ◆ Data collection (progress monitoring) for both the challenging behaviors and the replacement behaviors should occur after the BIP is implemented.
  - ◆ When/How Often?
  - ◆ Who is responsible for data collection? Review/graphing?
  - ◆ What kind of data collection (ABC, frequency)?
  - ◆ Frequency of data analysis and review?
  - ◆ How is data to be reviewed with parents (sent home, discussed in IEP meetings)?

38

# Data Analysis

When the analysis of the data does not support adequate progress, the IEP team should meet to make data-based decisions:

- ◆ Review BIP.
  - ◆ Modify BIP (antecedents, consequences, teaching of replacement behaviors).
  - ◆ Change reinforcers or reinforcement schedule.
  - ◆ Change data collection method.
  - ◆ Provide additional training (implementation issues).
- ◆ Obtain consent to conduct new FBA.
  - ◆ New challenging behaviors presented.
  - ◆ Hypothesized function seems incorrect.
- ◆ Amend crisis intervention plan.

39

## Navigating Post-Pandemic Employee Issues Related to Student Behavior



40

## Employee Issues Impacting BIP Implementation

- ◆ Staffing Shortages Post-Pandemic:
  - ◆ Higher Case Loads
  - ◆ Larger Class-Sizes
  - ◆ Less Support Staff (teacher aides, RBTs, etc.)

41

## Employee Issues Impacting BIP Implementation

- ◆ Resiliency Issues with Adults:
  - ◆ Quitting if assigned to work with challenging student behavior
    - ◆ Or threatening to quit if not reassigned
  - ◆ Experiencing mental health issues or significant stress
    - ◆ Sometimes intensifying because staff don't want to admit they are struggling emotionally
  - ◆ Spouses threatening to sue district due to emotional or physical harm to staff or due to expenses related to such injuries

42

## Overcoming Employee Related Issues Impacting Student Behavior

- ◆ Preventive Measures:
  - ◆ Recognize that even the best employees can only handle so much.
  - ◆ Rotate the staff that work with the most challenging student behavior
    - ◆ Keeping the best teacher/behavior support with a very challenging student all day long will likely lead to burnout and emotional issues.
  - ◆ Train, train, train!
    - ◆ Train staff on the BIP until they are implementing with fidelity.

43

## Overcoming Employee Related Issues Impacting Student Behavior

- ◆ Preventive Measures:
  - ◆ Collaborate with parents and private providers when possible.
  - ◆ Contract with BCBA's or other experts for additional intervention ideas and to support staff.
  - ◆ Assign an administrator to support special education classrooms with challenging behaviors.
  - ◆ Rethink your staffing structure/responsibilities.
    - ◆ For example, re-assigning paperwork responsibilities from teacher dealing with extremely challenging behaviors to another special education teacher

44

## Overcoming Employee Related Issues Impacting Student Behavior

- ◆ Remedial Measures:
  - ◆ Schedule debriefings with staff on a weekly basis (or after extremely stressful events)
  - ◆ Allow staff to express concerns and road-blocks to decreasing challenging behaviors
  - ◆ Address the any hurdles that can be addressed—Even if it doesn't improve the situation, it will likely improve staff moral because they feel heard.

45

## Overcoming Employee Related Issues Impacting Student Behavior

- ◆ Remedial Measures:
  - ◆ Know what mental health services are offered through worker's comp. or other employee programs for staff mental health issues.
  - ◆ Support staff by navigating confrontational situations with parents.
  - ◆ Involve your school board attorney to navigate complex situations.
  - ◆ Do something special- Bring donuts or cookies for the team.

46

# Questions??

47

# Thank you!

Deanna L. Arivett, Esq.  
Arivett Law PLLC  
567 Cason Lane, Suite A  
Murfreesboro, TN 37128  
(615) 987-6006  
deanna@arivettlaw.com  
arivettlaw.com



48