

# *The Law of Behavior*

Presented

by

Marcy Gutierrez

Gutierrez Law Group



# Marcy Gutierrez

## Gutierrez Law Group

Marcy Gutierrez has devoted her professional career to education for over 15 years. As someone committed to school improvement and "real education," Marcy uses her skills, expertise, and relationships to improve the image and outcomes of public school programs by working closely with school district administrators and staff, parents, attorneys/advocates, and other education stakeholders.



She began her career in the early 1990's as a public school teacher where she worked directly with high school students to create lifelong learners and motivate children to take active roles in their communities. While beginning her career as a teacher, Marcy considered other avenues for school improvement and decided to attend law school in the evening with the goal of continuing to work in the field of education.

As an attorney and consultant working with school districts and other public education agencies, Marcy relies on her background as a teacher and her experience as an attorney to provide effective counsel and advice regarding the duty and obligation of our public schools to provide free, appropriate public education programming for all children, including those with disabilities. Marcy finds her expertise is best used by providing training to staff, as well as consultation and advice in areas related to IDEA and Section 504 compliance.

Marcy has handled hundreds of cases, including cases successfully litigated before the Special Education Hearing Office (SEHO), Office of Administrative Hearings (OAH), the Eastern District Court of the United States, as well as the 9th Circuit Court of Appeals. Marcy has also successfully handled complaints and investigations before the Office of Civil Rights (OCR) and the California Department of Education (CDE).

Marcy belongs to the following organizations:

- California Council of School Attorneys
- Women Lawyers of Sacramento
- Sacramento County Bar Association
- American Bar Association
- St. Francis Parents' Group
- Of Counsel to Kronick, Moskovitz, Tiedemann & Girard
- California Women Lead

A graduate from the University of California, Davis and the University of the Pacific, McGeorge School of Law, Marcy enjoys an active life maintaining a healthy balance between her work and her family. She lives in Sacramento with her husband, Rick, and their two daughters, Mia and Zoe.

**The Law of Behavior**

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**This presentation  
custom designed by  
Marcy Gutierrez**

**Attorney and Advocate  
for Public Schools**

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**Behavior Assessments – In General**

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- To FBA? **Functional Behavioral Assessment (“FBA”)**
  
- To FAA? **Functional Analysis Assessment (“FAA”)**



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**Side-By-Side Comparison**

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<b>FBA</b>	<b>FAA</b>
<ul style="list-style-type: none"> <li>• No definition of assessment or written report.</li> <li>• In connection with disciplinary change in placement.</li> <li>• Does not specify who must conduct an FBA.</li> </ul>	<ul style="list-style-type: none"> <li>• Specific requirements of assessment and report.</li> <li>• Serious behavior problems and IEP not effective.</li> <li>• Must be done by or under supervision of person with documented behavior training.</li> </ul>

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**FBA's: The Big Picture**

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- **FBA** is a term that is used in the IDEA only in connection with disciplinary changes in placement.
- The IDEA does not refer to the term **FBA** in any other provision of the law.
- **FBA** is not a term that exists in California state law.

**Query: So what is an FBA?**

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**Is there a Definition of FBA?**

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- IDEA 1997 is where the term **FBA** was first added to the language of the IDEA
- It was not defined by the IDEA 1997
- Nor has IDEA 2004 defined the term
- Nor the 2006 IDEA Part B regulations



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**Is there a Definition of FBA? (cont.)**

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- There is a general consensus in expert professional circles.
- Generally, an FBA is an assessment that searches for an explanation behind problem behavior, so that a plan can be developed to reduce the problem behavior.
- So who should decide what an FBA is?
  - Lawyer?
  - Behavior "expert"?
  - Parent or their advocate or attorney?

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### Practice Tip

- Although the term FBA is not defined anywhere in the law, there should be standards.
  - Experience with conducting FBA
  - Records review
  - Definition of the behavior
  - Data to establish baseline
  - Consequences and strategies to use to address behavior
  - Replacement behaviors to teach

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### When is an FBA required? If behavior IS a Manifestation ...

- If the district, parent, and relevant IEP members determine that a student's conduct (that gave rise to a disciplinary change in placement, i.e., a **was a manifestation** of the student's disability, the IEP team **must**:
  - Conduct a **FBA** (provided the district had not conducted such assessment prior to the conduct at issue) **and** implement a behavioral intervention plan for the child;
  - When a Behavior Plan already has been developed, review the plan and modify it, as necessary, to address the behavior

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### If behavior IS NOT a Manifestation ...

- A student with a disability who is removed from his current placement for more than 10 consecutive school days for behavior **not determined to be a manifestation** of his disability . . .
- Must "receive, *as appropriate*, a **FBA**, behavioral intervention services and modifications, that are designed to address the behavior violation so it does not recur."

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**What if the Student is Removed from School?**



- A child who is removed from the current placement must continue to receive educational services:
  - to enable the child to continue to participate in the general education curriculum, although in another setting, and
  - to progress toward meeting the goals set out in the child's IEP; and ...
  - receive, **as appropriate**, an **FBA** and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur

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**In Plain English Please . . .**



- If the behavior is a manifestation, you **MUST** conduct an FBA and implement a behavior support plan (BSP)
  - Unless you already did an FBA prior to the conduct at issue
  - Unless the student already has a BSP, in which case you just need to review the BSP and revise it if necessary
- If it is **NOT** a manifestation, you only do an FBA "if appropriate to do so..."

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**Common Sense Query**



- So when do we do an FBA?

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### Who Conducts the FBA?

- IDEA is silent on this.
- In *Letter to Janssen*, OSERS stated that there is **no requirement** that a board-certified behavior analyst, or any other specific individual.

*Practice Tip & Query: Districts must ensure that those who do conduct them are adequately trained! What do you do when you hear the demand . . . "It must be done by a BCBA."*

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### How to Conduct an FBA?

- IDEA is silent on this!
- Professionals in the field acknowledge that there are multiple ways by which the underlying causes of behavior may be revealed.
- IEP teams need to be able to address the various situational, environmental and behavioral circumstances raised in individual cases

*There is no LEGALLY REQUIRED answer!*



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### Case Review

- Reliance on existing data for FBA is appropriate. See *A.L.* case - district wins!

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### Is Parental Consent Required?

- Whether parental consent is required to conduct an **FBA** depends largely on what is meant by an **FBA**.
- The IDEA regulations do not appear to give parents the right to challenge the requirement that an **FBA** be performed in connection with the circumstances set out in 34 CFR 300.530.



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### Case Review

- See *Indiana State Educational Agency*, 8 ECLPR 96 (2010).
- Case that discusses parental consent for an FBA – district loses!

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### Legal Query

What do we do if a parent will not consent to an FBA, but we are required to do it because the behavior IS a manifestation?



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### Case Review

- Parent request for FBA alone is not enough. See *Oakdale* case – district wins!
- BIP not needed for truancy and stealing. See *Rodriguez* case – district wins!
- Change in BSP without FBA is denial of FAPE. See *Wallingford* case – district loses!

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### Checklist for When to Do FBA?

- Suspension for more than 10 school days in a year
- Recommendation for expulsion
- 45 day IAES
- When else?



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### State Law on FAAs

- An FAA is required when the IEP team determines that the instructional/behavioral approaches in the student's IEP have been ineffective. (Cal. Code Regs., tit. 5, § 3052(b).)
- When a student exhibits “serious behavior problems” and a behavior support plan has been ineffective in controlling the behavior, the district can conduct an FAA so that a BIP can be formulated. (Cal. Code Regs., tit. 5, §§ 3001, 3052.)

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### State Law on FAAs

- “Serious behavior problems” are defined as:
  - Behaviors that are “self-injurious, assaultive, or cause serious property damage and other severe behavior problems that are maladaptive for which instructional/behavioral approaches ... in the student’s IEP are ineffective.” (Cal. Code Regs., tit. 5, §3001 (ab).)
- Examples include:
  - Bringing a pellet gun to school, sexually assaulting another student, fighting, extreme defiance towards teachers, excessive profanity in the classroom. (*Student v. Ravenswood City School District*, OAH Case No. 2008040747, July 24, 2008.)

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### State Law on FAAs

- A student’s parent or guardian, teacher or other service provider may make a request for assessment including an FAA. (Ed. Code § 56029; Cal. Code Regs., tit. 5, § 3052(b).)
- Within 15 days of the request, the district is obligated to give the parent a written assessment plan.

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### History of FAAs

- On September 12, 1990, the Hughes Bill was passed.
- The purpose of this new law was to address behavioral in a “positive” manner and to provide “an appropriate and meaningful education program in a safe and healthy environment for all children regardless of physical, mental, or emotionally disabling conditions.” (Ed. Code § 56520(a)(1).)

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### Purpose of FAA

- Design positive procedures which produce significant improvement in a student's behavior
  - through skill acquisition and
  - the reduction of problematic behavior.
- Provide the student with a greater access to a variety of community settings, social contacts, and to ensure the student's right to placement in the least restrictive educational environment as outlined in the student's IEP.

(Cal. Code Regs., tit. 5, § 3001, subd. (d).)

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### Who Must Conduct the FAA?

- Must be conducted by, or be under the supervision of a person :
  - who has documented training in behavior analysis
  - with an emphasis on positive behavioral interventions



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### When Must an FAA Be Done?

- A FAA shall occur after instructional or behavioral approaches specified in the student's IEP have been ineffective.
- But nothing can prevent a parent from requesting an FAA.

(Cal. Code Regs., tit. 5, § 3052, subd. (b).)

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### Information Must be Gathered From 3 Sources

- Direct observation
- Interviews with significant others
- Review of available data, such as assessment reports prepared by other professionals



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### What must an FAA procedure include?

- Systematic observation of **targeted behavior**
- Systematic observation of immediate **antecedent** events
- Systematic observation and analysis of **consequences** following behavior
- Ecological **analysis of settings** in which behavior occurs
- Review of **records**
- Review of **history of behavior**

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### FAA Report Must Meet 4 Requirements

- Discussion of the possible functions of the targeted and preceding behaviors.
- Define specific functional behaviors for student to replace the targeted behavior.
- Proposed behavioral interventions which include proposed modification of antecedent events and ecological factors.
- Recommendations for consideration by the IEP team in the form of a proposed behavioral intervention plan.

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**What is the end result of an FAA?**

- IEP team review within 60 days to review FAA and, if necessary, develop BIP.
- IEP team shall include BICM.
- BIP shall become part of the IEP.

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**What must the BIP Include?**

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**How does staff evaluate the effectiveness of the BIP?**



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### The Extras

- Modifications to the BIP Without Meeting
- Emergency Interventions
- Behavioral Emergency Report

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### Case Review

- Compensatory education ordered for failure to do FAA. See *Rialto* – district loses!
- Failure to do FAA is a denial of FAPE. See *Compton* – district loses!
- See *Eric J.* for appropriate BIP.
- See *Belmont* for overly restrictive BIP.



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### Legal Queries – Strategy Tips

- What would you do if a parent did not return rating scales or did not return your call to participate in an interview?
- What would you do at an IEP meeting if a parent said she did not agree with your behavior report?
- What would you do if a student was not at school when you needed to observe?
- What would you do if, at an IEP meeting, a teacher appeared not to understand the BIP?
- What would you do if you observed the student on 4 occasions and did not observe the concerning behavior?

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Thank you for attending this presentation.

**Call Marcy Gutierrez  
anytime at 916.492.2200**

Or email her at:  
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## LEGAL'S LATEST

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*A.L. & V.R., on behalf of E.L. v. NY City Department of Education,  
57 IDELR 69 (S.D. NY 2011)*

A New York school district that relied on a variety of existing data regarding the behavior of a teenager with autism in developing the student's BIP was not obligated to conduct an FBA and had adequately assessed the student. The student had attended a private school for several years and had various behaviors that interfered with learning. In developing the student's BIP, the IEP team relied on evaluations from the private school, a variety of input from the student's current teachers and service providers, its own observations, input from the student's mother, and went through each behavior. The IEP team also incorporated strategies that the student had best responded to in the past. **The District Court agreed with the IHO and SRO that the district adequately assessed the student and did not err in not conducting an FBA because the IEP team had sufficient information about the student's behavior to develop an IEP and BIP that addressed his needs and afforded the student a FAPE.**

*Indiana State Educational Agency, 8 ECLPR (2010)*

**A district that used questionnaires to gather information from a kindergartner's teachers as part of an FBA should have obtained parental consent first,** the Indiana ED concluded. Because the reevaluation was not just a review of data the district already had, parental approval was required. The district conducted an FBA in May 2009, and determined that the student did not require a BIP. Several months later, when the student began exhibiting escalating defiance in the student's general and special education classes, the district conducted a second FBA. The second FBA involved distributing surveys to the student's teachers and collecting the data. Based on that information, the district created a BIP. The parent was upset that the FBA had been conducted without her approval. She filed a complaint with the ED, alleging that the district violated the IDEA. The Indiana ED agreed. It rejected the district's assertion that consent was not required under the circumstances. Although the IDEA implementing regulation at 34 CFR 300.300(d)(1)(i) specifically states that consent is not required where a reevaluation involves merely the review of existing data as part of a reevaluation, that was not the situation in this case. Here, the FBA involved collecting data from teachers to help the IEP team determine the nature of the student's behavioral issues and whether and to what extent services should be increased. "Under these circumstances the FBA qualifies as an evaluation or reevaluation and necessitates parental consent," the ED wrote.

*Oakdale Joint Unified School District, 111 LRP 27948 (Cal. SEA 2011)*

**The observations of school staff members helped demonstrate that a California district did not violate the IDEA by failing to address the behavior of a kindergartner with an SLD.**

Although the child's parent expressed concern over her son's conduct, staff members uniformly reported that he behaved appropriately and was making solid progress. The child enrolled in the district in March 2009. At an April IEP meeting, the parent stated that the student told her he did not want to go to school because he felt embarrassed and humiliated. The parent asked the IEP team to address the problem. The district offered to convene an additional meeting regarding the subject, but the parent declined to attend. The following August, the student's behavior sharply escalated, with incidents of pushing and striking other students. The parent alleged the district denied her son FAPE by failing to address his behavior in April 2009. The ALJ noted that when a child's behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, "strategies, including positive behavioral interventions, strategies, and supports to address that behavior." 34 CFR 300.324. In this case, however, the information available to the IEP team at the time of the parent's request indicated that the child was not having the problems the parent cited. He was doing well academically, and his teacher, resource specialist, and the school psychologist stated that they did not observe him having any behavioral issues. To the contrary, the teacher reported that the student was attentive, kind, and interacted well with others. Although he engaged in minor misbehavior, those few incidents were typical for a child his age. Thus, the district's failure to address the child's behavior in April did not deny him FAPE.

***Eric RODRIGUEZ; Kimberlin RODRIGUEZ, Plaintiffs-Appellants, v. SAN MATEO UNION HIGH SCHOOL DISTRICT, Defendant-Appellee, 357 F. App'x 752 (9<sup>th</sup> Circuit 2009)***

**A California district was not required to develop a BIP for a student merely because he was arrested for stealing and had a problem with truancy.** The 9th U.S. Circuit Court of Appeals agreed with the District Court and an ALJ that the student's behavior was not severe enough to warrant a BIP. The student was arrested for taking beer from a supermarket. Pursuant to an agreement with a juvenile court, the student's parent placed him in a private residential program. Claiming that the district's failure to develop a BIP after the student's arrest amounted to a denial of FAPE, the parent sought reimbursement for the residential placement. An ALJ found for the district, and the District Court affirmed. The parent appealed. Affirming the District Court's ruling, the 9th Circuit reasoned in an unpublished decision that the student's behavioral problems did not cause harm or a serious threat of harm to persons or property, as outlined in California regulations. As such, the student was not entitled to a BIP under state law. Nor did the parent provide evidence of other circumstances warranting a BIP under the IDEA. While the student's truancy interfered with his learning, the district adequately addressed that issue in the student's IEP. The plaintiffs also raised a new argument on appeal -- that the student's IEP required consultation with mental health services. However, the court pointed out that such consultation was required only if the student's condition worsened. Furthermore, the court could not consider issues that the parent failed to raise at the due process hearing.

*Wallingford-Swarthmore School District, 110 LRP 68486 (2010)*

**The mother of a student with multiple disabilities established that a Pennsylvania district failed to provide appropriate supports to address her daughter's extensive maladaptive behavior.** As a result, the child's program conferred trivial benefit at best, and denied her FAPE, an impartial hearing officer concluded. After entering elementary school in 2007, the student's behavior severely regressed. She would scream, crawl on the floor, hide under desks, elope from the classroom, and engage in aggressive conduct. As a result, she was sometimes removed from class or restrained. The behavior continued until her mother unilaterally placed her in a private program in 2009. The parent alleged the district denied her FAPE. When a child's behavior impedes learning, the IEP team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 CFR 300.324(a)(2)(i). The IHO noted that the district regularly changed the child's behavior plan without conducting an FBA or consulting the parent. Nor did the district attempt to determine the effectiveness of particular reinforcers. Although the district presented evidence such as data collection, behavior charts and behavior plans, it did not establish that it used that information to adjust the child's program in a way that would appropriately address her behavior. "The District cites the use of behavioral technology (data collection) but demonstrates the clear lack of sufficient knowledge of how to apply procedures to positively affect behavior change," the IHO wrote. Finally, the IHO pointed out that the student progressed more behaviorally and academically at her unilateral placement in a few months than she did in two years at the district. Because the district denied the student FAPE, and the private placement was appropriate, the parent was entitled to tuition reimbursement.

*Rialto Unified School District, 48 IDELR 296 (SEA CA 2007)*

**An ALJ ordered a California district to provide 250 hours of compensatory education to a sixth grader who was expelled from school because of his escalating behavioral problems.** Noting that the district had never evaluated the student's behavioral needs, the ALJ determined that the district denied the student FAPE. The ALJ observed that the student, who received special education services for specific learning disabilities and ADHD, received multiple suspensions during his sixth-grade year and was frequently referred for disciplinary action. The student was also hospitalized that year for threatening to commit suicide. Although the district agreed to the parent's request for a mental health assessment, the evaluation was never performed. Meanwhile, the student's behavior escalated to the point where the district recommended expulsion. The ALJ rejected the district's determination that the student's behavior was unrelated to his disability. Given the student's ADHD and attentional deficits, the ALJ explained, the district should have assessed the student to identify the underlying cause of his behaviors. "What should have occurred prior to conducting the December 2005 pre-expulsion meeting was a reassessment of the student, including an FAA and, if necessary, the development of a BIP," the ALJ wrote. The ALJ ordered the district to provide tutoring services to compensate for instruction the student lost during his expulsion.

*Compton Unified School District v. A.F., et al.*, 54 IDELR 225 (C.D. Cal. 2010)

The District Court affirmed OAH's decision that the district denied the student a FAPE by failing to assess him for emotional disturbance ("ED") prior to his IEP meeting and failing to timely assess the student in all areas of suspected disability. From the beginning of the school year at issue, the student exhibited disruptive behavior and became extremely violent at school, engaging in disruptive and aggressive behavior. After biting one of his teachers, the student was transferred to a class with a different teacher. Shortly thereafter, the student's grandparents made a written request for a Functional Analysis Assessment ("FAA"), which was never conducted.

The District Court affirmed OAH's decision that, had the district conducted the FAA in a timely manner, the FAA would have been completed in time to be reviewed and discussed at the student's initial IEP meeting, which was held 3 months after the student's grandparents request for the FAA. As a result of the district's failure to conduct an FAA, critical assessment information was not available to the IEP to develop measurable behavior goals, identify services and provide a placement consistent with the student's unique needs. **Because the district failed to conduct an FAA, the district's offer of FAPE was "wholly deficient" as the district "did not have sufficient information to and guidance to develop an IEP with measurable behavior goals and interventions," resulting in a loss of educational opportunities and a denial of FAPE.**

*Eric J. v. Huntsville City Board of Education*, 22 IDELR 858 (N.D. Ala. 1995)

The District Court adopted the *Rowley* standard when it rejected the parents' claim that the district had not provided an appropriate behavior plan for their son. The district had developed a plan that was reasonably calculated to enable the student to attend a regular education public school and to confer an educational benefit despite his behavioral problems. The BIP assisted him in identifying inappropriate conduct and its consequences.

The behavior plan provided by a district to a 14-year-old student with a learning disability, speech and language impairments and Attention Deficit Hyperactivity Disorder (ADHD) was appropriate and allowed him to receive an educational benefit. Included in its chief components were the use of physical education as a reward for progress in behavior management, the opportunity for the student to show a "red card" when he became angry along with the option to leave the classroom and go to his social skills instructors' classroom, and goals in assisting the student in managing stress and the use of composure time.

After a due process hearing officer refused to grant them relief, the parents of a 14-year-old student with a learning disability, speech and language impairments and Attention Deficit Hyperactivity Disorder (ADHD) appealed to court seeking a determination that the district denied FAPE to the student by failing to devise/implement an appropriate behavior management plan and by failing to provide educational services during the student's out-of-school suspensions. The chief components of the behavior plan at issue provided for the use of physical education as a reward for progress in behavior management, the opportunity for the student to show a "red card" when he became angry along with the option to leave the classroom and go to his social skills instructor's classroom, and goals in assisting the student in managing stress and

the use of composure time. During the school year in question, the student missed a total of 12 days, five days of which were consecutive, due to out-of-school suspensions.

***Belmont Public Schools, 49 IDELR 209 (Mass. SEA 2007)***

A Massachusetts district ran afoul of the IDEA when it developed a BIP that required a fifth-grader with ODD to earn his way back into his mainstream placement. Criticizing the proposed BIP as overly restrictive, an IHO denied the district's request to implement the plan as written. The IHO identified several problems with the district's behavioral plan. Rather than convening an IEP meeting to consider appropriate behavioral strategies for the student, the district permitted a small group of social workers and officials to decide the contents of the BIP. "The IDEA requires that parents be 'members of any group that makes decisions on the educational placement of their child,'" the IHO wrote. Noting that the BIP would remove the student from his mainstream classes, the IHO explained that the district improperly excluded the parents from the IEP process. Furthermore, the IHO determined that the BIP was overly restrictive. According to a private neuropsychiatrist, the student could not make progress on his behavior while isolated at home or in the school's "Opportunity Room." The parents also testified that the student had a heightened sense of shame, and that his exclusion from school would trigger the very behaviors the district sought to control. Concluding that the proposed BIP was not likely to be effective, the IHO ordered the district to convene the student's IEP team and consider less restrictive behavior strategies.

***Capistrano Unified School District, 111 LRP 30718 (Cal. SEA 2011)***

A student's decline in behavior after a district conducts a limited-scope reassessment is insufficient to show inadequacy of the district's evaluation where its evaluator credibly defends the limited evaluation. A California district resolved to reassess a student with SLD only eight months after his triennial evaluation because he had escalating behavior problems. The student frequently eloped and engaged in classroom disruption, defiance, and the use of profanity. The district determined that a functional analysis assessment was necessary. The district's evaluator prepared an assessment plan which the student's parents approved. After the evaluation concluded and the IEP was amended, the student's conduct declined even further. He began to spit, hit, and throw objects in addition to his previously exhibited misconduct. The parents sought an IEE, which the district did not provide. Subsequently, the parents obtained private evaluations. The district filed for due process. The ALJ noted that the parents only contested the limited content of the district's assessment. The district evaluator defended the limited content, explaining that a comprehensive psycho-educational evaluation had been conducted only months before. She said that the limited scope assessment was intended to determine whether the IEP team needed to address the student's eligibility for services based on a suspected ED. The parents contended that the severe decline in the student's behavior was indicative of the inadequacy of the district's evaluations. The ALJ accepted the district's explanation that it limited the scope of this assessment and duplicated some of the assessments in the previous evaluation in order to quantify the changes in the student's behavior to determine the presence of ED. The ALJ dismissed the parents' argument and explained that a district's assessments aren't necessarily inappropriate if they don't guarantee positive results. Moreover, the ALJ remarked that the district's evaluation led to the same conclusion as that of private evaluators' hired by the parents,

that the student had an ED. She further concluded that the district appropriately addressed the student's ED in the revised IEP. Therefore, this district conducted appropriate evaluations and was not obligated to pay for IEEs.

***Neosho R-V School District v. Clark*, 315 F.3d 1022 (8<sup>th</sup> Cir. 2003)**

Any slight academic benefit the student received was lost because of ongoing behavior problems that interfered with his ability to learn. Each time the student's special education teacher advanced his work to a fifth-grade level, he experienced stress-induced behavioral problems that forced his teacher to scale back the work. The court ruled that an administrative panel did not err when it determined that any slight academic benefit the student received was lost due to behavior problems that "went unchecked and interfered with his ability to obtain a benefit from his education." It cited the lower court's conclusion that the need for -- and the district's ability to create -- a proper BIP existed long before it made the effort to establish such a plan. The 8th Circuit also affirmed the District Court's finding that the parents were prevailing parties, and supported the lower court's decision to award only 40 percent of the fees they sought. Parent's counsel spent much of the prehearing work on issues that were not ultimately tried.

***Burke v. Amherst School District*, 51 IDELR 220 (D.N.H. 2008)**

Noting that an IEP implementation failure is not a per se denial of FAPE. A New Hampshire district may have failed to videotape a student's social interactions as required by her IEP, but that did not require it to provide compensatory education. The U.S. District Court, District of New Hampshire held that the minor deviation from the student's IEP did not result in a denial of FAPE. The court based its decision mostly on the student's progress toward her behavioral goals. Not only did the student learn to recognize her problem behaviors, but she was learning to self-correct those behaviors when they occurred. Moreover, progress reports showed that the student was learning to demonstrate target behaviors in new situations. The court acknowledged that the district failed to videotape the student's social interactions so that the student could view them later and reflect on her actions. However, the court observed that the student's behavior improved despite the lack of videotaping. "[The student's] behavioral issues appear to have been largely in check, due in no small measure to IEP-driven monitoring by her teachers and the provision of services, such as the 'lunch bunch' group, beyond those called for by the IEP," U.S. District Judge Steven J. McAuliffe wrote in an unpublished decision. The court thus affirmed an IHO's finding that the implementation failure did not result in a denial of FAPE.

***Guntersville City Board of Education*, 47 IDELR 84 (SEA AL 2006)**

Holding that an Alabama district failed to implement a teenager's BIP by taking disciplinary action in response to certain incidents of misconduct while allowing other outbursts and disruptions to be ignored, the district's failure to properly or consistently implement the behavioral interventions identified in a student's BIP amounted to a denial of FAPE. An IHO determined that an Alabama district violated the IDEA by inconsistently implementing a 17-year-old student's BIP. Concluding that the district's lapse led to the student's arrest for threatening to assault his English teacher, as well as his subsequent withdrawal from school as part of a plea bargain, the IHO determined that the district denied the student FAPE and

breached a settlement with the student's parents regarding the management of the student's behavior. The IHO observed that the district did not conduct an FBA or document the nature of counseling provided to the student. Nor did the district follow a system of rewards and punishments set forth in the student's BIP. Although the district took disciplinary action in response to certain incidents of misconduct, the IHO noted that other outbursts and disruptions were ignored. "The [district's] actions and omissions obstructed the success of [the student]," the IHO wrote. "The special education director for the [district] recognized that children with behavioral problems have to be handled very systematically and in a very structured fashion for a behavior management program to work." Concluding that the district denied the student FAPE, the IHO ordered it to either develop a new BIP or provide homebound instruction. The IHO also ordered the district to provide 10 hours of compensatory education in reading, as well as compensatory counseling services.