

# BEHAVIOR INTERVENTION PLANS (BIPs): WHEN? WHAT? HOW?

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## BIPs: An Overview

- Positive behavior strategies and supports.
- Proactive; Individualized; Focused on identified behaviors.
- If inappropriate behaviors continue at the same rate, BIP is not working.
- Review and revise.

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## Duty to Address Behavior (In General)

- The IEP Team must — “In the case of a child whose behavior impedes the child’s learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior....”  
34 C.F.R. § 300.324(a)(2)(i).

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## Duty to Address Behavior In the Context of Disciplinary Change of Placement

<p>Determination that behavior was a manifestation [no special circumstances]. 34 C.F.R. § 300.530(f)(1).</p>	<p>Determination that behavior was not a manifestation or when special circumstances exist (drugs, weapons, serious bodily injury). 34 C.F.R. § 300.530(d)(1)(ii).</p>
<p>If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must—</p>	<p>A child with a disability who is removed from the child's current placement pursuant to paragraphs (c) [authority to remove for behavior that is not a manifestation of the disability], or (g) [authority to remove for up to 45 school days for special circumstances] of this section must—</p>
<p>(1) Either—                  (i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or                  (ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior...</p>	<p>...                  (ii) Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur.</p>

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## BIP as Part of IEP when Necessary for FAPE

- "...FBAs and BIPs must ... be used proactively if the IEP Team determines that they would be appropriate for the child."
  - "For a child with a disability whose behavior impedes his or her learning or that of others, and for whom the IEP Team has decided that a BIP is appropriate, or for a child with a disability whose violation of the code of student conduct is a manifestation of the child's disability, the IEP Team must include a BIP in the child's IEP to address the behavioral needs of the child."
- Questions and Answers on Discipline Procedures (OSERS 2009).*

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## What is FAPE?

- First, has the State complied with the procedures set forth in the Act?
  - Second, is the IEP developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?
- Board of Education v. Rowley, 102 S.Ct. 3034 (1982).*

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*Dumont Board of Education v. J.T.,*  
54 IDELR 231 (D.C.N.J. 2010)



- This case involved a child with autism transitioning from a Part C program to Part B.
- The court affirmed an administrative ruling in favor of the parents, ordering the district to reimburse the parents for the costs of a private program. In part, this was based on the district's failure to specify services that the hearing officer concluded the student needed.

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*Dumont Board of Education v. J.T.,*  
54 IDELR 231 (D.C.N.J. 2010)



- The IEP at issue involved the student's first year in a preschool program. The district expressed its willingness to adjust and change as they learned more about the child
- In particular, the district argued that a behavioral plan should not be put in place for a 3-year old first entering school without an evaluation period. But the hearing officer—after 16 days of testimony—disagreed, and the court affirmed.

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*Dumont Board of Education v. J.T.,*  
54 IDELR 231 (D.C.N.J. 2010)



- "This Court finds that the Dumont IEP did not provide a behavior modification plan as found necessary by [the Administrative Law Judge]. The IEP indicated that one would be developed if the need arose, and Dumont's witnesses indicated that they might have imposed one after 30 days, but neither of these qualified statements of a behavior modification plan's availability satisfied the need identified by the ALJ with respect to I.T.'s education."

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*R.K. v. New York City DOE*, 56 IDELR 212 (E.D. N.Y. 2011)



(The judge's decision adopts a Magistrate's Report)

- The district proposed placement in an autism-specific program. The IEP did not include an FBA or BIP.
- The hearing officer found that an FBA and BIP were not necessary because the student's behavior was not unusual for an autistic child, and the behaviors were being addressed through goals and objectives and within the context of the classroom program.

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*R.K. v. New York City DOE*, 56 IDELR 212 (E.D. N.Y. 2011)



- The court held that the hearing officer used an improper standard for determining whether an FBA and BIP were necessary for FAPE.
- The court held that the proper inquiry in determining the necessity of an FBA is whether the behavior impedes learning, not whether the behavior is atypical.
- The court held, "The evidence in the record overwhelmingly reflects that R.K.'s interfering behaviors did in fact impede her learning."

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*R.K. v. New York City DOE*, 56 IDELR 212 (E.D. N.Y. 2011)



- R.K.'s developmental deficits and non-functional behavior interfered significantly with her ability to learn, play, and interact effectively. She required maximum support to initiate and follow through with most tasks.
- R.K. was easily distracted and exhibited self-stimulatory behaviors that hindered her ability to learn without constant and direct supervision.
- R.K. required adult prompting and support to initiate and follow through with tasks.

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*R.K. v. New York City DOE*, 56 IDELR 212 (E.D. N.Y. 2011)



How the private school compared:

- A BIP was developed based on data collection.
- The BIP was discussed with the Parents so that they could implement the program at home.
- R.K. received 1:1 ABA instruction from a board-certified ABA instructor with nine years of experience.
- BIPs and curricula were reviewed and adjusted weekly, based on extensive data collection and graphing.
- Program included in-home and parent training.

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*Lauren P. v. Wissahickon School District*, 48 IDELR 99 (E.D. Pa. 2007)



- The court ordered compensatory education and tuition reimbursement to the parents of a student with ADHD due to the fact that the IEP did not include a behavior plan.
- The student's behavior demonstrated distractibility, failure to turn in assignments, failure to complete assignments, tardies, etc.
- The court concluded that the student's behaviors interfered with learning and were part of the student's disability, and therefore, a behavior plan should have been implemented.

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BIP Strategies Should be Based on Peer Reviewed Research to the Extent Practicable



- The IEP must include:  
"A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child — ..." (34 C.F.R. § 300.320(a)(4)).

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BIP Strategies Should be Based on Peer Reviewed Research to the Extent Practicable



- “If no such [peer-reviewed] research exists, the service may still be provided, if the IEP Team determines that such services are appropriate.” (71 Fed. Reg. 46665.)

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Staffs Must be Knowledgeable Regarding the Research



- “We will not set forth any bright-line rule as to what constitutes an adequately peer-reviewed special education program...”
- “We recognize that there may be cases in which the specially designed instruction proposed by a school district is so at odds with current research that it constitutes a denial of a FAPE.”

*Ridley School District v. M.R.*, 112 LRP 25613 (3d Cir. 2012).

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Is there a Standard for BIPs?



*Alex R. v. Forrestville Valley Community Unity School District #221*, 41 IDELR 146 (7th Cir. 2004).

- The hearing officer in the case had been quite critical of the school district’s BIP, ruling that it was “insufficient” under appropriate legal standards. On appeal, the district court reversed in favor of the school district, and the Seventh Circuit affirmed the district court. The Seventh Circuit rejected the notion of a substantive standard for BIPs.

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## Is there a Standard for BIPs?



*Alex R. v. Forrestville Valley Community Unity School District #221*, 41 IDELR 146 (7th Cir. 2004).

- “[...] [A]s of [the date in question] neither Congress nor the agency charged with devising the implementing regulations for the IDEA, the Department of Education, had created any specific substantive requirements for the behavioral intervention plan contemplated by [federal law]. Alex does not point us to any statute or regulation that has since filled the gap, and our research has uncovered none. Alex, nevertheless, urges us to follow the lead of the administrative judge in Mason City, who manufactured the substantive criteria of a sufficient behavioral intervention plan based on a string of administrative opinions.”

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## Is there a Standard for BIPs?



*Alex R. v. Forrestville Valley Community Unity School District #221*, 41 IDELR 146 (7th Cir. 2004).

- “We decline the invitation. Although we may interpret a statute and its implementing regulations, we may not create out of whole cloth substantive provisions for the behavioral intervention plan contemplated by Section 1415(k)(1) or 1414(d)(3)(B)(l). In short, the District’s behavioral intervention plan could not have fallen short of substantive criteria that do not exist, and so we conclude as a matter of law that it was not substantively invalid under the IDEA.”

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## *K.L. v. New York City Dep’t of Ed.*, 59 IDELR 190 (S.D. N.Y. 2012)



FBA not necessary for FAPE; BIP was appropriate:

- An FBA not needed because the IEP Team already “had a relatively solid understanding of the functions of [K.L.’s] behavior,” specifically, K.L.’s difficulty in communicating and feeling overwhelmed.
- A BIP was developed which described interfering behaviors, including distractibility, extremely short attention span, frequent out of seat behavior, chewing/shredding clothes, and hitting and kicking behaviors.

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*K.L. v. New York City Dep't of Ed.*,  
59 IDELR 190 (S.D. N.Y. 2012)



BIP was appropriate:

- The BIP outlined strategies for changing K.L.'s behavior, the support to be provided to K.L. to implement those strategies, and the expected changes.

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Using Unsound Methods may be  
Discriminatory



The court held that the pleadings stated a viable discrimination claim under 504. They alleged:

- The school shortened the student's day;
- The school used highly dangerous physical restraint techniques that were clearly ineffective; and
- Restraint was not necessary due to any student misconduct or danger, and was used in a malicious and reckless manner.

*Alexander v. Lawrence County Board of Developmental Disabilities*, 58 IDELR 153 (S.D. Ohio 2012).

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Physical Restraint



- Physical restraint is for emergencies only--not the type of "positive behavior intervention" that should go into a BIP.
- But parents should be on notice that restraint will be used in an emergency, as per Texas regulations.
- Be prepared for the request to prohibit or limit physical restraint.

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U.S. Department of Education Guidance Document on Physical Restraint (2012)



- “There is no evidence that using restraint or seclusion is effective in reducing the occurrence of the problem behaviors that frequently precipitate the use of such techniques.”

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U.S. Department of Education Guidance Document on Physical Restraint (2012)



- “Physical restraint or seclusion should be reserved for situations or conditions where there is imminent danger of serious physical harm to the child, other children, or school or program staff. These procedures should not be used except to protect the child and others from serious harm and to defuse imminently dangerous situations in the classroom or other non-classroom school settings (e.g., hallways, cafeteria, playground, sports field), and only should be used by trained personnel.”

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U.S. Department of Education Guidance Document on Physical Restraint (2012)



- “Physical restraint or seclusion should not be used as a response to inappropriate behavior (e.g., disrespect, noncompliance, insubordination, out of seat) that does not pose imminent danger of serious physical harm to self or others, nor should a child be restrained and secluded simultaneously as this could endanger the child.”

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U.S. Department of Education Guidance Document on Physical Restraint (2012)



- “Physical restraint and seclusion are not considered behavior management techniques, discipline management techniques, or other forms of educational intervention. Nor shall restraint or seclusion be used as punishment or discipline, as a means of coercion or retaliation, or as a convenience.”

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U.S. Department of Education Guidance Document on Physical Restraint (2012)



- “Physical restraint and seclusion shall be employed only by school personnel trained in the appropriate use of physical restraint and seclusion.”

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*B.H. v. West Clermont Bd of Ed.*, 56 IDELR 226 (S.D. Ohio 2011)



- The court held that the district denied FAPE to the student by failing to intervene while behaviors were escalating, and relying too much on physical restraint.
- 10 year-old B had significant behavior issues which included aggression, noncompliance, and running out of the classroom and building.
- None of B's IEPs contained any goals designed to address the significant adaptive behavior deficits she possessed including toileting, hygiene, self-care, and reciprocal social and communication.

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*B.H. v. West Clermont Bd of Ed.,*  
56 IDELR 226 (S.D. Ohio 2011)



- By December of 2007, B's practice of running out of the classroom had become enough of an issue to warrant an FBA which revealed that B was being restrained by the aide. The FBA was completed by an untrained aide. No changes were made to the IEP as a result of this assessment.
- B's behavior became more difficult, resulting in episodes documented by the aide in daily notes. B had frequent "fits" and her behavior escalated and included hitting, kicking, spitting, and noncompliance.

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*B.H. v. West Clermont Bd of Ed.,*  
56 IDELR 226 (S.D. Ohio 2011)



- The behavior plan used in the classroom was a point system which allowed B to earn points to move up "levels" but B did not understand the point system.
- In September 2008, a neuropsychological evaluation recommended direct speech, occupational therapies, and the use of a formal behavior system with immediate rewards.
- From the first day of the 2008-09 school year, B was repeatedly physically restrained by staff for her behaviors, sometimes multiple times per day.

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*B.H. v. West Clermont Bd of Ed.,*  
56 IDELR 226 (S.D. Ohio 2011)



- On January 21, 2009, B was restrained 8 times in one day. She came home bruised and hysterical and had to be hospitalized. B's parents placed her at the Widely School where physical restraint was no longer used and aggressive behaviors decreased.
- Expert testimony indicated B suffers from significant adaptive behavior deficits, and the goals in her IEP were not appropriate for her.
- Her skill levels have failed to progress over a number of years.

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*B.H. v. West Clermont Bd of Ed.,*  
56 IDELR 226 (S.D. Ohio 2011)



- The BMP used in the class was too complicated for B to understand, it was inconsistently applied, and had the effect of reinforcing her unwanted behaviors. The use of physical restraint over such an extended period was inappropriate, and, in any event, was not working to reduce her behaviors.
- Court awards 2 years of private school, direct speech therapy and occupational therapy, and attorney's fees.

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*School Bd. of the City of Norfolk v. Brown,*  
56 IDELR 18 (E.D. Va. 2010)



- Student was classified as Other Health Impaired (OHI) due to cerebral palsy and a seizure disorder.
- Student had a history of behavior problems but none of his IEPs (2007, 2008, 2009) addressed behavior.
- Student was long term suspended for leaving three threatening messages on the principal's voice mail.
- The IEP Team met and determined the behavior was not a manifestation of the student's disability.
- Parent requested a due process hearing to challenge the disciplinary change of placement.
- Also, following the incident, the student was admitted to a psychiatric hospital.

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*School Bd. of the City of Norfolk v. Brown,*  
56 IDELR 18 (E.D. Va. 2010)



- "The Hearing Officer found that, while the School Board's official records contained little information documenting Student's behavioral pattern, the guidance counselor's records, which were much more thorough, indicated a series of disciplinary events which placed the School Board on notice that Student was in need of a functional behavioral assessment and, ultimately a BIP, well before the disciplinary incident of February 2009."

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*School Bd. of the City of Norfolk v. Brown*,  
56 IDELR 18 (E.D. Va. 2010)

- The court found substantial evidence in the record to support the hearing officer's conclusion that the school should have developed a BIP and/or conducted a FBA prior to the imposition of long term discipline.
- The hearing officer and court called this a "child find" violation, noting that there was adequate reason to suspect disabilities in addition to the disability already identified (OHI).
- The court considered this both a failure to evaluate in all areas of suspected disability, and a failure to include necessary services in the IEP.

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Should We Consider Calling an IEP Meeting to  
Address Behavior if Problems Persist?

- The IDEA requires that the IEP Team meet to revise the IEP as appropriate to address "[a]ny lack of expected progress toward the annual goals described in §300.320(a)(2), and in the general education curriculum, if appropriate."

34 C.F.R. § 300.324(b)(1)(ii)(A).

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*The information in this handout was created by Walsh, Anderson, Gallegos, Green and Treviño, P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If specific legal advice is sought, consult an attorney.*

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