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Litigating Behavioral-Services Cases

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The Individuals with Disabilities Education Act (IDEA) was enacted to ensure “free appropriate public education” for children with disabilities.¹ According to the congressional findings, “research and experience has demonstrated that the education of children with disabilities can be made more effective by,” among other ways, “providing ... positive behavioral interventions and supports.”² Here we examine IDEA requirements for behavioral services, explain the basics of those services, and review some relevant

case law.³ Intended as an introduction to the topic of behavioral services under the IDEA, our article is a starting point for practitioners who are advising parents or litigating behavioral-services cases. Remember that these cases will require in almost all instances employing an expert or experts.

IDEA and Behavior

Under the IDEA, states receiving federal public education funding are required to provide a free appropriate public education to a child with a disability.⁴ A

statement of the student’s “present levels of academic achievement and functional performance,” a statement of “measurable annual goals,” a description of the progress toward those goals, and a list of the supplementary aids and services, program modifications, related services, and accommodations provided to the student.⁶

Behavioral services are relevant in three circumstances. First, “in the case of a child whose behavior impedes the child’s learning or that of others,” the IEP team “shall ... consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.”⁷ In such a circumstance, behavioral services, including an assessment of the factors that contribute to and influence the behavior, must be an integral part of the discussion at the IEP meeting. Behavioral services are also implicated in disciplinary suspensions. When a child’s behavior results in a suspension of 10 days or more, the child is entitled to a determination as to whether the behavior that led to the suspension is a manifestation of the child’s disability.⁸ If the team determines that the behavior is a manifestation of the disability, then the team must conduct a functional behavioral assessment and develop a behavior intervention plan or revise a current behavior intervention plan.⁹

A large body of literature has shown the successful use of applied behavior analysis–based procedures to reduce problem behavior and increase appropriate skills.

1 See Individuals with Disabilities Education Act, [20 U.S.C. §§ 1400–1482](#). Enacted in 1975, the Individuals with Disabilities Education Act (IDEA) was initially called the Education for All Handicapped Children’s Act or referred to by its Act number: “94-142.” (see Education for All Handicapped Children’s Act of 1975, [Pub. L. No. 94-142, 89 Stat. 773 \(1975\)](#)). In 1990 the Education for All Handicapped Children’s Act was amended under the title Individuals with Disabilities Education Act (Education of the Handicapped Act Amendments of 1990, [Pub. L. No. 101-476, 104 Stat. 1103 \(1990\)](#)). In 2004 the Individuals with Disabilities Education Act was amended again under the name Individuals with Disabilities Education Improvement Act (Individuals with Disabilities Education Improvement Act of 2004, [Pub. L. No. 108-446, 118 Stat. 2647 \(2004\)](#)). The Individuals with Disabilities Education Act is generally referred to as the IDEA, and that is the name used here. We do not discuss here any of the procedural safeguards or mechanisms available to challenge school district decisions (see generally [20 U.S.C. § 1415](#)).

2 Individuals with Disabilities Education Act [§ 1400\(c\)\(5\)\(F\)](#). One indication of the need for behavioral services may be gleaned from some available statistics. In the 2009–2010 school year there were 407,000 children between 3 and 21 years old with emotional disturbances in public schools; 378,000 children with autism; and 25,000 children with traumatic brain injuries (National Center for Education Statistics, Institute of Education Sciences, [U.S. Department of Education, Fast Facts: Students with Disabilities](#) (n.d.)). These statistics are merely estimates of children who might need services; some of them might not and others, with different disabilities, might

free appropriate public education “consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child ‘to benefit’ from the instruction.”⁵ This entitlement is ensured through the creation of an individualized education program (IEP) for each student. An IEP must contain several elements, including a

3 We primarily discuss cases decided after the 2004 amendments and not legislative developments prior to those amendments. For a review of those developments, including regulatory requirements and policy statements, see [Perry A. Zirkel, Case Law for Functional Behavior Assessments and Behavior Intervention Plans: An Empirical Analysis](#), 35 [SEATTLE UNIVERSITY LAW REVIEW](#) 175, 185–91 (2011). We do not discuss state-law requirements either. For a review of state law, see Perry A. Zirkel, [State Special Education Laws for Functional Behavioral Assessment and Behavior Intervention Plans](#), 4 [BEHAVIORAL DISORDERS](#) 262 (2011).

4 [20 U.S.C. § 1412\(a\)\(1\)](#).

5 [Board of Education v. Rowley](#), 458 U.S. 176, 189 (1982).

6 [20 U.S.C. § 1414\(d\)\(1\)\(A\)](#).

7 [Id. § 1414\(d\)\(3\)\(B\)\(i\)](#). For a review of changes in the IDEA provisions for disciplinary “removals” resulting from the 2004 amendments and the 2006 regulations, see Perry A. Zirkel, [Suspensions and Expulsions of Students with Disabilities: The Latest Requirements](#), [WEST’S EDUCATION LAW REPORTER](#) (Jan. 2007). Discipline is a complex area beyond the scope of our article.

8 [20 U.S.C. § 1415\(k\)\(1\)\(E\)\(i\)–\(ii\)](#).

9 [Id. § 1415\(k\)\(1\)\(F\)\(i\)–\(ii\)](#).

If the team determines that the behavior is not a manifestation of the disability and the child is placed in an alternative placement, the child is entitled to receive “as appropriate” a functional behavioral assessment and intervention services “that are designed to address the behavior violation so that it does not recur.”¹⁰

Behavior Assessment, Instruction, and Intervention

To understand behavioral services in the education context, the practitioner should know how “problem” behavior is generally defined, appreciate the varying abilities of educators to identify it, gain an overview of the science of behavior analysis, learn basic information about the assessment and intervention techniques born of that science, and become familiar with the steps involved in assessment and intervention under the IDEA.

PROBLEM BEHAVIOR

Classified as “problem behavior” is behavior that is significantly dangerous, destructive, or disruptive to the learning of other students. The extent to which behavior is considered disruptive to the ability of the child to benefit from instruction or interferes with the instruction to other children can vary greatly from teacher to teacher. The interpretation of the behavior is based on the strength of the teacher’s classroom management strategies, understanding of the meaning of the behavior, and relationship with the student.¹¹

Take the example of an autistic student who lunges out of his seat and rapidly walks around the classroom while the teacher is explaining the steps in a group science experiment. One teacher may

understand that this behavior allows the student to become calm when feeling anxious or actually helps him focus when processing new information. The teacher has made sure that the classroom peers understand and respect this behavior as an individual need and something to be ignored. She continues with instruction and the student eventually sits down. Another teacher, not understanding the meaning of the behavior, directs the student to sit down (which raises anxiety) and repeats herself with a raised voice until she calls the principal and asks for the student to be removed. As a result, the class is stopped, the student’s anxiety increases, and the stage is set for the student to become upset and unable to return to his seat. A subsequent request for a behavior assessment and placement change may, under this scenario, have more to do with teacher skill than the impact of the behavior itself.

In any case, when the behavior results in a student’s exclusion from academic classes, instructional opportunities, social groups, or community settings, it can be considered a problem that warrants an assessment of the purposes or “functions” that the behavior serves and the development of an intervention plan.

THE SCIENCE UNDERLYING ASSESSMENT AND INTERVENTION

Behavior analysis is the systematic study of variables that influence behavior.¹² “Applied behavior analysis” uses behavioral science in real-world settings to deal with “socially important” behavior problems and learning.¹³ Educators and clinicians use applied behavior analysis methods to teach individuals new communication, social interaction, developmental, and

academic skills. Applied behavior analysis methods may also be used to deal with a broad range of behavior problems through techniques that reinforce alternative behavior and promote the withholding of reinforcement of the problematic behavior.

These methods require the clinician or educator to understand the motivation of the behavior and the function it serves. All applied behavior analysis methods use objective measurement of behavior and systematic modifications or interventions. Changes in the physical and sensory environment, social interactions and interpersonal communications with the student, and changes in activities or expectations are among systematic modifications or interventions. All applied behavior analysis methods also use procedures for implementing the interventions that are based on scientifically established principles of behavior.

Over the past 40 years a large body of literature has shown the successful use of applied behavior analysis–based procedures to reduce problem behavior and increase appropriate skills for individuals with intellectual disabilities, autism and related disorders, and other disabilities. Several review articles and meta-analyses have been published summarizing the literature.¹⁴

BEHAVIOR ASSESSMENT

As noted, the IDEA requires a formal behavior assessment under certain circumstances. Behavior assessment is an evaluation of “why” the behavior occurs. A functional behavioral assessment uses data from a variety of sources to help educators understand the larger context that influences the student’s behavior, the environmental variables that act as

10 *Id.* § 1415(k)(1)(D)(ii).

11 Dawn M. Decker et al., *Behaviorally At-Risk African American Students: The Importance of Student-Teacher Relationships for Student Outcomes*, 45 *JOURNAL OF SCHOOL PSYCHOLOGY* 83, 84–85 (2007).

12 BETH SULZER-AZAROFF & G. ROY MAYER, *BEHAVIOR ANALYSIS FOR LASTING CHANGE* 1 (1991).

13 Donald M. Baer et al., *Some Current Dimensions of Applied Behavior Analysis*, 1 *JOURNAL OF APPLIED BEHAVIOR ANALYSIS* 91, 92 (1968).

14 See, e.g., Dennis R. Dixon et al., *A Brief History of Functional Analysis and Applied Behavior Analysis*, in *FUNCTIONAL ASSESSMENT OF CHALLENGING BEHAVIORS* 3 (Johnny L. Matson ed., 2012).



immediate signals or cues that are likely to result in the behavior (also called “triggers”), and the outcomes achieved for the student by the behavior. Data are gathered from interviews of family members and teachers (and sometimes the student); from direct observation and a rating of the behavior when it occurs (such as frequency, intensity, or duration or all three); from a narrative description of the events surrounding the behavior; and from a “scatter plot,” which shows when the behavior did and did not occur over time. A hypothesis about the behavior is developed; the hypothesis describes the circumstances under which the behavior is likely to occur (e.g., when the student has not had sleep, when a family member is traveling, during science class, etc.), possible cues or “triggers” (e.g., when given a difficult math assignment, when given repeated verbal directions), what the behavior will look like, and what function is achieved (e.g., to avoid doing the assignment, in order to talk with peers in the hall).

A functional behavior “analysis” is different from a functional behavioral assessment.

The functional behavior analysis is typically conducted in clinical settings for students with extreme behavior for the purpose of scientifically testing the functional behavioral assessment hypothesis. The influencing variables are systematically manipulated in order to see how the behavior changes under different conditions. Performing a functional behavior analysis with any integrity in a school environment is not possible.

STEPS WITHIN THE FUNCTIONAL BEHAVIORAL ASSESSMENT

The functional behavioral assessment involves the participation of multiple school team members and may be led by a school psychologist, behavior specialist, or other person trained in applied behavior analysis principles and functional behavioral assessment methods. The process requires the team to do the following:

Define the Problem Behavior. The behavior should be defined in terms that are observable, measurable, and clear. Observable behavior is conduct that can be seen or heard. “Noncompliant” and “aggressive” are adjectives that describe the opinion of

the observer. These are not actions with a beginning and end. “Saying no” or “yelling above conversational level” or “throwing a book” is an observable action. The problem behavior should also be measured. It can be counted, timed, or rated on a scale of intensity with accuracy between multiple observers. And the behavior should be defined so clearly that a person unfamiliar with the student could accurately act it out.

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Collect Data. Collecting data involves five steps:

1. Conduct a structured interview with a family member, teacher, and other person who knows the student well in order to understand better the student’s overall quality of life, when and where the behavior seems to occur most, what “works” to resolve the behavior, any successful interventions to “prevent” the behavior, what motivates the student, what interests the student, the skills and talents of the student, any changes in the student’s life, and any services that the student receives.
2. Collect “scatter plot” data over a two-week period to identify when the behavior does and does not occur.
3. Observe the student and chart the occurrence of the behavior in terms of frequency, duration, or intensity or all three. Observations should occur across a variety of settings, such as those where the behavior is most and least likely to occur.
4. Collect descriptive data for what happens before the behavior occurs (Antecedents), what the behavior looks like when

it happens (Behavior), and what happens after the behavior occurs (Consequences)—often referred to as A-B-C charts.

5. Review attendance, academic performance, and any other school data.

Develop a Hypothesis. After reviewing the data, the school team describes the conditions that influence the likelihood that the behavior will occur, the triggers, the behavior, and the function.

Here are some examples:

When Juan is recovering from a sickness or it is late afternoon, and he is given math work to do independently, he is likely to crumble up his paper, break his pencils, throw a book, or yell “NO” at his teacher in order to avoid doing the work and be moved to the back of the class.

When Monica is in a class with fluorescent lights and students are speaking loudly, she may close her eyes and cover her ears. If the teacher asks her to pay attention and look at her work, she may scream and jump up and run out the door in

order to escape the sensory stimulation of the sound and lights.

When Christopher is late and misses first-period class, and he sees his friends in the hall, he is likely to enter second-period class late, talk to other students in a loud voice, refuse to do work (saying “No” or ignoring the teacher’s direction), and leave class in order to get peer attention.

PLANNING AND SELECTING FUNCTION-BASED INTERVENTIONS

Behavioral interventions should be designed or selected (1) to limit (or remove) the circumstances that are likely to lead to the behavior; (2) to systematically teach, and reinforce the student for using, alternative and more acceptable behaviors to achieve the same function; and (3) to include strategies for responding when the behavior occurs so that the problem behavior is not reinforced. Thus a good behavior intervention plan has three components, and together these interventions complement one another:

Supports to Prevent the Problem Behavior. Reduction or increase in social interactions, changes in the physical or

sensory environment, changes in the student’s schedule, and methods to increase the overall control that a student has in life are among the supports to prevent the problem behavior. These supports may be included in the IEP section on supplementary aids and services (in addition to the written behavior intervention plan) so that they are an integral part of the IEP.

Instruction to Teach Alternative (or Replacement) Behavior. To increase alternative or replacement behavior, behavioral goals need to be established. That a goal to reduce behavior alone will be effective is rare unless the student has a way to communicate or act in a more acceptable manner and can obtain the same function.

Responses to Minimize the Effectiveness of the Problem Behavior. That behavior severe enough to warrant extensive assessment and planning will just disappear is not likely even with the most effective behavior plans. The team needs to identify how it will respond when the behavior does occur, and how the team can minimize the value of the behavior to the student by not reinforcing it.

IMPLEMENTING AND EVALUATING THE PLAN

Once the plan is developed, staff members who will be implementing it need to be trained and supported to implement it with fidelity. They may need to see it modeled, use role-play, and receive feedback. Data on the behavior to be taught as well as the behavior of concern need to be taken in a systematic way, but doable in the classroom. Carrying out this responsibility is difficult for the teacher when strategies and data collection interfere with the instruction of all students. Evaluation should consider the fidelity of implementation and not only the change in student performance as measured by objective data.



During the evaluation discussion staff members should consider the fidelity of implementation (Were the staff able to implement the procedures in a consistent way as intended?) and the data on student performance (Did the student learn to use alternative behavior under that same condition and did the problem behavior decrease?). Staff members should also engage in a qualitative discussion of the effectiveness of the intervention strategies and supports. All of these issues need to be considered at least three weeks following the implementation of the program and on a monthly to bimonthly basis. Any changes in the behavior intervention plan should be made on the basis of data and discussion of the utility of the procedures. If the program needs to be changed, then the team needs to meet (1) to discuss whether the functional behavioral assessment was accurate or if more data need to be gathered; (2) to describe changes in the program; (3) to determine if the measures for the behavior will be modified; and (4) to decide how the team will continue to evaluate the effectiveness of the program. Evaluation and ongoing modification of the program continue, using data to support the changes.

Behavioral Intervention in the Courts

The following is a review of cases dealing with behavioral-services legal issues under the IDEA. The review is not exhaustive but rather is a sampling of the contexts in which such problems arise. Although each case turns on its unique facts, the cases are a research starting point.

GENERAL FRAMEWORK FOR IDEA LITIGATION

To enforce a student's right to a free appropriate public education, litigation may be brought.¹⁵ In the seminal case

15 See [20 U.S.C. § 1415\(i\)\(2\)\(A\)](#).

of *Board of Education v. Rowley*, the U.S. Supreme Court held that “a court’s inquiry” in such cases “is twofold”: (1) Is the IEP “reasonably calculated to enable the child to receive educational benefits?” and (2) Has the school district “complied with the procedures set forth in the Act?”¹⁶ As discussed below, behavioral cases are litigated under both prongs of *Rowley*.

INDIVIDUALIZED PROGRAM CHALLENGES

In *Neosho R-V School District v. Clark* the Eighth Circuit held that the school district’s failure to address adequately the student’s problem behavior was a denial of a free appropriate public education.¹⁷ The student had Asperger’s syndrome and a learning disability and his “behavior prevented him from being included in

A school district’s failure to conduct a functional behavioral assessment and develop a behavior intervention plan may constitute procedural inadequacies resulting in a denial of a free appropriate public education.

mainstreamed classes beyond music and substantially interfered with his ability to learn.”¹⁸ The student’s IEPs “stated that a behavior plan was attached to them.”¹⁹ Although the student’s behavior problems dramatically increased during one school year, the school district did not begin to formulate a new behavior plan until close to the end of that year.

The court found that “the attachments [to the IEPs] were merely short-term goals and objectives that did not provide specific interventions and strategies to manage

16 *Rowley*, 458 U.S. at 207.

17 [Neosho R-V School District v. Clark](#), 315 F.3d 1022 (8th Cir. 2003).

18 *Id.* at 1025.

19 *Id.*

[the student’s] behavior problems.”²⁰

The court affirmed the district court’s finding that “because the IEPs required a behavior plan and because the attachment to the IEPs did not qualify as such and no approved plan was timely developed, the IEPs were not reasonably calculated to provide an educational benefit.”²¹ The court found that “[t]he fact that no cohesive plan was in place to meet [the student’s] behavioral needs supports the ultimate conclusion that he was not able to obtain a benefit from his education.”²²

The Eighth Circuit in *M.M. v. District 0001* took a seemingly stricter approach than it took in *Neosho*.²³ In *M.M.* a student with autism had behavioral problems including self-injury and physical aggression against others. In dealing with the student’s

behavior, the school district employed, among other ways, “calming strategies ... which included taking [the student] to a room away from other students.”²⁴ Despite the student’s continued behavior problems at the end of the second grade, the school district promoted him to the third grade

20 *Id.*

21 *Id.* at 1027.

22 *Id.* at 1029. The issue before the court was the implementation of an administrative order. This case illustrates, among other points, the necessity of conducting a functional behavioral assessment and having clear benchmarks in the individualized education program (IEP) for measuring behavioral services, the circumstances in which a functional behavioral assessment is required, and the type of order that might be achieved. See also *L.J. v. Audubon Board of Education*, 2007 WL 3252240, at *3–5 (D.N.J. Nov. 5, 2007).

23 *M.M. v. District 0001*, 702 F.3d 479 (8th Cir. 2012).

24 *Id.* at 482.

because it found that his progress was “sufficient” and that he “exceeded district standards in several areas.”²⁵ Although the student continued to behave aggressively, even toward staff, and although he had increased time away from his peers and was given less demanding work, his “test results and writing samples indicated that he was making academic progress.”²⁶

Before the end of the third grade, the parents placed him in a short-term rehabilitation facility located at Johns Hopkins Medical School, where he stayed for six months. The Hopkins staff members developed a detailed behavioral plan which did not include a “calming room.” They concluded that there was

in federal court; they alleged that the school district had denied their child a free appropriate public education. The district court ruled in favor of the school district.

Affirming the district court’s judgment, the Eighth Circuit held that the student was not denied a free appropriate public education.²⁸ The court determined that the IEP team was required only to “consider” the results of outside evaluations” but not necessarily to adopt them.²⁹ Whether the school district could have used more interventions was irrelevant. Rather, the school district was required only to make a “good faith effort” to help the student achieve IEP goals.³⁰ The court viewed the parties’ disagreement as one regarding

the fourth-year IEP of “specific goals” in mathematics, reading, and speech, the student’s fourth-year “IEP would have provided him ‘some educational benefit,’” as required under *Rowley*.³³

The court found that the least restrictive environment for the student was not the private school he attended with mostly typical peers. Rather, the district’s school was found to be the least restrictive environment, even though the student would be in his regular classroom only 45 minutes a day under the school district’s proposed schedule.³⁴

PROCEDURAL CHALLENGES

The 2004 amendments to the IDEA specify that a procedural violation constitutes

A procedural violation constitutes a denial of a free appropriate public education only if the violation “impeded the child’s right to” a free appropriate public education; “significantly impeded” parental opportunity to participate in decision making; or “caused a deprivation of educational benefits.”

a correlation between the use of such a room and the student’s increased aggressive behavior and that “problem behaviors would decrease if a calming room was not used as a punishment.”²⁷

The parents subsequently met with the school district to plan for the student’s return to public school. The district refused to adopt the Hopkins plan in whole. Instead the district borrowed pieces of that plan and proposed the continued use of the calming room. The parents rejected the school district’s plan and placed the student in a private Montessori school where the student body comprised mostly typical students. The parents then brought suit against the school district

methodology. Under *Rowley*, as long as a student is benefitting from education, the prerogative to determine the appropriate methodology is the educators’.³¹

In finding that the student was not denied a free appropriate public education, the court also focused on the student’s academic progress; the court noted that such progress “is an ‘important factor’ in deciding ‘whether a disabled student’s IEP was reasonably calculated to provide educational benefit.’”³² The court found that, given the student’s past progress under IEPs previously implemented by the school district, and the inclusion in

a denial of a free appropriate public education only if the violation “impeded the child’s right to” a free appropriate public education; “significantly impeded” parental opportunity to participate in decision making; or “caused a deprivation of educational benefits.”³⁵

A school district’s failure to conduct a functional behavioral assessment and develop a behavior intervention plan may constitute procedural inadequacies resulting in a denial of a free appropriate public education. In *R.E. v. New York City Department of Education* the Second Circuit consolidated three actions challenging IEP failures for

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.* at 487.

30 *Id.*

31 *Rowley*, 458 U.S. at 208.

32 *M.M.*, 702 F.3d at 486, quoting *CJN v. Minneapolis Public Schools*, 323 F.3d 630, 638 (8th Cir. 2003).

33 *Id.*, quoting *Park Hill School District v. Dass*, 655 F.3d 762, 766 (8th Cir. 2011).

34 *Id.* at 488.

35 [20 U.S.C. § 1415\(f\)\(3\)\(E\)](#).

children with autism.³⁶ In one case (*R.E.*) the independent hearing officer, ruling in favor of the parents, found that, although the IEP contained a functional behavioral

public education, but the state review officer reversed the independent hearing officer's finding. The parents brought suit and secured a favorable decision from the

failure to conduct a functional behavioral assessment “seriously impairs substantive review of the IEP because courts cannot determine exactly what information [a functional behavioral assessment] would have yielded and whether that information would be consistent with the student's IEP.”⁴² The court further opined that while not all such failures will be a denial of a free appropriate public education, “when [a functional behavioral assessment] is not conducted, [a] court must take particular care to ensure that the IEP adequately addresses the child's problem behaviors.”⁴³ Applying these principles, the Second Circuit upheld the district court's decision in favor of the parents in *R.K.*; the Second Circuit held that the IEP did not adequately address the student's behavioral issues.⁴⁴ The Second Circuit held in each of the two remaining cases, however, that the school district's failure to conduct a functional behavioral assessment did not amount to a denial of a free appropriate public education.⁴⁵

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assessment and a behavior intervention plan, neither included “specific information about the frequency, duration, and intensity of the problem behaviors” as required by New York State regulations.³⁷ On administrative appeal, the state review officer reversed the independent hearing officer's decision; the state review officer “concluded that the goals and objectives listed in the IEP were adequately linked to [the student's] academic level and needs, and that, contrary to the [independent hearing officer's] finding,” the proposed program “was appropriate.”³⁸ The district court reversed the state review officer's decision, and the school district appealed. In the second case (*R.K.*) the school district's IEP, while recommending some behavioral interventions, did not include a functional behavioral assessment because the school district had “conclud[ed] that [the student's] behavior does not seriously interfere with instruction.”³⁹ The independent hearing officer found that the student was denied a free appropriate

district court. The school district appealed. In the third case (*E.Z.-L.*), the IEP did not include a functional behavioral assessment or a behavior intervention plan because the school district did not think that the student's behavior seriously interfered with her instruction. The independent hearing officer disagreed and ruled in favor of the parents, but the state review officer reversed the independent hearing officer's ruling.⁴⁰ The parents brought suit in federal court. The district court ruled in favor of the school district, and the parents appealed.

The Second Circuit held that the absence of functional behavioral assessments and behavior intervention plans, or sufficiently detailed functional behavioral assessments and behavior intervention plans, constituted procedural violations. The court emphasized that the “failure to conduct an adequate [functional behavioral assessment] is a serious procedural violation because it may prevent [a school district] from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all.”⁴¹ Noting that “the entire purpose of [a functional behavioral assessment] is to ensure that the IEP's drafters have sufficient information about the student's behaviors to craft a plan that will appropriately address those behaviors,” the court found that a

Similarly, the case of *Park Hill School District v. Dass* involved a school district's failure to conduct a functional behavioral assessment.⁴⁶ In that case the parents of twin boys with autism challenged their children's IEPs; they alleged that the IEPs did not “address [...] transition and behavior issues.”⁴⁷ The Eighth Circuit concluded that “[t]he absence of IEP provisions addressing ... behavior issues does not, standing alone, violate the IDEA or deprive the

36 *R.E. v. New York City Department of Education*, 694 F.3d 167 (2d Cir. 2012).

37 *Id.* at 177. States have statutes and regulations which implement the IDEA. These may provide a higher standard for a free appropriate public education than the federal statute and are enforceable in federal court (see, e.g., *Thompson R2-J School District v. Luke P.*, 540 F.3d 1143, 1155 (10th Cir. 2008)). For a review of state regulations on behavior, see Kim Killu et al., *Behavior Intervention Planning and Implementation of Positive Behavioral Support Plans: An Examination of States' Adherence to Standards for Practice*, 8 JOURNAL OF POSITIVE BEHAVIOR INTERVENTIONS 195 (2006).

38 *R.E.*, 694 F.3d at 177.

39 *Id.* at 179 (internal citations omitted).

40 *Id.* at 195.

41 *Id.* at 190.

42 *Id.*

43 *Id.*

44 *Id.* at 194. The *R.E.* court also held that “testimony about what would have happened if a student had accepted the [district's] proposed placement must be limited to testimony regarding the services described in ... the IEP” (*id.* at 174). The principle was recently followed in *C.F. v. New York City Department of Education*, No. 11-5003-cv, 2014 WL 814884, at *8 (2d Cir. March 4, 2014). This means that a school district, at least in the Second Circuit, may not offer after-the-fact testimony about what it would have done.

45 *R.E.*, 694 F.3d at 193, 195.

46 *Dass*, 655 F.3d at 764.

47 *Id.* at 766.

disabled child of a [free appropriate public education].”⁴⁸ Relying on its earlier cases, the court reasoned that the absence of the provisions “was at most a procedural, not a substantive error”—meaning that the procedural error did not result in substantive harm to the students.⁴⁹

This brief overview of behavior assessments and interventions and legal issues surrounding behavioral services under the IDEA offers a starting point for any practitioner new to the subject area. There are, in addition, significant Internet resources available to assist attorneys and parents in understanding behavioral problems and interventions. And, although costly, behavioral experts are essential to understanding the unique needs of the child and in litigating behavioral-services cases.

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48 *Id.* at 767.

49 *Id.* See also *A.C. v. Board of Education of the Chappaqua Central School District*, 553 F.3d 165 (2d Cir. 2009). This case is cited in *R.E.* for the proposition that not every failure to conduct a functional behavioral assessment constitutes “a procedural violation of the IDEA that deprive[s] ... [the student] of a free appropriate education” (*R.E.*, 694 F.3d at 172, 190). Taken together, *R.E.*, *Park Hill*, and *A.C.* demonstrate the fact-intensive nature of the inquiry and the need for expert testimony to make direct links between a school district’s failures and the harm to the child.

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