

What Does the Law Say?

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Free Appropriate Public Education (FAPE) and Individualized Education Programs (IEPs)

Do the latest IDEA regulations require districts to cease provision of FAPE (i.e., special education and related services under the IEP) any time that the parents revoke written notice in writing?

Yes. On December 1, 2008, the U.S. Department of Education issued an amendment to the 2006 IDEA regulations that requires the district first to issue written notice and then to cease continuation of services upon receipt of such written parental consent (34 C.F.R. § 300.300(b)(4)). Additionally, the revised regulation makes clear that (a) the district may not use mediation or due process to override the parents' revocation, (b) the parents effectively forfeit the FAPE and discipline protections of IDEA, and (c) the district is not required to reconvene the IEP team or develop a new IEP (presumably until the parents restart the entire process).

Does a documented "school response" from the district's behavior consultant that, prior to the IEP meeting, countered each of the parents' proposals with a lower level of services constitute predetermination and, thus, a violation of the obligation to provide parents with a meaningful opportunity for participation?

Not necessarily—it depends on a judicial determination of whether the district representatives came to the IEP meeting with an open mind. In a recent decision involving such a school response, the Second Circuit sided with the district, reversing the lower court's ruling (*T.P. v. Mamaroneck Union Free*

School District, 2009). Other court decisions concerning alleged IEP predetermination have gone in each direction, depending on the totality of the circumstances (compare *Board of Education v. Ross*, 2007, with *Deal v. Hamilton County Board of Education*, 2004).

To meet their burden of persuasion that the child's eighth-grade IEP, which proposed a semi-inclusionary placement, was a denial of FAPE, would the parents' proof that their child progressed well in a segregated placement in 10th grade be persuasive?

Not in most cases. For example, on remand from the Supreme Court's burden of proof ruling, the Fourth Circuit upheld the appropriateness of the child's eighth-grade IEP, thus denying the parents' request for tuition reimbursement. The court explained that the prevailing judicial view in the various circuits is that determination of FAPE is based on what the IEP team knew or should have known at the time of developing the disputed IEP, thus avoiding Monday-morning quarterbacking (*Schaffer v. Weast*, 2009).

Functional Behavior Assessments (FBAs) and Behavior Intervention Plans (BIPs)

Does IDEA require exclusively positive behavioral strategies and techniques? Conversely, does the IDEA at least prohibit the use of aversive behavioral techniques such as mechanical restraints?

The references to positive behavioral techniques in the IDEA regulations are relatively limited in strength and scope: Specifically, they are as follows: (a) the definition of *psychological services* as including "assisting in developing positive behavioral intervention strategies"

(§ 300.34(c)(10)); (b) the requirement in the wake of racially disproportional suspension/expulsion rates of children with disabilities for review and revision of policies and practices for "the use of positive behavioral interventions and supports" (§ 300.170(b)); (c) the authorization of state-level activities to include assisting school districts in providing such interventions and supports (§ 300.704(b)(4)(3)); (d) the specification that the role of the general education teacher on the IEP team include consultation for "appropriate positive behavioral interventions and supports and other strategies for the child" (§ 300.324(a)(3)(i)); and, most significantly, (e) the requirement—and only if the child's behavior impedes the child's learning or that of others—that the IEP team "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior" (§ 300.324(a)(2)(i)). Thus, the U.S. Department of Education's Office of Special Education Programs (OSEP) explained that IDEA "does not flatly prohibit the use of mechanical restraints or other aversive behavioral techniques" (Letter to Anonymous, 2008). In contrast, special or regular education laws in some states and, in extreme cases, federal civil rights claims under the Constitution, Section 504 of the Rehabilitation Act of 1973, or the Americans With Disabilities Act of 1990 provide applicable limitations (Zirkel, 2008a).

Does IDEA require an FBA and/or a BIP for each student with a disability whose behavior interferes with his/her learning or that of others?

Perhaps surprisingly, no. Although both an FBA and a BIP are a matter of best practice in such circumstances

and may be required under state special education laws, this IDEA provision (§ 300.324), as spelled out previously, is only a required IEP team consideration. In such cases, depending on the frequency and severity of the learning-interfering behaviors, an FBA and/or BIP may be appropriate, but neither is required as a general matter.

The only situation in which IDEA specifically requires an FBA and BIP is for a disciplinary change in placement for behavior that is a manifestation of the child's disability (§ 300.530(f)(i)). Less strongly, the IDEA regulations require an FBA "as appropriate" and "behavior intervention services and modifications" designed to prevent recurrence upon (a) a disciplinary change in placement for behavior that is not a manifestation of the child's disability, or (b) the district's permissible (i.e., for weapons, drugs, or serious bodily injury) removal of the child to a 45-day interim alternate educational setting (§ 300.530(d)(ii)). A federal court in the District of Columbia recently ruled that the defendant violated this provision (*Shelton v. Maya Angelou Public Charter School*, 2008). However, outside this disciplinary context, the courts have generally not been rigorous about the need and standards of FBAs and BIPs under IDEA (e.g., *Alex R. v. Forrestville Valley Community School District*, 2004; *School Board v. Renollett*, 2006). In the latest example, the First Circuit Court of Appeals recently rejected a parent's claim that the lack of a BIP in the child's IEP constituted a denial of FAPE (*Lessard v. Wilton-Lyndeborough Cooperative School District*, 2008). The exceptions tend to be limited to egregious circumstances, such as when combined with other IEP deficiencies (e.g., *Escambia County Board of Education v. Benton*, 2005; *Neosho R-C School District v. Clark*, 2003).

Do state laws add to the requirements for FBAs and BIPs?

The majority of the states do not, but some states have much more extensive requirements and standards than the IDEA does for FBAs and BIPs. For example, Pennsylvania (2008)

requires a "positive behavior support plan" based on an FBA "to address behavior that interferes with learning" (§ 14.133). Similarly but more strongly, New York's regulations (2008) provide specific standards for FBAs and BIPs; require an FBA as part of the initial special education evaluation; and extend the IDEA required consideration of a BIP to situations where the child's behavior "places the student or others at risk of harm or injury" (§§ 200.1, 200.4(b)) and where the IEP team "is considering more restrictive programs or placements as a result of the student's behavior" (§§200.22(a)-(b)). Although such state laws are likely to be decisive in the state education agency's complaint resolution process and in due process hearings, they are not necessarily controlling in the courts. For example, in a recent case, the Second Circuit Court of Appeals (*A.C. v. Board of Education*, 2009) ruled that the district's failure to conduct an FBA in developing the IEP, in violation of New York's special education regulations, did not constitute a denial of FAPE under IDEA. The court concluded that the district's compliance with the aforementioned IEP consideration, resulting in effective strategies for the child's behavior, rendered the violation of state law, in effect, harmless error.

Does an FBA constitute an "evaluation" under IDEA, thus requiring consent and being subject to the provision for an independent educational evaluation (IEE) at public expense?

The agency that administers IDEA has opined that the answer to this question depends on the purpose of the FBA; if it is designed to assess the behavior of the individual child or the behavioral component of his/her program, rather than the effectiveness of behavioral interventions in the school as a whole, the FBA is an evaluation (Letter to Sarzynski, 2007). The federal district court in Washington, D.C. recently reached a similar conclusion, ruling that an FBA qualified as an IEE when conducted in relation to the individual child (*Harris v. District of Columbia*, 2008).

Manifestation Determinations

Does a manifestation determination under IDEA require the full IEP team? In any event, does the decision require consensus?

No. The reauthorized IDEA and current IDEA regulations streamline the required participants to the local education agency (LEA) representative, the parent, and "other relevant members of the IEP team (as determined by the parent and the LEA)" (§ 300.530(e)). A recent federal district court decision in Virginia interpreted this language as not requiring mutual agreement; each party may invite other relevant members (*Fitzgerald v. Fairfax County School Board*, 2008). In upholding the determination that the child's conduct, defacing the school building with a paint-gun, was not a manifestation of his disability, which was emotional disturbance, the court also ruled that IDEA did not require consensus or even a majority vote for a manifestation determination, because the parent had the right to challenge the district's decision by filing for a due process hearing. This decision is only binding in Virginia, and other jurisdictions have not yet issued published court decisions under the revised requirements for manifestation determinations under IDEA 2004, including the new causation criterion. For a synthesis of OSEP policy interpretations and hearing/review officer decisions to date under the new statutory criteria, see Zirkel (in press).

Other IDEA Obligations

If a district formally conducts other interventions, such as response to intervention (RTI) or § 504 Plans prior to moving to an evaluation for special education, has it violated its child-find obligation under IDEA?

It depends. The determinative question, which depends on the totality of the circumstances, is whether the district during the time of developing and implementing these interventions had reason to suspect that the child met the criteria for one or more of the IDEA classifications and, by reason thereof, needed special education. For examples

of opposing outcomes depending on the facts of the case, compare *A.P. v. Woodstock Board of Education* (2008) with *El Paso Independent School District v. Richard R.* (2008).

Are the terms “evidence-based,” “scientifically based research,” and “peer-reviewed” research synonymous in the context of the IDEA?

No, although these terms are interrelated in the context of the current IDEA regulations and the U.S. Department of Education’s interpretive commentary. As explained in a recent brief article (Zirkel, 2008b), these three terms appear to be overlapping but successively narrower in the IDEA context. The IDEA regulations do not specifically refer to “evidence-based,” but the accompanying commentary suggests a broad scope for this term. In contrast, the IDEA regulations define, by cross-reference to the No Child Left Behind Act of 2001, “scientifically based research” (SBR) as having a narrower, more strict scope which includes “peer-reviewed research” (PRR) as one component. As found in a detailed analysis (Zirkel & Rose, in press), IDEA used SBR repeatedly, but largely as a permissive rather than mandatory term and, except for the reference to what is popularly known as RTI, directed more at state education agencies than local education agencies. IDEA uses PRR only with regard to the IEP’s component for specially designed instruction and related services and as a requirement with the qualifier “to the extent practicable.”

Various special education experts advocate the use of universal design (UD) for instruction and testing of students with disabilities. Does IDEA require UD?

The first explicit reference to UD in the IDEA was the requirement in the 2004 Reauthorization that state and local education agencies “must, to the extent possible, use universal design principles in developing and administering [all statewide and districtwide] assessments,” including those implemented under the NCLB. The subsequent IDEA regulations (§ 300.44) incorporated this

definition of UD from the Assistive Technology Act:

The term “universal design” means a concept or philosophy for designing and delivering products and services that are usable by people with the widest possible range of functional capabilities, which include products and services that are directly accessible (without requiring assistive technologies) and products and services that are interoperable with assistive technologies.

The only other express reference to UD in the IDEA regulations is to permit states to use their allocation of IDEA funds to support “the use of technology, including technology with universal design principles . . . , to maximize accessibility to the general education curriculum for children with disabilities” (§ 300.704(b)(4)(v)). Finally, as a related matter, the regulations require states to “ensure that all public agencies [e.g., school districts] take all reasonable steps to provide instructional materials in accessible formats to children with disabilities who need those instructional materials at the same time as other children receive instructional materials” (§ 300.172(b)(4)). Thus, using UD not only in teaching but also for testing is in line with the general direction of IDEA provided that—as Salend (2009) made clear—school employees use due care and, for test materials, the focus is on student access without content or construct alteration.

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