

# Chapter 3

## Family Interests and Positive Behavior Support

### Opportunities Under the Individuals with Disabilities Education Act

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This chapter describes how families of children with disabilities and accompanying challenging behavior are suitable beneficiaries of positive behavior support (PBS) under provisions of the Individuals with Disabilities Education Act (IDEA). Thus, the chapter's focus is three-fold. First, what are IDEA's basic provisions that authorize families to be involved in their children's education? Second, what are IDEA's basic provisions that affect children who are suitable beneficiaries of PBS? Third, what is the relationship of the family-participation provisions of IDEA to the PBS provisions of IDEA, and what are the consequences of that relationship for families, service providers, and researchers? This chapter does not review the research on family-provider relationships, especially as they revolve around PBS. We have done that elsewhere and have concluded that, as a general rule, the IDEA legal authority for a partnership between families and professionals is less than optimally realized (Turnbull & Turnbull, 2001). Despite these findings, the fact remains that parents are more fully involved with schools and the education of their children than ever before, and the IDEA structure that made that result possible was strengthened by the Individuals with Disabilities Education Act Amendments of 1997 (PL 105-17).

Those two statements are cause for celebration. Yet, the new IDEA provisions for PBS put an extraordinary burden on parents. Parents need to understand IDEA, PBS, and the relationship between them as well as be prepared to act on that knowledge base. Parents also must invest extraordinary amounts of time, incur emotional stress when advocating for a new technology, and, perhaps, shoulder the legal expenses to secure PBS.

Is the price too high for parents to pay? We think not. Even so, we continue to bemoan the fact that, as in the past, the burden of ensuring a free appropriate public education (FAPE) and using the newest technologies ultimately falls on parents (Turnbull & Turnbull, 2001). Nonetheless, as researchers into and users of positive behavioral interventions and supports, it is clear to us that PBS is worthy of hot pursuit by parents (Turnbull, Turnbull, Stowe, & Wilcox, 2000).

## **THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT'S SIX PRINCIPLES**

Ever since IDEA was first enacted as the Education for All Handicapped Children Act of 1975 (PL 94-142), its six basic principles have governed the rights of students and the duties of schools (see Turnbull et al., 2000). The significance of these principles is that they have also authorized families and schools to enter into a special partnership (see Turnbull & Turnbull, 2001). This fact is particularly salient with respect to PBS.

The first of the six principles is zero reject. This is a rule against excluding any child with a disability from a FAPE. Among other things, it states that the student may be disciplined but may not be subjected to any cessation of educational services (IDEA, §§ 1412 [a][1], 1415 [k]). It also provides the student with a public education at no cost to his or her parents (IDEA, §§ 1412 [a][1], 1401 [8]).

The second principle is nondiscriminatory evaluation. This principle requires fair assessment of the student to determine whether he or she has a disability and, if so, what special education and related services are required (IDEA, § 1414 [a]-[c]). To carry out a fair evaluation, the school must conduct an interdisciplinary assessment of the student across a variety of domains (cognitive, behavioral, developmental, and physical) and in the specific areas in which the student is known or suspected to have a disability (IDEA, § 1414 [b]). Among other things, this principle also includes the student's parents as members of the team that evaluates the student. It also gives them the right to secure (sometimes at the cost of the school) and have considered evaluations conducted by qualified individuals who are not employees or contractors of the school (IDEA, § 1414 [b], [c]).

The third principle is a FAPE. This is a rule requiring the individualization of special education and related services (IDEA § 1414 [d]). Just as the student's parents are members of the nondiscriminatory evaluation team, so too are they members of the student's individualized education program (IEP) team. This team must base the student's IEP and related services on the student's evaluation. The purpose of a FAPE is to ensure specified outcomes for the student, including a productive, independent adult life to the maximum extent possible (IDEA, § 1400 [c][5][E][ii]). The linchpin of a FAPE is the student's IEP; the standards for determining whether a student has a FAPE are that the school follows proper IDEA procedure and that the IEP allows the student to benefit from special education and any other services provided (IDEA, § 1414 [d]; *Board v. Rowley*, 458 U.S. 176 [1982]). A FAPE includes, among other things, provisions regarding PBS, as explained more fully later in this chapter.

The fourth principle is the least restrictive environment (LRE). LRE is a rule of access to and progress through the general curriculum, which is comprised of the academic, extracurricular, and other school activities for students without disabilities (see 34 C.F.R. §§ 300.347, 300.553). To have that access and the opportunity to benefit, the student is entitled to receive supplementary aids and services as specified by his or her IEP team (IDEA, §§ 1401 [291], 1412 [a][51]).

Significantly, Congress regards special education as a service, not as a place to which students are sent (IDEA, § 1400 [c][5][C]). Accordingly, the legal presumption is that the student will be educated, to the maximum extent appropriate for the student,

with students who do not have disabilities (IDEA, § 1412 [a][5]. This presumption may be set aside only if the "nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily" (34 C.F.R. § 300.550). Even in such cases, however, the local education agency (LEA) must provide a proper continuum of available services to ensure that the student is taught in the most inclusive environment possible (34 C.F.R. § 300.551). The student's IEP team, supplemented by general educators and school administrators, determines the student's placement and, if applicable, must justify why access with supports to the general curriculum should not be afforded (34 C.F.R. 300.347).

The fifth and sixth principles are, respectively, procedural due process (sometimes called *procedural safeguards*) and parent-student participation. These rules create checks and balances. They are ways to ensure that the student benefits from being in school and that the school provides the required services and placements (see *Board v. Rowley*; 34 C.F.R. §§ 300.500-300.589). They also ensure shared decision making concerning the student's education (IDEA, § 1414 [d][1][B][i]; 34 C.F.R. §§ 300.344 [a][1], 300.345).

## **POSITIVE BEHAVIOR SUPPORT: DEFINITION AND PURPOSE**

PBS is a technology of intervention that is applied to and on behalf of students whose behavior is or is regarded as challenging or problematic (see Sugai et al., 1999). Its purpose is to produce "socially important behavior change" (IDEA, § 1414 [b]). Its focus extends beyond the student and includes systems change activities, environmental alterations, skill instruction activities, and behavioral consequence activities (IDEA, § 1414[b]). These four components combine to form what Sugai and colleagues described as

[A] behaviorally based systems approach [which is applied] to enhance the capacity of schools, families, and communities to design effective environments that improve the fit or link between research-validated practices and the environments in which teaching and learning occurs. Attention is focused on creating and sustaining school environments that improve lifestyle results (personal, health, social, family, work, recreation, etc.) for all children and youth by making problem behavior less effective, efficient, and relevant, and desired behavior more functional. In addition, the use of culturally appropriate interventions is emphasized. At the core, [PBS] is the integration of behavioral science, practical interventions, social values, and a systems perspective. (1999, pp. 6-7)

## RELATIONSHIP OF IDEA'S SIX PRINCIPLES TO ITS PROVISIONS FOR POSITIVE BEHAVIOR SUPPORT AND RELATED INTERVENTIONS

Having briefly described IDEA's six principles and the characteristics and purposes of PBS, it is now appropriate to examine the relationship between the two. To do that, one must remember that IDEA's six principles create a seamless procedure: Enroll the student and keep him or her in school no matter what (zero reject), evaluate him or her fairly (nondiscriminatory evaluation), and provide a benefit from education (a FAPE).

It is also important to remember that PBS itself is a seamless process: Determine whether the student's behaviors warrant the technology and, if so, conduct a functional behavioral assessment (FBA)<sup>1</sup> (nondiscriminatory evaluation) as the basis for the intervention; develop a behavioral intervention plan (BIP) (an appropriate education) that details the intervention; and deliver services in the LRE and through the least drastic means (i.e., presumptively, through positive means). It is futile to separate these two seamless processes from each other; it is, however, fruitful to show their connections. The connections arise from two separate sets of IDEA's provisions. The first set deals with the IEP process, and the second deals with discipline.

### Provisions for the Individualized Education Program Process and Positive Behavioral Support

IDEA Section 1414(d)(3)(B)-which relates to the IEP-requires each IEP team to consider "special factors" when it develops a student's IEP. Section 1414(d)(3)(B)(i) provides that "in the case of a child whose behavior impedes his or her learning or that of others," the IEP team shall "consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior." This provision has several implications for families.

**Definitions** It is significant that IDEA does not define what behavior impedes the student's or other students' learning. A consortium of university PBS research and technical assistance centers offered the following definition of *impeding behaviors* (Turnbull, Wilcox Turnbull, Sailor, & Wickham, 2001, p. 467):

1. impede the learning of the student or of others and include those behaviors that are externalizing (such as verbal abuse, aggression, self-injury, or property destruction), are internalizing (such as physical or social withdrawal, depression, passivity, resistance, social or physical isolation, or noncompliance), are manifestations of biological or neurological conditions (such as obsessions, compulsions, stereotypes, or irresistible impulses), are manifestations of abuse, neglect, exploitation or maltreatment, or are disruptive (such as annoying, confrontational, defiant, or taunting), and
2. could cause the student to be disciplined pursuant to any state or federal law

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<sup>1</sup> IDEA uses *functional behavioral assessment* and some professionals use *functional assessment*. These terms are synonymous. The former appears in this chapter because this is the IDEA term and IDEA is the topic of this chapter.

- regulations, or could cause any consideration of change of the student's educational placement, and
3. are consistently recurring and therefore require behavioral interventions and supports

Several comments about this definition are in order. First, the identified behaviors are associated with various types of disabilities. A parent should not be thwarted from seeking PBS for a child simply because the child's disability has not been subjected to PBS research (Sugai et al., 1999). A child who has a developmental disability, emotional disorder, physical disability, learning disability, or attention deficit/hyperactivity disorder can benefit from this definition, as its approach is pragmatic and not theoretical.

Second, we create a causal connection between the behavior and the consequences. If, as a result of the behavior, the student could be disciplined or if a change of placement might be considered, then PBS is appropriate. That is so because, as parents know, prevention is the best approach. Waiting until discipline or a change of placement is required may be waiting too long.

Third, we say that the behaviors must be "consistently recurring." This is a serious limitation, for it prevents consideration of PBS if there is only a single behavioral event. Some parents may want even the single event to trigger PBS. Yet, schools may argue that a single event may not be the reason for discipline (unless it is a weapons or drugs violation) or a change of placement debate. Parents, then, should respond that if the behavior is punishable under a school code of conduct, it is impeding. Or, they may agree that one occurrence may trigger requirements, but that the key is likelihood of recurrence.

Turning now from this proposed definition, let us consider what IDEA and the U.S. Department of Education (ED), which is responsible for implementing IDEA, say about PBS. Here, parents encounter some serious problems of interpretation. Two problems arise initially with respect to the term *impeding behavior*. First, *impeding behavior* has not been defined by IDEA, its regulations, or the ED. Second, IDEA itself and its regulations use only the term *impede* whereas the ED uses the terms *interfere and significantly impair* in phrases a id, manners that indicate that *impede, impair, and interfere* may have similar meanings (64 ed. Reg. 12,479, 12,480, & 12,588, March 12, 1999). This is more than a matter of semantics. Whatever the ED says *impede* means is how most courts will interpret the word, or courts defer to agency interpretations unless these interpretations are clearly indefensible (see *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 [1999]). Thus, for a parent who wants PBS for his or her child, the term *significantly impair* limits the opportunity for PBS to be provided. That is so because *significantly* qualifies *impair*.

Moreover, the ED seems to further limit the opportunity for PBS to be provided. This is so because of the following clarification regarding PBS: "School officials have powerful incentives to implement positive behavioral interventions, strategies and supports whenever behavior interferes with the important teaching and learning activities of school" (65 Fed. Reg. 12,588). In our judgment, the ED's clarification here is significant because it instructs courts, hearing officers, state and local school administrators and other professionals, parents, and advocates for students with disabilities concerning the interpretation and application of IDEA and its regulations.

Let us be precise. The term *incentive* is different from the term *requirement*. In our view an incentive is a positive reason for acting; a requirement is a legal duty to act. Thus, despite the requirement to consider PBS, the ED clarifies that there is no

requirement to implement PBS. However, it indicates that the PBS provisions do presume in favor of PBS. Therefore, a parent may at least argue that PBS should be used; it is presumptively the correct intervention for "impeding" behavior. Professional judgment will still prevail in determining whether PBS is the correct technology to use for any particular student.

The term *interferes* seems to us to be a synonym for *impede*. Yet, note what follows the term *interferes--namely*, the phrase "the important teaching and learning activities of the school." We believe that this phrase asks a decision maker (e.g., the student's IEP team, a hearing officer, a court) to determine what is an "important" activity and to distinguish it from an "unimportant" or "less important" activity. This seems to be a limiting or qualifying phrase: Unless the behavior interferes with something "important," it does not "impede" and, therefore, does not trigger the IEP team to consider the use of PBS. On the one hand, if the courts defer to the ED, the definition of *important* is all-important: On its meaning hang the opportunities for PBS. On the other hand, courts may disregard the ED's interpretation as being in conflict with the statute.

Moreover, the phrase also adds the phrase "teaching and," suggesting to us that not just the learning of the student and others is affected by impeding behavior. The teaching--the activities of the school staff must also be impeded for educators or others to determine that behavior does indeed impede. Assuming, again, that the courts defer to this interpretation, the ED puts the burden on the parents to show that their child's behavior not only impairs his or her own learning and/or the learning of other students but that it also impairs the ability of the school faculty to teach. Thus, the parents face a two-pronged test.

In our judgment, this is a defensible interpretation because, if an educator cannot teach on account of a student's behavior, then that student's behavior impedes or interferes with the learning by other students. Yet, it also limits the ability of a student to receive PBS, and that is something that parents may well find objectionable. It gives the parents the unenviable task of asserting that the particular teacher(s) lacked competency to teach their child or to teach other children while their child was in the classroom. This makes the parents take the offensive against a teacher, requires the parent to document poor teaching and perhaps to even suggest how the teacher should have responded (i.e., to define good teaching), and subjects the child to possible teacher or administrator retaliation.

Moreover, it seems to us that the ED considers violation of a school code of conduct to be "impeding behavior." This reflects the language of Congress (IDEA, § 1414 [d][3][B] [i]). In its questions and answers on IEPs, the ED states that

In most cases in which a child's behavior that impedes his or her learning or that of others is ... repetitive, proper development of the child's IEP will include the development of strategies, including positive behavioral interventions, strategies and supports to address that behavior.... This includes behavior that could violate a school code of conduct. (64 Fed. Reg. 12,479)

Here, the limiting term--consistent with the consortium's definition--is *repetitive*. Again, the single behavior that impedes learning will not benefit the child or the parents who are seeking PBS. That is the thrust of the first sentence. Under the ED's interpretation, the impeding behavior must be repetitive, *or* there must be a significant chance that it will recur.

Yet, note that there may be an inconsistency within the interpretation. That is so because any violation--even the single violation of a school code of conduct--may trigger PBS. That is the thrust of the second sentence. The distinction between the first and the second sentences is significant, for it is not just the "high visibility/high risk" violations (e.g., assaults, verbal harassment, sexual harassment, property destruction) that trigger PBS's consideration; it is also for matters such as running in the hallways and talking during school assemblies-whether repetitive or not.

Thus, the severity of the impeding behavior is not the key element; the frequency or future likelihood are. Accordingly, parents seeking PBS will want to document how often their child has been written up for impeding behavior. In impeding cases, the count controls, and that may well be so with code violations as well.

**Team Membership** Under IDEA, the IEP team must take the required action for PBS and impeding behavior. This fact necessitates discussion of two significant aspects. The first is that the IEP team members are fundamentally the same people who complete the student's nondiscriminatory evaluation (IDEA, § 1414 [d][1][B]). The second is that the IEP and evaluation teams include the student's parents.

The consequences of the evaluation and IEP teams having overlapping members are that the evaluation data are known to the IEP team (and to the parents as team members) and that the data must be taken into account when the teams decide whether to consider PBS. By being members of the evaluation and IEP teams, the parents are in a position to provide information that may be useful to the team, such as how the child behaves at home and in the community. The school personnel team members probably would not have this information. Yet, the "whole child" is the team's concern, and behaviors at home and in the community may well be relevant to behaviors at school (and vice versa). As members of the team, parents are in a position to describe the home and community behaviors and, thereby, to provide a more complete description of the child-the whole child perspective that is necessary for a full understanding of why behaviors occur and what can be done to ameliorate them.

**Basing an Individualized Education Program and a Behavior Support Plan on the Nondiscriminatory Evaluation and Functional Behavioral Assessment** Any plan for PBS must be based on some form of evaluation: no evaluation means no defensible plan. This is the rule of the statute and the holding of the cases (see Turnbull et al., 2000). It is also a common-sense rule: The principle of nondiscriminatory evaluation precedes the principle of a FAPE because the purpose of the evaluation is to determine whether the child has a disability and, if so, the educational consequences of that finding (IDEA, § 1414 [a][1][B]). The educational consequences can include a plan to address impeding behavior. Yet, that plan will be only as good as the evaluation on which it rests. Data must drive the development of any particular plan.

Therefore, a brief discussion about the evaluation and plan development is in order. No PBS plan should be developed, incorporated into an IEP, and implemented unless the LEA- has first conducted an FBA (Sugai et al., 1999). The assessment should be conducted across all home and community environments. A written report should be prepared that documents the actions taken to conduct the assessment and the results of the assessment (34 C.F.R §§ 300.530-300.543; see also Sugai et al., 1999).

Some might argue that a PBS plan is too complex and unwieldy to be included in the

EP because various minor changes may be required at different times and holding an IEP meeting regarding every change would be nearly impossible. Minor changes that do not affect the core components of the PBS plan, however, can be made without an IEP meeting if the IEP has a provision allowing such changes. For example, the IEP could include schedules for altering specified interventions or supports, or their frequency or duration, without requiring the IEP team to reconvene.

***Incorporating Positive Behavior Support into the Individualized Education Program*** As noted previously, PBS is among the special factors that IEP teams must consider in IEP development, review, and revision. If the IEP team determines during this development, review, or revision that the child is in need of "a particular device or service including an intervention, accommodation, or other program modification) in order for the child to receive a FAPE, the IEP team must include a statement to that effect in the child's IEP" (34 C.F.R. § 300.346 [c]). Thus, if the IEP team determines that a student requires any positive behavioral intervention or support, then the student's IEP must include a statement to that effect. Indeed, if a student has a PBS plan, then the IEP team should incorporate that plan into the student's IEP. IDEA itself, the regulations promulgated under it, and the Office of Special Education Programs (OSEP) commentary imply that this should be the case (34 C.F.R. § 300.346 [c]; see also 64 Fed. Reg. 12,620). For this reason alone, parents should insist that the PBS plan and the IEP be merged or incorporated.

There is yet another reason why this is a sound recommendation: If the student exhibits behaviors that subject him or her to school discipline, then the parents will want to argue that the student's behaviors are manifestations of his or her disability. That argument may safeguard the student against various kinds of sanctions. If the IEP team itself has determined that certain behaviors are challenging or problematic-and if they have made this determination after conducting an FBA, developing a PBS plan, and incorporating the plan into the student's IEP-then it will be very difficult for the school to argue successfully that the student's behavior is not a manifestation of the disability. In effect, the FBA and IEP/PBS procedures may stop a school from applying certain types of discipline.

***Considering and Documenting*** Yet another implication of the parents' participation in the evaluation and IEP teams relates to the IEP team's duty to consider



the use of PBS. The word *consider* is important. The word *consider* requires the IEP team to

- Understand what PBS is and how it works
- Have the ability to implement PBS
- Engage in a discussion about whether to employ PBS
- Detail the reasoning behind it's decision on whether to employ PBS

These elements of the word *consider* are common-sensically defensible. The IEP team members cannot consider what they do not understand, and it is meaningless for them to consider a futile option-one they cannot implement, even rudimentarily. Furthermore, for them to consider anything, they must engage in a discussion, weighing the pros and cons of using PBS, and they must decide on one or more rationale for a decision. A result without a reason is indefensible and subject to attack as whimsical and not professionally sound. If any of these elements are absent, then it is questionable whether the IEP team has met its statutory duty to consider PBS.

Accordingly, parents should themselves be well versed in the meaning of PBS. They should also ask the other team members about the following:

- What training they have had in PBS How they define PBS
- What they believe are the purpose and methods of PBS
- How PBS may apply to the child
- How PBS is being used with respect to other children

In short, the parents should not only know their child and PBS but should also ensure that the school faculty and administrators know the child and PBS. In the absence of that kind of knowledge-both theoretical (about PBS) and applied (about the child)-it is not likely that PBS can be considered, or effectively delivered.

***Considering When Appropriate*** The IEP team must consider positive behavioral interventions and supports "when appropriate," namely, when the student's behavior impedes learning (IDEA, § 1414 [d][3][B][i]; 34 C.F.R. § 300.346 [a][2][i]). Two questions that parents should always ask, and that the IEP team may be asked in a challenge to its decision-making process and the results of that process, are

- When is PBS not appropriate to be considered?
- What factors rule out PBS in the team's consideration?

These are entirely proper questions for parents and the entire team to ask. After all, IDEA identifies PBS as an intervention that must be considered. Therefore, the duty

seems to be not only to consider PBS but also to decide whether it should not be used and, if not, why. It is advisable for the team to document its decision-making process, the result (i.e., not to use PBS), and the reasons for that result. If the parents so choose, they may make their own notes of the team's processes, results, and reasons, paying particular attention to why the team decided against using PBS. Was it because the child's behavior did not impede learning or teaching? Was it because the behavior was not likely to recur? Or was it for other reasons?

**Considering Alternative Interventions** The team members are not required to use PBS. They are required only to think about (to consider) whether to use them or other interventions or no interventions at all. IDEA's language allows the IEP team to "consider" the use of PBS, other interventions, both, or none at all. Accordingly, we believe that a team may consider interventions such as a therapeutic drug regimen (relying on medical advice); the use of nonpositive interventions (which are hard to justify under the rebuttable presumption given to PBS; Turnbull et al., 2000; Turnbull et al., 2001); or the continuation, modification, or discontinuation of present (positive or other) interventions, if any. Note, however, that in every such case the IEP team is required to consider PBS, even if they are also considering other strategies.

Again, the parents, as members of the IEP team, are in an excellent position to request team members to justify any decision they make about PBS or other interventions. For one thing, the parent may have information about the child's medical history and medication. Unless the parent has authorized the child's physician to release medical records to the school and the doctor has complied, the IEP team would not have this useful information. Inasmuch as some behaviors may be caused by neurobiological conditions that only a physician can diagnose and treat, and inasmuch as the definition of impede includes behaviors that are traceable to underlying neurobiological conditions, it is helpful for the team to know what only the parents or the physician know. If a behavior does have a neurobiological basis, then PBS, coupled with medication, may be entirely warranted (although this is not to say it may not be warranted in other cases).

**Addressing the Behavior** The IEP team must consider "strategies" to "address" the student's behavior (IDEA, § 1414 [d][3](B)(i); 34 C.F.R. § 300.346 [a][2](i)). This language comes within the "appropriate education" (FAPE) principle and means that the strategies must target preventing, reducing, replacing, or otherwise appropriately addressing the behavior or behaviors. The basis for this judgment is the Supreme Court's *Board v. Rowley* decision (458 U.S. 176). In that case, the Supreme Court interpreted IDEA's requirement of a FAPE to mean that the student must be given services that will enable the student to "benefit" from special education. This standard suggests that any strategy to address a student's behavior must be one that will benefit the student in the sense that it is efficacious for the purpose for which it is used—that is, the interventions change the student's behavior and, thus, enhance the student's ability to benefit from special education and related services.

Hence, the parents are in the position, as team members, to ask other team members to justify any intervention in terms of its outcomes. Will it effectively produce change in behavior (address the behavior)? If not, what is its justification? These are good questions for parents to ask. Moreover, in asking these questions, the parents must make it clear that their inquiry rests on the student's right to a FAPE. That is the principle that guides the address requirement.

In defining an "appropriate education" in *Board v. Rowley*, the Supreme Court created two key tests for determining whether a student has received a FAPE: the process test and the benefit test. *Board v. Rowley*'s process test essentially requires LEAs to follow IDEA's procedural requirements to provide a FAPE. Thus, if proper IDEA procedures are not followed, then, in most cases, a court will hold that the student has not received a FAPE (Turnbull et al., 2000).

*Board v. Rowley*'s benefit test requires that the student benefit from the services provided. Thus, even if the proper procedures are followed, a student is not receiving a FAPE if he or she is not receiving a benefit from the services. This need not be the maximum benefit, but the services provided must result in some substantive level of benefit, and the student's capacities must not regress (Turnbull et al., 2000).

Note that this benefit is only required when IDEA necessitates PBS consideration and behavioral intervention planning. In the absence of a situation in which behavioral intervention planning is required by IDEA, the student is not required to benefit from such planning for a FAPE to be established. For example, a student who requires other special education or related services but not individualized PBS may still receive PBS as part of a schoolwide program. The student will not have been denied a FAPE if the schoolwide PBS services fail to provide a benefit. For the student who requires individualized behavioral planning under IDEA, however, PBS and behavioral planning must provide a benefit.

Regardless of requirement by law, using PBS with any and all students, and attempting to provide a benefit therefrom, is best practice. Similarly, providing a higher level of benefit than that required by law is best practice. These best practices provide benefit not only for individual students but also provide schoolwide benefits, including environments that are more conducive to learning because of fewer class disruptions (Sugai et al., 1999; Turnbull et al., 2001).

In the team's consideration of PBS and of other interventions, parents can be very useful, providing information about the following:

- Their child's medical history, present diagnosis, and treatment (especially with respect to medication)
- What other forms of behavioral or educational interventions the parents have used in the past
- Whether the parents or other professionals have resorted to nonpositive measures (e.g., extensive time-out)

- What interventions have seemed to be effective and the conditions under which they were effective

Again, gathering such information is a matter of the team having a complete picture of the whole child.

**Documentation and the Individualized Education Program Team Decision Making Process** We also believe that it is advisable for the team to document their decision-making process by minutes (e.g., notes, audiotape recordings) that at least reflect the following matters: which interventions were considered, how much time did the team spend in consideration, who was on the team, how often did it meet, why it was not regarded as appropriate to consider PBS, which other strategies were considered, and which factors ruled out PBS in the team's consideration. The reasons for documentation are straightforward.

First, fair process tends to produce fair results. This legal maxim, incorporated into Section 1414 of IDEA, assures that, at the very least, there is documentation of the team's consideration (see Turnbull et al., 2000). Documentation tends to be a technique for accountability: If the team knows that the parents are documenting the team's actions, then the team itself may well engage in much more careful consideration of the interventions offered to the child.

Second, in a lawsuit or due process hearing, the team's decision-making process may be attacked on the grounds that a flawed process cannot lead to an acceptable result. In such a case, documentation of the process can be evidence of a defensible process. Under *Board v. Rowley*, a fair decision-making process is one defense to a claim that a school has not provided a student with a FAPE. By extension of the "process definition" of a FAPE, it seems to us that a similar standard probably will apply to the "consider" requirements related to PBS.

## **Provisions for Discipline**

As noted previously, IDEA requires educators and parents to address PBS under two circumstances. The first relates to the IEP process. The second relates to the discipline of the student. Here, several of IDEA's six principles come into play. First, the principle of zero reject applies because IDEA prohibits "cessation" of services to any child with a disability; alternatively stated, the zero-reject rule and the IDEA no-cessation rule prevent the school from excluding the student on account of discipline. The principle of nondiscriminatory evaluation is also important because, as noted previously, any program for the child must be based on a nondiscriminatory evaluation, including one that consists of an FBA. The principle of a FAPE applies because there must be an opportunity for the child to benefit from whatever environment or program the child is offered. Furthermore, the school must follow proper procedure in providing or denying PBS. The principle of LRE comes into play because, even if the child is subject to discipline, the child must still have the opportunity to participate in the general curriculum and to progress through it. The student must also be able to progress in his or her IEP goals, regardless of disciplinary placement (34 C.F.R. § 300.121 [d]).

**Removing the Child from the Current Placement** IDEA Section 1415(k) (1)(A) gives LEAs the authority to remove a child from the current placement "to an appropriate interim alternative educational setting, another setting, or suspension, for not

more than 10 school days to the extent such alternatives would be applied to children without disabilities" or

To an appropriate interim alternative educational setting for the same amount of time that child without a disability would be subject to discipline, but for not more than 45 days if:

- the child carries or possesses a weapon to or at school, on school premises, or to or at a school function, under the jurisdiction of a state or a local educational agency; or
- the child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function under the jurisdiction of a State or local educational agency.

Under IDEA Section 1415(k)(2), a hearing officer is given authority to

Order a change in the placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 days if the hearing officer:

- determines that the public agency has demonstrated by substantial evidence that maintaining the current placement of such child is substantially likely to result in injury to the child or to others;
- considers the appropriateness of the child's current placement;
- considers whether the public agency has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services; and
- determines that the interim alternative educational setting meets [specified requirements].

***Individuals with Disabilities Education Act Provisions*** IDEA Section 1415 (k)(1)(B) imposes on LEAs a requirement concerning PBS when disciplinary actions for weapons or drugs are taken against a child with a disability. It states,

If the [LEA] did not conduct a functional behavioral assessment and implement a behavioral intervention plan for such child before the behavior that resulted [in the discipline], the agency shall convene an IEP meeting to develop an assessment plan to address that behavior.

This meeting must take place "either before or not later than 10 [business] days after taking [the disciplinary action]. Furthermore, "if the child already has a behavioral intervention plan, the IEP team shall review the plan and modify it, as necessary, to address the behavior."

***Department of Education Regulations*** The statute describes FBA/BIP requirements in terms of the disciplinary actions described in Sec. 1415(k)(1)(A) (weapon and drug removals). The regulations in 34 C.F.R. § 300.520(b)(1) clarify that the FBA and BIP are required when "either first removing the child for more than 10 school days in a school year or commencing a removal that constitutes a change of placement under § 300.519, including [changes of placement for weapon or drug violations under § 300.520(a)(2)]." This would also trigger the FBA/BIP requirements in the case of removal by a hearing officer based on a substantial likelihood of injury to self or others in the current placement.

***Defining "Change of Placement"*** *Change of placement* is a technical term that refers to removals of *two* kinds. The first is for "more than 10 consecutive school days." The second is for a

Series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year, and because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another. (34 C.F.R. § 300.519)

***Interpreting the Statute and Regulations with Respect to Positive Behavior Support*** Note that the FBA and BIP requirements make no mention of PBS in the event of disciplinary action. When the need for discipline arises, however, the IEP team is required to create, review, or revise any BIP for the sole purpose of addressing the student's sanctionable behavior (34 C.F.R. § 300.520 [b][c]). If it has to develop the plan in the first place, then it must do so by conducting an FBA before implementing a plan based on the assessment (34 C.F.R. § 300.520 [b][1][i]).

In our view, *FBA* and PBS are inseparable in the research and practice literature (Sugai et al., 1999; Turnbull et al., 2001). Furthermore, the impede provision requires the team to consider PBS to address learning-impeding behavior (IDEA, § 1414 [d][3][B][i]; 34 C.F.R. § 300.346 [a][2][i]). Thus, a fair reading of the statute and regulations is that the team must at least consider PBS as interventions to address the behavior for which the student is disciplined.

Discipline triggers FBA, BIP, and PBS. Parents whose children are being disciplined may assert this interpretation and its very practical implications—namely, that any discipline that triggers more discipline should be modified and that PBS is an effective intervention to change behavior. Indeed, although it is too late to use PBS as a prevention strategy because the student's behavior has already resulted in discipline, it is not too late to use PBS as a strategy to prevent further occurrences of behavior that are subject to discipline. The argument is that, although one incident triggering discipline has occurred, others can be prevented by PBS.

***Positive Behavior Support as Part of a Behavioral Intervention Plan*** The argument in favor of linking PBS to discipline is fortified by an explanation by OSEP in its commentary on 34 C.F.R. § 300.520 (a discipline regulation). In its commentary, OSEP . states that a PBS plan may itself comprise the BIP:

If, under § 300.346 (a) and (c), IEP teams are proactively addressing a child's behavior that impedes the child's learning or that of others in the development of IEPs, those strategies, including positive behavioral interventions, strategies and supports in the child's IEP will constitute the behavioral intervention plan that the IEP team reviews under paragraph (b)(2) of [§ 300.520]. (64 Fed. Reg. 12,620)

Therefore, it seems that whenever the IEP team is required to examine an existing BIP (pursuant to 34 C.F.R. § 300.520), the team will necessarily reexamine the extent to which an FBA and possibly a BIP should be undertaken and developed.

**The Manifestation Rule** The authority of LEAs to remove students with disabilities from the classroom is tempered by "the manifestation rule." In all but three circumstances (the student possesses weapons or illegal drugs or poses a substantial threat of injury to himself or others; see IDEA, § 1415 [k]; 34 C.F.R. §§ 300.520 [a], 300.521), a LEA may not change the placement of a student with a disability as a form of discipline if the student's behavior is a manifestation of his or her disability (*Honig v. Doe*, 484 U.S. 305 [1988]). As noted previously, *change of placement* is a term defined by the IDEA regulations.

Say that a school does propose discipline that the parents believe is a change of placement. In this circumstance, the school must conduct a "manifestation determination" to decide whether the behavior is a manifestation of the child's disability (34 C.F.R. § 300.523). The review must be carried out no later than 10 school days after the decision has been made to remove the child from his or her present placement. If this review determines that the behavior is not a manifestation of disability, then the child may be disciplined in the same manner as a child without a disability except that the no cessation protection will apply (34 C.F.R. §§ 300.524, 300.121 [d]). If the review determines that the behavior is a manifestation of disability, then the change of placement may not be used to discipline the child except in cases of weapons, drugs, injury to self *or* others, or parental consent (see *Honig v. Doe*).

If a parent challenges the school's decision to discipline the student and invokes the right to a due process hearing, and if the school proposes to change the student's placement as a form of discipline, then the parent may assert that the behavior was a manifestation of the disability and that the school's right to change placement is contingent on the school complying with the change of placement provisions. In particular, the school must repeat in whole or in part and, as appropriate for the student, the processes applicable to evaluation, the IEP, and placement decisions (see IDEA, § 1415 [k]; 34 C.F.R. §§ 300.519, 300.520). These rules apply to all discipline, including discipline imposed when the student possesses weapons or illegal drugs at school or when the current placement would result in a substantial likelihood of injury to the student or others. In these latter cases, however, the student is not eligible for "stay-put" rules and, therefore, may be removed from the current placement immediately (34 C.F.R. § 300.514). If the school does repeat the process, then it must perform the nondiscriminatory evaluation and FBA and use them to develop an IEP, a BIP, and, possibly, a positive behavior support plan.

**Positive Behavior Support as Presumptively Correct Intervention (Intervention of Choice)** Just as the LRE principle creates a rebuttable presumption in favor of access to and progress through the general curriculum, so it seems that IDEA has created a rebuttable presumption in favor of the use of PBS. That is, PBS is presumed to be the intervention strategy of choice for the IEP team in the case of impeding behavior. This is so because PBS is the only intervention specifically required for consideration by IDEA and, although other interventions may be considered, only PBS must be considered. This provision inherently requires that if the IEP team considers other

interventions, then it may do so only in comparison to PBS and must have adequate cause for adopting another intervention over PBS when both are appropriate. The significance of this interpretation for parents is simple and direct: Parents should assert that their children are entitled to PBS over any other intervention and that their child's IEP team has the burden of proving that PBS is not warranted.

***Presumption Against Aversive or Nonpositive Interventions*** A presumption in favor of PBS is also a presumption against the use of aversive interventions. PBS rewards desirable behavior, making it functional, and removes rewards from undesirable behavior to decrease its functionality. Aversive interventions do not reward desirable behavior; instead, they attempt to punish undesirable behavior until it is eliminated (Sugai et al., 1999; Turnbull et al., 2001). These two approaches are antithetical; thus, preference for one is preference against the other.

IDEA does not explicitly prohibit aversive interventions, but commentary by the ED supports the conclusion that there is a rebuttable presumption in favor of PBS and against aversive interventions. In this commentary, the ED explained,

Regarding what behavioral interventions and strategies can be used, and whether the use of aversive behavioral management strategies is prohibited under these regulations, the needs of the *individual* child are of paramount importance in determining the behavioral management strategies that are appropriate for inclusion in the child's IEP. In making these determinations, the primary focus must be on ensuring that the behavioral management strategies in the child's IEP reflect *the Act's requirement for the use of positive behavioral interventions and strategies.* (65 Fed. Reg. 12,589; emphasis added)

Here, the significance of this interpretation is the same as with respect to the presumption in favor of PBS. Parents should assert that their child should be protected against nonpositive interventions, and the burden of proof is on the IEP team to justify nonpositive or aversive interventions.

## **FAMILIES, CHILDREN, AND THEIR CONTEXTS**

Up to this point, this chapter has concentrated on IDEA's provisions, their interpretations by the ED, and interpretations of the statute and the ED's comments. Necessarily, the focus has been on the school as the context for PBS and on the parent-professional relationships within which PBS may be operationalized. A larger context is addressed next: the family and the community.

One of the premises of PBS is that it is useful in all environments that an individual with challenging behavior occupies (Sugai et al., 1999; Turnbull et al., 2001). This premise is consistent with the traditional precepts that education, particularly that which takes the form of behavioral interventions, should generalize across environments and individuals within various environments and that education and behavioral interventions should be durable across time.

Indeed, a consensus definition of PBS holds that one of the components of PBS is environmental alterations – changing the environments in which the student receives special or general education. Those educational environments can well include the student's home, especially given the emphasis on home-school collaborations and the generalization of interventions from school to home (Turnbull, Turnbull, Shank, Smith &



Leal, 2002). Moreover, there is consensus that the FBA, which underpins the PBS plan, should include targeted behavioral events occur, including the home and family interactions (Turnbull et al., 2001).

These precepts, consensus statements, and facts about the sites of research and application of PBS have implications for families. There can be no doubt but that families are significant "environments" in which PBS can be applied; indeed, the precepts of generalization and durability command that whenever a family is willing to use PBS, the family should be competent to deliver it. The implication of "willing and able" is, quite simply, that the family is entitled to receive training in PBS: what it is, what its purposes and outcomes are and should be, and how it may be delivered. Indeed, under IDEA, families or other third-party surrogates for the child or other person with challenging behavior have the right to be trained in PBS matters.

Parent and family education in PBS is available under two different sets of provisions within IDEA. The first set is the related services provisions. A related service is any developmental, corrective, or other supportive service necessary for the student to benefit from special education (IDEA, § 1401 [22] [1999]; 34 C.F.R. § 300.24 [b]). Among the related services that benefit not just children but also families and can be associated with PBS, are

- Counseling, especially by social workers and psychologists, whom the ED identifies as being qualified to provide PBS
- Medical services
- Psychological services, which include assistance "in developing positive behavioral intervention strategies"
- School health services
- School social work services, which include assistant "in developing positive behavioral intervention strategies"

The second set of provisions covers Parent Training and Information Centers (PTIs) (IDEA, 42 U.S.C. § 1482). PTIs exist in each state; some states have more than one. Their purpose is to provide information and education to parents concerning IDEA. To carry out this duty, PTIs should provide information about PBS. To fail to do so is to fail to capitalize on this new technology. Moreover, the ED recognizes that it is desirable to "export" technologies such as PBS from the school environment to family and community environments to better aid the student in IEP or individualized family service plan (IFSP) goal attainment (see 64 Fed. Reg. 12,549 & 12,588).

Finally, some children are served by schools and other agencies (e.g., mental health, developmental disabilities, juvenile justice, or child protective services agencies). Thus, the precepts of generalization suggest that PBS should be delivered in each of those agencies if it is also being delivered in school and that it should be delivered in the same way. Accordingly, parents should advocate for PBS generalization across these agencies and for representatives of these agencies to attend and contribute to the FBA and the IEP team meetings at which a BIP or PBS plan is being considered, developed, reviewed, or revised.

## CONCLUSION

A new technology is only as effective as those who know about it, know how to deliver it, and are committed to delivering it. It is only as effective as it spreads—whether in schools as they consider positive behavior support as part of their required attention to impeding behavior or as part of their discipline-imposing procedures or whether in the individual's home or community environments. Given their membership on the school evaluation and IEP teams, their legal rights under IDEA to collaborate with schools in other aspects of their child's education, their legal rights to consent on behalf of their children, and their interests in securing generalized and durable interventions—and, in turn, universal changes of behavior in their children—it seems to us as if parents are in an excellent position to advocate for positive behavior support in service-delivery environments and, thus, to benefit from it. Of course, the hitch is that, as with most innovations in education or other service delivery, the burden of persuasion—the job of making sure that agencies do their job—to often falls, and falls too hard, on the parents.

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