

# Case Law for Functional Behavior Assessments and Behavior Intervention Plans: An Empirical Analysis

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## I. INTRODUCTION

An interrelated pair of procedures that have come into favor in the field of special education for proactively addressing the behavior problems of students with disabilities—which range from violence to self or others to extreme introversion or inattention—are functional behavior assessments (FBAs) and behavior intervention plans (BIPs). An FBA is a systematic process of identifying the purpose—and more specifically the function—of problem behaviors by investigating the preexisting environmental factors that have served the purpose of these behaviors.<sup>1</sup> Based on the foundation provided by FBAs, a BIP is a concrete plan of action for reducing problem behaviors, dictated by the particular needs of the student exhibiting the behaviors.<sup>2</sup> Special education experts regard an FBA as inseparable from an effective, relevant, and efficient BIP.<sup>3</sup>

The principal legal framework for providing special education generally, and FBAs and BIPs specifically, for students with disabilities is the Individuals with Disabilities Education Act (IDEA).<sup>4</sup> The IDEA re-

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1. See generally Gregory P. Hanley et al., *Functional Analysis of Problem Behavior: A Review*, 36 J. APPLIED BEHAV. ANALYSIS 147 (2003); Mark W. Steege & T. Stuart Watson, *Best Practices in Functional Behavior Assessment*, in BEST PRACTICES IN SCHOOL PSYCHOLOGY V 337 (Alex Thomas & Jeff Grimes eds., 2008).

2. See generally Rutherford Turnbull, III et al., *Public Policy Foundations for Positive Behavioral Interventions, Strategies, and Supports*, 2 J. POSITIVE BEHAV. INTERVENTIONS 218 (2000).

3. E.g., George Sugai et al., *Applying Positive Behavior Support and Functional Behavioral Assessments in Schools*, 23 J. POSITIVE BEHAV. INTERVENTIONS 131 (2000); Turnbull et al., *supra* note 2, at 220; T. Stuart Watson et al., *Teacher-Implemented Functional Analysis and Treatment: A Method for Linking Assessment to Intervention*, 28 SCH. PSYCHOL. REV. 292, 293–94 (1999).

4. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1450 (2008). The IDEA regulations are at 34 C.F.R. pt., 300. The overlapping secondary statutory and regulatory framework at the federal level consists of section 504 of the Rehabilitation Act and the Americans with Disabilities Act. See generally PERRY A. ZIRKEL, SECTION 504, THE ADA AND THE SCHOOLS (3d ed. 2011).

quires school districts to provide each “child with disability”<sup>5</sup> with “free appropriate public education” (FAPE)<sup>6</sup> via an individualized education program (IEP)<sup>7</sup> in the “least restrictive environment” (LRE).<sup>8</sup> The Act includes detailed provisions for the content specifications for IEPs<sup>9</sup> and for the procedural protections for disciplinary changes in placement.<sup>10</sup> Each state educational agency (SEA) receives and distributes funding available under the IDEA and is responsible for monitoring compliance with the Act’s various requirements.<sup>11</sup> The IDEA’s primary dispute resolution mechanism is adjudicative, starting at the administrative level with an impartial hearing officer and, in states that opt for a second administrative tier, a review officer.<sup>12</sup> Federal and state courts have concurrent jurisdiction under the IDEA for judicial review of hearing officer decisions and, if applicable, review officer decisions.<sup>13</sup>

In its landmark decision under the IDEA, *Board of Education v. Rowley*,<sup>14</sup> the Supreme Court interpreted the original version of the IDEA to provide for a two-pronged standard of FAPE. Viewing Congress as emphasizing access via procedures, the Court concluded that the purpose of the legislation was to “open the door”<sup>15</sup> rather than to provide a high substantive floor. Thus, the *Rowley* Court concluded that the standards for FAPE were the following: (1) did the district comply with the various applicable procedures, and (2) is the IEP “reasonably calculated to ena-

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5. 20 U.S.C. § 1402(3).

6. *Id.* §§ 1402(9), 1412(a)(1).

7. *Id.* §§ 1402(9) & (14), 1412(d).

8. *Id.* § 1412(a)(5). The LRE requires placement within the range of placement options that, with supplementary aids and services, provide interaction with nondisabled students to the maximum extent appropriate. Thus, although associated with the concept of mainstreaming or inclusion, LRE—via its reference to appropriateness and its interrelationship with FAPE—does not mean placement of every child with a disability in the regular classroom.

9. *Id.* § 1412(d)(1)(A).

10. *Id.* § 1415(k)(1). Disciplinary changes in placement under the Act are removals—typically referred to by schools as “suspensions” or “expulsions”—that exceed ten school days. *Id.* § 1415(k)(1)(B). For the distinction between consecutive and cumulative days within a school year, see *infra* note 78.

11. *E.g., id.* § 1412(a).

12. *Id.* § 1415(f)–(g). For a current snapshot of the state one- and two-tier systems under the IDEA, see Perry A. Zirkel & Gina Scala, *Due Process Hearing Systems under the IDEA: A State-by-State Survey*, 21 J. DISABILITY POL’Y STUD. 3 (2009). For trends in the frequency of hearings under the IDEA, see Perry A. Zirkel & Karen Gischlar, *Due Process Hearings under the IDEA: A Longitudinal Frequency Analysis*, 21 J. SPECIAL EDUC. LEADERSHIP 22 (2008). For an overview of the alternate IDEA mechanism of the state complaint resolution system and the overlapping dispute resolution avenues under Section 504 and the ADA, see Perry A. Zirkel & Brooke L. McGuire, *A Roadmap of Legal Dispute Resolution for Students with Disabilities*, 23 J. SPECIAL EDUC. LEADERSHIP 100 (2010).

13. 20 U.S.C. § 1415(i).

14. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982).

15. *Id.* at 192.

ble the child to receive educational benefits?”<sup>16</sup> The substantive standard was relatively low; indeed, as the dissent pointed out,<sup>17</sup> a district could apparently meet the standard by providing a teacher with a loud voice to Amy Rowley, whose disability was deafness. In the intervening years since *Rowley*, the Supreme Court has addressed various other IDEA issues, but not FBAs or BIPs,<sup>18</sup> and Congress has codified a modified procedural standard for FAPE.<sup>19</sup>

The special education literature on FBAs and BIPs is full of rhetoric, research, and increasingly more detailed practical sources, but the legal literature specific to FBAs and BIPs is much more limited in both quantity and quality. Both of these intersecting literature streams reflect a notable misunderstanding of the legal requirements for FBAs and BIPs (i.e., the minimum that must be done) and fail to differentiate professional best practice (i.e., the optimum amount to do).<sup>20</sup> Moreover, a comprehensive and systematic analysis of the case law is missing.

This Article fills this gap by providing an empirical analysis of IDEA case law after reviewing the legal literature on FBAs and BIPs and synthesizing the legal framework of the IDEA. I propose that such a systematic synthesis offers two separable and parallel contributions to the field of special education. First, it shows practitioners and researchers in the field of special education the significant difference between the “should” of their professional norms and the “must” of the IDEA’s legal requirements. Second, it informs adjudicators and policymakers in special education law of the need for more consistent and well-conceived legal standards for determining whether a student with disabilities is entitled to an FBA or a BIP and, if so, whether its contents and implementation are appropriate under the IDEA and its corollary state special education laws.

Part II of this Article provides a review of the literature concerning FBAs and BIPs, with particular attention to legal analyses. Part III provides an overview of IDEA legislation and, in particular, the 1997 and

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16. *Id.* at 206–07.

17. *Id.* at 215 (White, J., dissenting).

18. For an overview of most of these decisions, see, e.g., Perry A. Zirkel, *A Primer of Special Education Law*, 38 TEACHING EXCEPTIONAL CHILD. 62 (2005).

19. Section 1415(f)(3)(E) of the IDEA provides the following:

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies—

(i) Impeded the child’s right to a FAPE;

(ii) Significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or

(iii) Caused a deprivation of educational benefit.

20. E.g., Steege & Watson, *supra* note 1, at 344 (characterizing FBAs and BIPs as not only legally required but also the best practice without any differentiation).

2004 amendments that are specific to FBAs and BIPs. Part IV summarizes the method used for collecting and analyzing case law concerning these two interrelated behavioral techniques under the IDEA. Part V provides the results of this empirical analysis, and Part VI provides a discussion of these results. Finally, Part VII concludes that there is a need for a more consistent and coherent approach to the access, appropriateness, and implementation of FBAs and BIPs under the IDEA.

## II. LITERATURE REVIEW

### A. Special Education Dimension

The perceived need for the FBA–BIP approach arose from the ineffectiveness of the early behavioral intervention approach, which had focused on imposing arbitrary consequential events upon the occurrence of a problem behavior.<sup>21</sup> Subjective opinion often shaped the diagnostic criteria used to determine the form of intervention—i.e., reinforcement or punishment.<sup>22</sup> This approach had several inherent shortcomings: (1) intervention often ignored an individual student's needs by overly emphasizing the topography of problem behaviors rather than exploring their triggers; (2) intervention success was temporary, as problem behaviors reemerged due to the failure to address preexisting factors; and (3) intervention ineffectiveness often led to the use of more restrictive, more intrusive, and more punitive interventions.<sup>23</sup>

To overcome these limitations, researchers shifted the focus of their conceptual discussion to the environmental factors surrounding problem behavior.<sup>24</sup> The resulting empirical research revealed that the environmental factors serving the particular purpose and function of a problem behavior maintained a topographically identical behavior.<sup>25</sup> For example, one student may exhibit aggression for the purpose of gaining a teacher's attention whereas another student may exhibit the same form of aggres-

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21. *E.g.*, Teodoro Ayllon & Jack Michael, *The Psychiatric Nurse as Behavioral Engineer*, 2 J. EXPERIMENTAL ANALYSIS BEHAV. 323 (1959).

22. *E.g.*, Steege & Watson, *supra* note 1, at 337–47.

23. *E.g.*, Nathan H. Azrin, *A Strategy for Applied Research*, 32 AM. PSYCHOL. 140 (1977); Donald M. Baer, *A Fight of Behavior Analysis*, 4 BEHAV. ANALYST 85 (1981); Samuel M. Dietz, *Current Status of Applied Behavior Analysis*, 33 AM. PSYCHOL. 805 (1978); Ruth A. Ervin et al., *Reaffirming the Importance of Analysis in Applied Behavior Analysis: A Review of Functional Analysis of Problem Behavior*, 34 J. APPLIED BEHAV. ANALYSIS 255 (2001).

24. *E.g.*, Donald M. Baer et al., *Some Current Dimensions of Applied Behavior Analysis*, 1 J. APPLIED BEHAV. ANALYSIS 91 (1968).

25. *See, e.g.*, Edward G. Carr et al., *Escape as a Factor in the Aggressive Behavior of Two Retarded Children*, 13 J. APPLIED BEHAV. ANALYSIS 101 (1980); Marian Weeks & Robert Gaylord-Ross, *Task Difficulty and Aberrant Behavior in Severely Handicapped Students*, 14 J. APPLIED BEHAV. ANALYSIS 449 (1981).

sion to avoid difficult class instruction. The use of a detention room may assuage the aggression for the first student and aggravate it for the second student. Thus, these early studies illustrated the value of, and prompted the need for, a procedure for identifying and assessing the preexisting environmental factors that serve the purpose and function of the problem behaviors.<sup>26</sup>

In the first comprehensive analysis of a general model of FBA–BIP procedure, two separate teams of researchers developed and refined a concurrent assessment of the occurrence of problem behaviors under three to four test conditions containing different environmental factors, such as amount of attention and difficulty of instruction.<sup>27</sup> They found that the occurrence of aggressive behaviors was higher under a particular test condition, suggesting that the particular condition served the purpose of the behaviors.<sup>28</sup> Subsequent studies replicated and extended this FBA–BIP procedure across a wide range of student populations, target behaviors, and educational environments, leading to the development of more precise positive-reinforcement-based interventions and demonstrating an apparent decrease in the use of overly restrictive, intrusive, and punitive interventions.<sup>29</sup> Further research efforts are in progress to refine an FBA–BIP procedure that is more applicable to the school setting.<sup>30</sup>

Although research has not yet yielded one particular set of procedures as a proven best practice, special education experts recommend FBAs as the foundational steps of a two-pronged strategy that should include the following core components and culminate in a BIP: (1) operational definitions of problem behaviors; (2) descriptions of the assessment conditions that may reliably predict the occurrence and nonoccurrence of problem behaviors; (3) descriptions of the consequence events that maintain problem behaviors; (4) direct observation of the problem

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26. E.g., Hanley et al., *supra* note 1.

27. Edward G. Carr & V. Mark Durand, *Reducing Behavior Problems Through Functional Communication Training*, 18 J. APPLIED BEHAV. ANALYSIS 111 (1985); Brian A. Iwata et al., *Toward a Functional Analysis of Self-Injury*, 2 ANALYSIS & INTERVENTION IN DEV. DISABILITIES 3 (1982) (reprinted in 27 J. APPLIED BEHAV. ANALYSIS 197 (1994)).

28. Carr & Durand, *supra* note 27, at 111; Iwata et al., *supra* note 27, at 3.

29. E.g., Craig H. Kennedy et al., *Analyzing the Multiple Functions of Stereotypical Behavior for Students with Autism*, 33 J. APPLIED BEHAV. ANALYSIS 559 (2000); Lillian Pelios et al., *The Impact of Functional Analysis Methodology on Treatment Choice for Self-Injurious and Aggressive Behavior*, 32 J. APPLIED BEHAV. ANALYSIS 185 (1999).

30. E.g., James Fox & Carol Davis, *Functional Behavior Assessment in Schools: Current Research Findings and Future Directions*, 14 J. BEHAV. EDUC. 1 (2005); Steege & Watson, *supra* note 1.

behaviors across the assessment conditions; and (5) a BIP based on the analysis of this information.<sup>31</sup>

### B. Legal Dimension

The legal literature addressing FBAs and BIPs is limited and, to a notable extent, is neither sufficiently complete nor accurate. The first legal analysis of FBAs or BIPs was a state-by-state survey study limited to FBAs after their initial recognition in the 1997 amendments to the IDEA.<sup>32</sup> The National Association of State Directors of Special Education (NASDSE) provided a brief summary of the survey results from “[forty-five responding] states and territories about policies, procedures and guidelines related to . . . [FBAs].”<sup>33</sup> Specifically, NASDSE reported that, in the wake of the 1997 amendments to the IDEA and prior to the 1999 IDEA regulations, nineteen respondents had—and another thirty-five respondents planned to revise or develop—written policies, procedures, or guidelines for FBAs. But the report did not provide any systematic information about the nineteen respondents in the first group, such as which were states versus territories, what was the nature of their policies or guidance, and whether any of the policies, procedures, and guidance were legally binding (i.e., codified in state laws).<sup>34</sup>

Similarly, triggered by the initial express recognition of FBAs in the IDEA, Professors Erik Drasgow and Mitchell Yell<sup>35</sup> followed an overview of the 1997 amendments with an analysis of “due process hearings that directly involved FBAs from the time that IDEA 1997 became law until August 2000.”<sup>36</sup> Noting an absence of any published court decisions, they identified fourteen hearing officer decisions and reported that the outcomes were in favor of the parents in thirteen (94%) of these non-judicial decisions. Reflecting a professional inclination toward best practice instead of legal objectivity, Professors Drasgow and Yell concluded that school districts conducting FBAs and developing BIPs in only the

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31. Fox & Davis, *supra* note 30; Steege & Watson, *supra* note 1; Sugai et al., *supra* note 3; Turnbull et al., *supra* note 2.

32. For the explicit recognition of FBAs and BIPs in the 1997 amendments to the IDEA, see *infra* notes 71–72 and accompanying text.

33. PROJECT FORUM AT NAT’L ASS’N OF STATE DIRECTORS OF SPECIAL EDUC., QTA, FUNCTIONAL BEHAVIORAL ASSESSMENT STATE POLICIES AND PROCEDURES 1 (June 1998), [http://www.nasdse.org/Portals/0/Documents/Download Publications/PFR-808.pdf](http://www.nasdse.org/Portals/0/Documents/Download%20Publications/PFR-808.pdf).

34. For the distinction and the need for differentiation in the field of special education, see, e.g., Perry A. Zirkel & Lisa B. Thomas, *State Laws and Guidelines for Implementing RTI*, 43 TEACHING EXCEPTIONAL CHILD. 60 (Sept./Oct. 2010).

35. Erik Drasgow & Mitchell L. Yell, *Functional Behavioral Assessments: Legal Requirements and Challenges*, 30 SCH. PSYCHOL. REV. 239 (2001).

36. *Id.* at 246. “Due process hearings” in this context refers to the impartial hearings that are the first tier of adjudication under the IDEA. See *supra* note 12 and accompanying text.

limited circumstances prescribed in the IDEA “will probably not meet IDEA ’97’s requirement to address problem behavior proactively.”<sup>37</sup>

The Drasgow–Yell analysis had several significant limitations. First, it relied on an Office of Special Education Programs (OSEP)<sup>38</sup> policy memorandum for its conclusion rather than on the legislation, regulations, and hearing officer decisions, and the policy memorandum did not constitute a requirement.<sup>39</sup> Second, the selection criteria for nonjudicial decisions, which were limited to those addressing FBAs, were not sufficiently precise in terms of formulation and implementation. For example, four of their fourteen decisions did not have an FBA issue, being limited instead to a BIP.<sup>40</sup> Similarly, at least as many of the selected decisions were based on state law requirements that exceeded those of the IDEA.<sup>41</sup> Additionally, although the article was premised on the 1997 IDEA amendments, approximately half of the decisions arose prior to July 1, 1998, the date when the pertinent provisions became effective.<sup>42</sup> Compounding these deficiencies, the sample of case law was too limited in total number, adjudicative level, and time period to demonstrate weighty legal trends. Finally, the ultimate analysis of the hearing officer decisions was questionable. For example, the reported 94% parent-win rate did not take into consideration other differences revealed by more refined out-

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37. *Id.* at 250. In a separate article that did not include case law, Drasgow and Yell made clear that they interpreted the 1997 amendments to the IDEA to require the development of FBAs and BIPs not only for disciplinary changes in placement but also for students whose behavior impedes their learning or the learning of others. Erik Drasgow et al., *The IDEA Amendments of 1997: A School-Wide Model for Conducting Functional Behavioral Assessments and Developing Behavior Intervention Plans*, 22 EDUC. & TREATMENT OF CHILD. 244, 261–63 (1999).

38. OSEP is the unit in the U.S. Department of Education specifically responsible for administering the IDEA. See *Welcome to OSEP!*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/about/offices/list/osep/index.html> (last visited July 18, 2011).

39. For a discussion of the nonbinding, although often persuasive, weight of OSEP’s policy interpretations, see Perry A. Zirkel, *Do OSEP Policy Letters Have Legal Weight?*, 171 EDUC. LAW REP. 391 (2003).

40. See, e.g., Mason City Cmty. Sch. Dist., 32 IDELR ¶ 216 (Iowa SEA 2000); Stroudsburg Area Sch. Dist., 27 IDELR 975 (Pa. SEA 1998); Devine Indep. Sch. Dist., 25 IDELR 1238 (Tex. SEA 1997).

41. See, e.g., Moorpark Unified Sch. Dist., 33 IDELR ¶ 24 (Cal. SEA 1999); Indep. Sch. Dist. No. 2310, 29 IDELR 330 (Minn. SEA 1998); Jim Thorpe Area Sch. Dist., 29 IDELR 320 (Pa. SEA 1998).

42. See, e.g., Bonita Unified Sch. Dist., 27 IDELR 248 (Cal. SEA 1997); William S. Hart Sch. Dist., 26 IDELR 1258 (Cal. SEA 1997); Devine Indep. Sch. Dist., 25 IDELR 1238 (Tex. SEA 1997). Additionally, contrary to their assertion of the absence of judicial authority, at least one of the fourteen cases was subject to a court decision during the time period for the case selection. See *Stroudsburg Area Sch. Dist. v. Jared M.*, 712 A.2d 807 (Pa. Commw. Ct. 1998).

come scales<sup>43</sup> and the dramatically different outcome pattern for IDEA hearing and review officer decisions.<sup>44</sup>

Next, in 2006, a pair of articles that focused on BIPs highlighted another limitation—confusing legal requirements regarding professional recommendations—that resulted in an inaccurate legal analysis. In the first of these two articles, Professor Susan Etscheidt provided detailed methodological information explaining her identification of fifty-two published decisions in LRP’s databases<sup>45</sup> “in which the development of a BIP was at issue” ranging from one in 1997 to two in 2005.<sup>46</sup> Her analysis had three primary problems that lead to skewed results. First, she did not adequately account for differences in legal weight of the decisions. For example, in her tabulation, she relied on a hearing officer’s decision in Illinois<sup>47</sup> that the Seventh Circuit Court of Appeals reversed.<sup>48</sup> Indeed, in reversing the hearing officer’s decision, the Seventh Circuit expressly rejected Etscheidt’s approach of “manufactur[ing] the substantive criteria of a sufficient [BIP] based on a string of administrative opinions.”<sup>49</sup> Second, she did not take into account the difference between the IDEA and more stringent state laws.<sup>50</sup> Finally, and more significantly, she used qualitative research techniques for content analysis thus failing to differentiate between the holding and the dicta in the various decisions.<sup>51</sup> The

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43. See, e.g., Youssef Chouhoud & Perry A. Zirkel, *The Goss Progeny: An Empirical Analysis*, 45 SAN DIEGO L. REV. 353 (2008).

44. See, e.g., Perry A. Zirkel & Anastasia D’Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 EDUC. LAW REP. 731 (2002).

45. LRP is the major specialized publisher for legal materials in special education. Its materials include the *Individuals with Disabilities Education Law Report*, which is the hard-copy case compilation, and Special Ed Connection®, which is its electronic database. See LRP PUBLICATIONS, <http://www.lrp.com> (last visited July 18, 2011).

46. Susan Etscheidt, *Behavioral Intervention Plans: Pedagogical and Legal Analysis of Issues*, 31 BEHAV. DISORDERS 223 (2006).

47. Forrestville Valley Cmty. Unit Sch. Dist., 37 IDELR ¶ 209 (Ill. SEA 2002).

48. *Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist.*, 375 F.3d 603, 615 (7th Cir. 2004).

49. *Id.* In this context, the Seventh Circuit was referring to Professor Etscheidt’s role as an IDEA hearing officer in an FBA–BIP decision on which the plaintiff–parent had relied.

50. Perry A. Zirkel, *State Laws for FBAs and BIPs*, BEHAV. DISORDERS (forthcoming 2011).

51. For example, Etscheidt cited a Pennsylvania review officer’s decision to support the proposition that the purported appropriateness criterion for BIPs should be individualized, specifically quoting the review officer as ruling that “the IEP team ‘did nothing to tailor the student’s [BIP] to his individual needs.’” Etscheidt, *supra* note 46, at 230. But this quotation is from the publisher’s abstract. In fact, the review officer affirmed the hearing officer’s LRE ruling with incidental commentary refusing to endorse a BIP that did not target alternative coping skills. *Hempfield Sch. Dist.*, 28 IDELR 509, 512 (Pa. SEA 1998). As another example, she cited a Maine hearing officer’s decision to support her appropriateness criterion that the BIP include positive behavior strategies. But the hearing officer based this limited part of her denial of FAPE ruling on the lack of any BIP, not on the absence of any positive behavior strategies. The comment about the use of abbreviated school days, other than the conclusion that it constituted a denial of FAPE, merely hypothesized that it could have



result was the subjective identification of best practice themes, such as the notion that “a BIP must be developed if behavior is interfering with learning.”<sup>52</sup> Consequently, Professor Etscheidt’s conclusions do not square with the asserted legal support.<sup>53</sup>

In the other 2006 study, Professors John Maag and Antonis Katsiyannis appropriately started with best practice recommendations for BIPs that were duly differentiated from the significantly lower IDEA requirements.<sup>54</sup> But their subsequent “case law” analysis of ninety-six “decisions” from 1997 to 2003 included numerous sources—twenty-eight Office for Civil Rights (OCR)<sup>55</sup> rulings and one OSEP policy letter—that were not adjudicative rulings. Additionally, the OCR letters of findings and voluntary resolution agreements relied upon in the study do not fall under the IDEA.<sup>56</sup> Although the authors’ conclusions were more balanced than those of Professor Etscheidt’s, they similarly did not include a comprehensive tabulation of the cases, including the legal bases (e.g., IDEA or state law) and outcomes. Instead, they provided a brief overview that compared selected case rulings to the related provisions of IDEA 2004, which was not in effect at the time of those case rulings. Finally, their resulting recommendations did not separate those that were based on professional norms from those based on legal requirements. Thus, their conclusions, including the assertion that legal precedent “has established specific parameters”<sup>57</sup> for BIPs, are clearly questionable.

More recently, in an analysis of the 1997 and 2004 IDEA amendments and court decisions concerning the general topic of discipline, retired principal Allan Osborne and Professor Charles Russo included a section on FBAs and BIPs.<sup>58</sup> Limiting their IDEA analysis to legislation, they averred that “FBAs and BIPs are required whenever school officials

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served as a positive incentive if there had been a BIP. *Augusta Sch. Dist.*, 36 IDELR ¶ 229, 1001 (Me. SEA 2001).

52. Etscheidt, *supra* note 46, at 225.

53. For the asserted legal support in the IDEA, see *infra* notes 69–70 and accompanying text. For the ultimately contrasting case law interpretation, see *infra* notes 181–83 and accompanying text.

54. John W. Maag & Antonis Katsiyannis, *Behavioral Intervention Plans: Legal and Practical Considerations for Students with Emotional and Behavioral Disorders*, 31 BEHAV. DISORDERS 348 (2006).

55. OCR is the unit of the U.S. Department of Education responsible for administering Section 504 and the ADA as applied to students in K–12 schools. For a general overview of the OCR, see the OCR’s website, which is available at <http://www2.ed.gov/about/offices/list/ocr/index.html> (last visited July 18, 2011).

56. *Id.*

57. *Id.*

58. Allan G. Osborne & Charles J. Russo, *Update on the Disciplinary Provisions of the 1997 and 2004 IDEA Amendments*, 244 EDUC. LAW REP. 915 (2009).

seek to impose suspension of more than 10 days.”<sup>59</sup> Osborne and Russo’s conclusion was clearly correct for the 1999 IDEA regulations, but—as summarized in Part III of this Article<sup>60</sup>—they missed the 2006 regulations’ elimination of this requirement upon the eleventh day of removal. Similarly, they asserted broadly that “FBAs and BIPs are required regardless of whether students’ misconduct is a manifestation of their disabilities.”<sup>61</sup> Thus, Osborne and Russo neglected the differential treatment that, as explained below,<sup>62</sup> Congress provided in the 2004 amendments.<sup>63</sup>

Finally, in a companion piece to the present study, I evaluated thirty-one state laws, including both statutes and regulations, that are specific to FBAs and BIPs in the special education context.<sup>64</sup> Through a systematic tabulation of these state law provisions, which exceed the rather narrow foundation requirements of the IDEA, I revealed that most of these additions were of notably limited scope and specificity in terms of extending the entitlement to FBAs and BIPs and establishing standards for their appropriateness and implementation. California was the leading exception, with New York a distant second, in terms of the scope and specificity of additional provisions, such as definitional criteria for FBAs and BIPs. Because I created the categories and criteria, which may differ from those of scholars and researchers in special education, the reliability and validity of the findings of this study are subject to critical review and replication.

In sum, the literature to date lacks a sufficiently careful, comprehensive, and current analysis of the legal requirements specific to FBAs and BIPs under the IDEA and related state laws. For case law addressing the IDEA’s legal framework, the analyses to date also fail to differentiate the following issues specific to FBAs and BIPs: (1) access (i.e., whether the child is entitled to an FBA or a BIP); (2) appropriateness (i.e., whether the FBA or BIP meets applicable legal standards); and (3) implementation (i.e., whether the district sufficiently provided the FBA or BIP that it had formulated).

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59. *Id.* at 916.

60. *See infra* Part III.B.

61. Osborne & Russo, *supra* note 58, at 916.

62. *See infra* notes 73–75 and accompanying text.

63. Notably, in a recent point-counterpoint feature, Osborne and Russo continued to maintain the correctness of their interpretation of these two issues. *See* Allan Osborne, Charles Russo & Perry A. Zirkel, *You Be the Judge: Point/Counterpoint—FBAs and BIPs*, 45 ELA NOTES 8 (July 2010).

64. Zirkel, *supra* note 50.

### III. IDEA FRAMEWORK

This Article provides a comprehensive analysis of case law regarding FBAs and BIPs since the express recognition of the behavioral strategies in the 1997 IDEA amendments, with particular attention paid to the trend and frequency of the issues and outcomes. Providing the framework for the case law analysis, Part III gives an overview of IDEA provisions and related administrative regulations and interpretations that specifically pertain to FBAs and BIPs.

The federal framework for the case law concerning FBAs and BIPs consists of three ever-evolving levels of the IDEA: (1) the statute itself, which is subject to periodic amendments and reauthorizations because it is a funding law; (2) the regulations, which the administering agency issues after each set of amendments; and (3) the agency's policy interpretations, which includes the commentary accompanying the regulations as well as OSEP's policy letters and memoranda. Also, as the OSEP interpretations expressly acknowledge, state laws may exceed this federal minimum.<sup>65</sup> The evolution of the IDEA legislation with respect to FBAs and BIPs has had three stages. At first, the IDEA contained no express provisions specific to FBAs and BIPs. Starting in 1997, the IDEA included specific provisions that were indirectly pertinent with regard to IEPs<sup>66</sup> and directly pertinent with regard to disciplinary changes in placement.<sup>67</sup> Finally, starting in 2004, these particular provisions were refined to directly address FBAs and BIPs.

#### A. Legislation

The IDEA did not contain any local educational agency (LEA)<sup>68</sup> requirements pertaining to FBAs or BIPs until the 1997 and 2004 amendments. First, without expressly mentioning either FBAs or BIPs, the 1997 amendments included the requirement, as a special consideration for IEP teams, that "in the case of a child whose behavior impedes his or her learning or that of others, consider, when appropriate, strategies, in-

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65. See *infra* note 87 and accompanying text.

66. An IEP is the document that the IDEA prescribes in considerable detail as the mechanism to demonstrate that the district has provided FAPE in the LRE to the child with a disability. See *supra* note 7 and accompanying text.

67. See *supra* note 10 and accompanying text.

68. The IDEA uses this term generically to refer to school districts and other local governmental entities that provide education to students with disabilities. Individuals with Disabilities Education Act, 20 U.S.C. § 1401(19) (2008). LEAs have the primary responsibility of implementing the various requirements of the IDEA, subject to SEA oversight. See *supra* note 11 and accompanying text.

cluding positive behavioral interventions, strategies, and supports . . . .”<sup>69</sup> The 2004 amendments slightly strengthened this special consideration requirement by removing the “when appropriate” language and inserting the more straightforward language requiring the IEP team to consider “the use of positive behavioral intervention and supports, and other strategies” to address such behavior.<sup>70</sup> The operant verb of these iterations was “to consider,” not “to develop or implement,” and—more importantly—the objects were interventions, supports, and strategies, not specifically FBAs or BIPs.

Second, and more significantly, the 1997 amendments expressly required an FBA and a BIP in tandem with disciplinary changes in placement.<sup>71</sup> Specifically, upon a disciplinary change in placement, including a removal to an interim educational setting for three specified serious behavior violations, the 1997 amendments required the development or modification of an FBA and a BIP in tandem with a determination of whether the student’s violation of the school’s conduct code is a manifestation of the student’s disability.<sup>72</sup> The 2004 amendments subtly differentiated this requirement depending on the results of the manifestation determination. For determinations that the conduct in question was a manifestation of the child’s disability, the requirement for an FBA and a BIP remained the same.<sup>73</sup> But for determinations that the conduct was not a manifestation of the child’s disability and for removals to a forty-five-day interim alternate educational setting,<sup>74</sup> the language changed to require “as appropriate, a[n] [FBA], behavior intervention services and modifications that are designed to address the behavior violation so that it does not recur.”<sup>75</sup> Thus, the 2004 amendments relaxed the relevant re-

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69. Individuals with Disabilities Education Act Amendments for 1997, Pub. L. No. 105-17, § 614(d)(3)(B)(i), 111 Stat. 37 (1997). For a comprehensive comparative overview of the 1997 amendments, see Perry A. Zirkel, *Suspensions and Expulsions of Students with Disabilities: The Latest Requirements*, 214 EDUC. L. REP. 445 (2007).

70. 20 U.S.C. § 1414(d)(3)(B)(i).

71. See *supra* note 10 and accompanying text.

72. Individuals with Disabilities Education Act Amendments for 1997 § 615(k)(1)(B)(i)–(ii). The three specified situations for these forty-five-day interim placements were weapons violations, use or possession of illegal drugs, and—as determined by the impartial hearing officer—substantial likelihood of danger to self or others. *Id.*

73. 20 U.S.C. §§ 1415(k)(1)(F)(i)–(ii).

74. The 2004 amendments added a fourth specified situation for the forty-five-day interim placement—where the student inflicts serious bodily injury on another person. *Id.* § 1415(k)(1)(G)(iii).

75. *Id.* § 1415(k)(1)(D)(ii). This differentiation is predicated on the qualifier “as appropriate,” which weakens the requirement because it allows for exceptions in the scope of its application. But to the extent that the tandem “so that it does not recur” standard is stronger in the applicable circumstances, the overall imposition “irrespective of whether the behavior is determined to be a manifestation of the child’s disability” removes the differentiation. *Id.*

quirement in two ways: (1) they limited the FBA component to undefined appropriate circumstances, and (2) they used more generic options than exclusively prescribing the BIP component.<sup>76</sup> Overall, the legislation expressly required an FBA or a BIP only in connection with disciplinary changes in placement.

### *B. Regulations*

As explained in a prior article,<sup>77</sup> the 1999 regulations expanded on the 1997 legislative amendments by requiring an “assessment plan” for an FBA and a BIP for any child that did not already have them upon the eleventh cumulative day of removal.<sup>78</sup> The 2006 regulations, however, dropped this requirement and otherwise largely mirrored the 2004 amendments in relevant parts. For example, the regulation for the IEP special consideration of learning-impeding behavior follows the legislative provision word for word.<sup>79</sup> Similarly, the relevant requirements for FBAs and BIPs upon disciplinary changes in placement<sup>80</sup> are almost identical to the legislative provisions. Like the legislation, the regulations do not include a definition, much less criteria, for either an FBA or a BIP. Thus, the regulations extended the requirement for FBAs or BIPs only in relation to disciplinary removals, and that extension was limited to FBAs only under the 1999 regulations not the presently applicable 2006 regulations.

### *C. OSEP Interpretations*

In a policy memorandum issued directly after the 1997 amendments,<sup>81</sup> OSEP clarified that the then new legislation did not require an FBA for cumulative removals of less than ten days in a school year.<sup>82</sup> In the same interpretive guidance, OSEP recommended—by using the word “should” rather than “shall”—proactive steps for learning-impeding be-

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76. But the specified purpose of the more flexible behavioral component—designed to prevent recurrence—arguably provided a more stringent standard of appropriateness.

77. Zirkel, *supra* note 69, at 447–48.

78. Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed. Reg. 12,453 (Mar. 12, 1999). Unchanged from the 1999 version, the 2006 regulations trigger a disciplinary change in placement at the eleventh consecutive school day of removal; for cumulative days, the regulations use a multi-factor test for determining the point at which cumulative days amount, as a pattern, as the equivalent of eleven consecutive days. 34 C.F.R. § 300.536 (2009).

79. 34 C.F.R. § 300.324(a)(2)(1).

80. *Id.* §§ 300.530(d)(1)(ii), (f)(1).

81. In a policy letter before the 1997 amendments, OSEP made it clear that the IDEA does not have a requirement for, or prohibition against, including BIPs in IEPs. Letter to Huefner, 23 IDELR 1072 (OSEP 1995).

82. OSEP Mem. No. 97–7, 26 IDELR 981 (OSEP 1997).

havior. For example, OSEP stated that, in addition to the required consideration, “school districts should take prompt steps to address misconduct when it first appears,” providing that “when misconduct appears, a[n] [FBA] could be conducted.”<sup>83</sup> The following year, in response to an inquiry that maintained that FBAs do not sufficiently honor a child’s strengths, OSEP recited related provisions in the 1997 amendments that emphasized positive behavior interventions and supports.<sup>84</sup>

In the commentary accompanying the 1999 regulations, OSEP included these interpretations:

A[n] [FBA] may be an evaluation requiring parent consent if it meets the standard identified in [the regulation defining evaluations]. In other cases, it may be a review of existing data that can be completed at the IEP meeting called to develop the assessment plan [upon the eleventh cumulative day]. If under [the special consideration regulation], 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 [BIP] that the IEP team reviews under [the requirements upon disciplinary changes in placement].<sup>85</sup>

The 1999 commentary also opined that “in appropriate circumstances, the IEP team . . . might determine that the child’s [BIP] includes specific regular or alternative disciplinary measures, such as denial of certain privileges or short suspensions, that would result from particular infractions of school rules, along with positive behavior intervention strategies and supports.”<sup>86</sup>

In the commentary accompanying the 2006 regulations, OSEP provided its interpretation of regulatory provisions concerning IEPs and manifestation determinations. For the behavior-impeding situation, OSEP opined that FBAs and BIPs “are not required components of an IEP” unless state law provides otherwise.<sup>87</sup> More specifically, while viewing FBAs as typically preceding positive behavioral strategies presumably as a matter of best practice, OSEP rejected requiring an FBA for a child whose behavior impedes the learning of the child or others because the

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83. *Id.* at 982.

84. Letter to Anonymous, 30 IDELR 707 (OSEP 1998).

85. IDEA Regulations Commentary, 64 Fed. Reg. 12,621 (Mar. 12, 1999).

86. *Id.* at 12,479.

87. IDEA Regulations Commentary, 71 Fed. Reg. 46,629 (Aug. 14, 2006).

statutory language “focuses on interventions and strategies, not assessments.”<sup>88</sup>

For manifestation determinations, OSEP declined to specify standards for a valid or current FBA, reasoning that “such decisions are best left to the LEA, the parent, and [other] relevant members of the IEP Team.”<sup>89</sup> Moreover, declining to add a requirement for an FBA and a BIP upon the determination that the misconduct was not a manifestation of the student’s disability,<sup>90</sup> OSEP observed the change in legislative language and cross-referenced the IEP special consideration as “a proactive approach . . . [that] should ensure that children who need [BIPs] to succeed in school receive them.”<sup>91</sup> Thus, like its interpretations relating to the 1999 regulations, OSEP’s commentary encouraged preventive and proactive practices but was careful not to expand the requirements of the 2006 regulations.

After the issuance of the 2006 regulations, OSEP added further relevant interpretations in the form of policy letters and memoranda. These interpretations started with a policy letter tangentially related to the FBAs and BIPs, in which OSEP wrote that state special education regulations that allow aversive interventions are not in conflict with the IDEA.<sup>92</sup> In this policy letter, OSEP differentiated recommendations and requirements as follows: “While the [IDEA] requires that an IEP Team consider the use of positive behavioral interventions and supports, and as such, emphasizes and encourages the use of such supports, it does not contain a flat prohibition on the use of aversive behavioral interventions.”<sup>93</sup>

Next, OSEP and its immediate parent agency, the Office of Special Education and Rehabilitation Services (OSERS),<sup>94</sup> issued four successive clarifications that arguably reflect a revised emphasis on FBAs and BIPs. First, OSERS took the position that the regulations *require* both an FBA and a BIP only in cases of a disciplinary change in placement where the conduct is determined to be a manifestation of the child’s disability, whereas the regulations *permit* an FBA or a BIP when the IEP Team deter-

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88. *Id.* at 46,683.

89. *Id.* at 46,721.

90. See *supra* note 75 and accompanying text.

91. IDEA Regulations Commentary, 71 Fed. Reg. at 46,721.

92. Letter to Trader, 48 IDELR ¶ 47 (OSEP 2006).

93. *Id.*

94. In the organizational structure of the U.S. Department of Education, OSEP is a unit within OSERS. See *About OSEP*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/about/offices/list/osers/aboutus.html> (last visited July 18, 2011).

mines, under the special consideration provision or otherwise, that an FBA or BIP is appropriate for the child.<sup>95</sup>

Second, and soon thereafter, OSEP said that an FBA is an evaluation or reevaluation that has special requirements, including parental consent, but only if used to assist in determining a child's eligibility for "free appropriate public education" (FAPE).<sup>96</sup> As a result, OSEP concluded that (1) an FBA in such circumstances, including an FBA to revise the behavioral component in an IEP, requires parental consent; (2) an FBA conducted for individual evaluative purposes to develop or modify a BIP may trigger a parent's right to an independent educational evaluation at public expense; and (3) an FBA conducted as best practice to assess the effectiveness of behavioral interventions in the school as a whole would not require parental consent.<sup>97</sup> The following year, OSEP repeated the first consent interpretation of this earlier letter.<sup>98</sup>

Third, OSERS recently issued a superseding interpretation that slightly strengthened its previous position by adding the following two limited situations where the legislation or regulations expressly require a BIP: (1) for a determination that the misconduct is not a manifestation of the child's disability; and (2) "[f]or a child with a disability whose behavior impedes his or her learning or that of others, and for whom the IEP Team has decided that a BIP is appropriate."<sup>99</sup> In light of the statutory qualifier "as appropriate,"<sup>100</sup> the first situation is more of a reminder than an expander. Similarly, the second situation is largely limited to a semantic circularity, as evidenced by comparing the previous memorandum<sup>101</sup> with this more recent conclusion: "FBAs and BIPs must also be used proactively, if the IEP Team determines that they would be appropriate for the child."<sup>102</sup> But this more recent policy statement added definitional guidance about an FBA:

An FBA focuses on identifying the function or purpose behind a child's behavior. Typically the process involves looking closely at a wide range of child-specific factors (e.g., social, affective, environmental). Knowing why a child misbehaves is directly helpful to the IEP Team in developing a BIP that will reduce or eliminate the misbehavior.<sup>103</sup>

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95. Questions and Answers on Discipline Procedures, 47 IDELR ¶ 227 (OSERS 2007).

96. Letter to Christiansen, 48 IDELR ¶ 161 (OSEP 2007).

97. *Id.*

98. Letter to Sarzynski, 51 IDELR ¶ 193 (OSEP 2008).

99. Questions and Answers on Discipline Procedures, 52 IDELR ¶ 231 (OSERS 2009).

100. *See supra* note 75 and accompanying text.

101. Questions and Answers on Discipline Procedures, 47 IDELR ¶ 227 (OSERS 2007).

102. Questions and Answers on Discipline Procedures, 52 IDELR ¶ 231.

103. *Id.*



Moreover, this latest OSERS discipline guidance, which is in a question-and-answer format, slightly and perhaps insignificantly revised the intervening OSEP interpretation regarding whether an FBA constitutes an evaluation or a reevaluation.<sup>104</sup> By posing the question with regard to an individual child, OSERS's interpretation requiring consent would seem to be consistent with the 2007 OSEP letter.<sup>105</sup> Similarly, the additional clarification regarding independent educational evaluations (IEE) would seem to square with the previous interpretation regarding those at public expense: "[A] parent who disagrees with an FBA that is conducted in order to develop an appropriate IEP also is entitled to request an IEE."<sup>106</sup>

Fourth, between the two latest OSERS interpretations, OSEP provided guidance as to what the purposes and components of an FBA are and who must conduct an FBA. More specifically, OSEP explained that the IDEA does not specify the components of an FBA beyond its linkage to the development of a BIP. Similarly, in the absence of IDEA specifications, OSEP deferred to state law as to who is qualified to conduct the FBA, rejecting the contention that the IDEA requires FBAs to be conducted by a board-certified behavior analyst.<sup>107</sup>

Thus, the various OSERS and OSEP interpretations, which adjudicators often find persuasive but not binding,<sup>108</sup> are not expansive with regard to access, appropriateness, and implementation of FBAs and BIPs. When carefully sifted from recommendations, the requirements specified in these agency interpretations do not differ significantly from the express language of the IDEA legislation and regulations.

#### IV. METHOD

To trace the longitudinal trend and categorical distribution of the frequency and outcomes of case law regarding FBAs and BIPs, this study provides an analysis of the issue rulings within the cases specific to FBAs and BIPs.<sup>109</sup> For each ruling, the analysis of frequency (i.e., the number of final adjudications) and outcomes (i.e., the distribution between rulings in favor of the parent and those in favor of the district) was in terms of the successive issues for FBAs and BIPs, respectively. Issues analyzed included the following: (1) whether the child was entitled to an

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104. *Id.*

105. Letter to Christiansen, 48 IDELR ¶ 161 (OSEP 2007).

106. *Id.*

107. Letter to Janssen, 51 IDELR ¶ 253 (OSEP 2008).

108. See Zirkel, *supra* note 39.

109. For the distinction between cases and issue rulings as the unit of analysis, see, e.g., Chouhoud & Zirkel, *supra* note 43, at 367.

FBA or a BIP (designated as “access”);<sup>110</sup> (2) whether the FBA or BIP met the requisite standards for quality (designated as “appropriateness”); and (3) whether the district actually and sufficiently provided the BIP<sup>111</sup> (designated as “implementation”).<sup>112</sup>

The comprehensive sample<sup>113</sup> consisted of both hearing/review officer decisions<sup>114</sup> and court decisions published in the *Individual with Disabilities Education Law Report (IDELR)*<sup>115</sup> specific to FBAs and BIPs issued between January 1, 1998 and December 31, 2010.<sup>116</sup> The primary search mechanism was the IDELR topical index,<sup>117</sup> although the following sources served to identify additional pertinent cases: (1) the topical index and the Boolean search mechanism of Special Ed Connec-

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110. This tentative term is operationally understandable but legally imprecise. More specifically, it combines the collective concept of legal rights, the limited per se requirements of the IDEA and related state law, and the ad hoc concept of whether the individual child, under the particular circumstances of the case, was legally entitled to an FBA or a BIP.

111. Given the continuum of FBAs and BIPs, there were no cases regarding implementation of an FBA. Beyond development—after access and appropriateness—of an FBA, the next stage is a BIP. Thus, the FBA category had only two subcategories whereas the BIP had three.

112. These self-conceived labels appear herein simply as convenient short identifying phrases; they are not accepted terms of art or science with regard to FBAs or BIPs. In accordance with the field, however, they form a flowchart-like continuum that starts with access to an FBA and ends with implementation of a BIP.

113. Although far more comprehensive than the previous legal studies specific to FBAs and BIPs, “sample” here serves as a reminder that the target population is either all of the cases, including those not “published” in the broad sense of any national database, or all cases in the LRP database, which in recent years includes an increasing proportion of cases available only electronically.

114. The IDEA provides states with the option of having administrative adjudication via a one-tier (i.e., hearing officer) or two-tier (i.e., hearing officer followed by review officer) system. 20 U.S.C. § 1415(g) (2009). The citations of hearing and review officer decisions customarily contain the designation of “SEA” because the state education agency has the responsibility under the IDEA to establish and supervise this system. Most states have a one-tier system. *See, e.g.*, Zirkel & Scala, *supra* note 12, at 5. For this reason, and because the IDELR does not generally distinguish between hearing and review officer decisions, this study—like others—refers generically to “hearing/review officer” decisions.

115. Published by LRP, IDELR is the only national hard-copy publication that includes not only court decisions but also hearing and review officer decisions, and has done so regularly since the late 1970s.

116. “Issued” in this context refers to the date of decision not the date of publication. Although only an approximate dividing line, 1998 was the starting point because it was in the immediate wake of the 1997 amendments to the IDEA, which went into effect on October 1, 1997.

117. The principal topic headings were “Behavior Management/Modification” (specifically, the subtopics “Aversives,” “Development of Plan,” “Functional Behavioral Assessments,” and “In General”) and “Discipline” (specifically, the subtopics “Expulsion,” “Interim Alternate Educational Placements,” “Relationship between Misconduct and Disability,” and “Suspensions”), but the subtopic headings of “Behavior Managements” and “Discipline” served as supplementary sources where they appeared under other topic headings (e.g., under “Attention Deficit Disorders” and “Autism”).

tion<sup>®</sup>;<sup>118</sup> (2) the cases cited in previous studies;<sup>119</sup> and (3) the Westlaw database.<sup>120</sup>

The primary selection criteria were that (1) the case had at least one ruling on the merits specific to an FBA or a BIP, and (2) the decision was the final adjudication for the precise FBA or BIP issue raised.<sup>121</sup> As a result of the first criterion,<sup>122</sup> the survey excluded cases that (1) merely mentioned an FBA or a BIP in the background,<sup>123</sup> (2) identified an FBA or a BIP issue but disposed of it on threshold technical grounds, such as subject-matter jurisdiction;<sup>124</sup> (3) included an FBA or a BIP only in the remedy but not in the rulings or legal conclusions;<sup>125</sup> (4) reported an FBA or a BIP ruling at a lower, unpublished level that was not at issue in the reported review decision;<sup>126</sup> (5) ruled on a tangential FBA- or BIP-related issue;<sup>127</sup> (6) ruled on behavioral strategies not specific to an FBA or a

118. This electronic subscription service of LRP Publications also includes a topical index that captures hearing/review officer and court decisions published in IDELR in addition to others available only electronically, which is similar to Westlaw's coverage of court decisions more generally.

119. See Drasgow & Yell, *supra* note 35; Etscheidt, *supra* note 46; Maag & Katsiyannis, *supra* note 54; Osborne & Russo, *supra* note 58.

120. For the Boolean searches, the search terms included "functional behavior assessment," "functional behavioral assessment," "behavior intervention plan," "behavior management plan," and "behavior support plan."

121. Given the framework of this study, its scope did not extend to the occasional claim beyond the IDEA or related state special education law. See, e.g., Sanchez v. Puerto Rico, 53 IDELR ¶ 325 (D.P.R. 2010) (ruling under § 1983 and the Fourteenth Amendment's definition of "liberty"); Alex G. v. Bd. of Tr. of Davis Unified Sch. Dist., 44 IDELR ¶ 130 (E.D. Cal. 2005) (ruling under § 504); Lower Merion Sch. Dist., 42 IDELR ¶ 256 (Pa. SEA 2004) (ruling under state gifted education regulations).

122. An occasional case met or missed the first criterion only marginally. Compare, e.g., CJN v. Minneapolis Pub. Sch., 323 F.3d 630 (8th Cir. 2003) (ruling that incomplete compliance with the state's BIP regulation was a minor procedural violation), with Evans v. Dist. No. 17 of Douglas Cnty., 841 F.2d 824 (8th Cir. 1988) (skirting the issue of a lack of a BIP by resolving tuition reimbursement on lack of parental notice).

123. See, e.g., J.L. v. Francis Howell R-3 Sch. Dist., 693 F. Supp. 2d 1009, 54 IDELR ¶ 5 (E.D. Mo. 2010); Vigo Cnty. Sch. Dist., 37 IDELR ¶ 199 (Ind. SEA 2002).

124. See, e.g., C.B. v. Sonora Sch. Dist., 691 F. Supp. 2d 1123 (E.D. Cal. 2009); P.R. v. Cent. Tex. Autism Ctr., Inc., 52 IDELR ¶ 222 (W.D. Tex. 2009); cf. M.S.-G. v. Lenape Reg'l High Sch. Dist. Bd. of Educ., 51 IDELR ¶ 236 (3d Cir. 2009) (insufficiency of due process hearing complaint); Cabouli v. Chappaqua Cent. Sch. Dist., 202 F. App'x 519 (2d Cir. 2006) (pretransition from private school); T.M. v. Allegany-Limestone Cent. Sch. Dist., 53 IDELR ¶ 148 (W.D.N.Y. 2009) (mootness).

125. See, e.g., Johnson v. Olathe Dist. Sch., 316 F. Supp. 2d 960 (D. Kan. 2003); Watson Chapel Sch. Dist., 27 IDELR 899 (Ark. SEA 1998); E. Cent. Kan. Special Educ. Coop., 31 IDELR ¶ 256 (Kan. SEA 1999); Alcorn Cnty. Sch. Dist., 53 IDELR ¶ 136 (Miss. SEA 2009).

126. See, e.g., T.B. v. Bryan Indep. Sch. Dist., 628 F.3d 240 (5th Cir. 2010); M.P. v. Noblesville Sch., 41 IDELR ¶ 33 (S.D. Ind. 2004); *In re Student with a Disability*, 42 IDELR ¶ 224 (Pa. SEA 2005).

127. See, e.g., Harris v. District of Columbia, 561 F. Supp. 2d 63 (D.D.C. 2008) (ruling on whether an FBA is an evaluation); Belmont Pub. Sch., 49 IDELR ¶ 209 (Mass. SEA) (deciding whether district may implement BIP without the IEP team considering its appropriateness); Bd. of Educ. of New York City, 48 IDELR ¶ 294 (N.Y. SEA 2007) (ruling on parent's request to maintain

BIP;<sup>128</sup> (7) ruled on an FBA or a BIP where a school district was not a party;<sup>129</sup> (8) ruled on a closely related issue but not on the FBA or BIP itself;<sup>130</sup> (9) ruled on an FBA or a BIP after the period of this study;<sup>131</sup> and (10) ruled on an FBA or a BIP but in a forum different from an IDEA hearing or review.<sup>132</sup> The second criterion, which required searching the history of each case and selecting the final FBA or BIP ruling,<sup>133</sup> resulted in the exclusion of two categories of cases: (1) the decisions in IDELR that were superseded by subsequent, typically higher-level decisions in IDELR;<sup>134</sup> and (2) the subsequent, typically higher-level decisions that did not address the previous FBA or BIP ruling.<sup>135</sup>

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aversive BIP under the “stay-put” provision); *Stancourt v. Worthington City Sch. Dist.*, 51 IDELR ¶ 19 (Ohio Ct. App. 2008), *cert. denied*, 130 S. Ct. 74 (2009) (determining whether reduction in reinforcement in BIP was violation of IDEA’s stay-put provision).

128. *See, e.g.*, *Damian J. v. Sch. Dist. of Philadelphia*, 49 IDELR ¶ 161 (E.D. Pa. 2008); *San Rafael Elementary Sch. Dist. v. California Special Educ. Hearing Office*, 482 F. Supp. 2d 1152 (N.D. Cal. 2007); *Elizabethtown Area Sch. Dist.*, 50 IDELR ¶ 24 (Pa. SEA 2008); *Montgomery Cnty. Pub. Sch.*, 49 IDELR ¶ 174 (Md. SEA 2007); *Surry Sch. Dep’t*, 52 IDELR ¶ 209 (Me. SEA 2009); *Wilson Cnty. Bd. of Educ.*, 53 IDELR ¶ 248 (Tenn. SEA 2009).

129. *See, e.g.*, *A.G. v. Frieden*, 52 IDELR ¶ 65 (S.D.N.Y. 2009) (ruling for Department of Mental Health under Part C of the IDEA).

130. *See, e.g.*, *Coleman v. Newburgh Enlarged Sch. Dist.*, 319 F. Supp. 2d 446 (E.D.N.Y. 2004) (ruling that in the absence of an FBA, the manifestation determination warranted strict scrutiny); *Pell City Bd. of Educ.*, 38 IDELR ¶ 253 (Ala. SEA 2003); *Waterbury Bd. of Educ.*, 37 IDELR ¶ 262 (Conn. SEA 2002) (ruling on whether a student who had a BIP needed an aide); *cf. Masar v. Bd. of Educ. of Fruitport Cmty. Sch.*, 39 IDELR ¶ 239 (W.D. Mich. 2003) (ruling that expert testimony concerning FBA was not at all decisive).

131. *See, e.g.*, *L.G. v. Wissahickon Sch. Dist.*, 55 IDELR ¶ 280 (E.D. Pa. 2011).

132. *See, e.g.*, *St. Vrain Valley Dist. RE-1J*, 38 IDELR ¶ 258 (Colo. SEA 2003) (ruling under state’s complaint resolution process under the IDEA); *Shakopee Indep. Sch. Dist. No. 720*, 45 IDELR ¶ 171 (Minn. SEA 2005); *In re Student with a Disability*, 55 IDELR ¶ 299 (Wyo. SEA 2010); *cf. J.D.P. v. Cherokee Cnty. Sch. Dist.*, 735 F. Supp. 2d 1348 (N.D. Ga. 2010) (ruling on BIP claim based on § 504). Similarly, the scope of the study did not extend to the complaint process of the Office for Civil Rights, which is under § 504, not the IDEA. For an overview of these alternate avenues and forums, see Zirkel & McGuire, *supra* note 12.

133. On occasion, the IDELR had duplicate entries for the same case. *Compare* *Indep. Sch. Dist. No. 279*, 30 IDELR 645 (Minn. SEA 1998); *Houston Indep. Sch. Dist.*, 29 IDELR 60 (Tex. SEA 1998), *with* *Indep. Sch. Dist. No. 279*, 33 IDELR ¶ 28 (Minn. SEA 1998); *Houston Indep. Sch. Dist.*, 31 IDELR ¶ 46 (Tex. SEA 1998).

134. Some of these cases were at the hearing/review officer level. *See, e.g.*, *Waukee Cmty. Sch. Dist.*, 48 IDELR ¶ 26 (Iowa SEA 2007); *Forrestville Sch. Dist.*, 37 IDELR ¶ 209 (Ill. SEA 2002); *Wilton-Lindeborough Coop. Sch. Dist.*, 44 IDELR ¶ 236 (N.H. SEA 2005); *Lake Travis Indep. Sch. Dist.*, 45 IDELR ¶ 204 (Tex. SEA 2005). Others were at the trial court level. *See, e.g.*, *Lathrop R-II Sch. Dist. v. Gray*, 53 IDELR ¶ 77 (W.D. Mo. 2009); *A.C. v. Bd. of Educ. of Chappaqua Cent. Sch. Dist.*, 47 IDELR ¶ 294 (S.D.N.Y. 2007); *S.J. v. Issaquah Sch. Dist.*, 48 IDELR ¶ 218 (W.D. Wash. 2007); *Lessard v. Wilton-Lindeborough Coop. Sch. Dist.*, 47 IDELR ¶ 299 (D.N.H. 2007); *Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett*, 42 IDELR ¶ 83 (N.D. Ill. 2005).

135. *See, e.g.*, *Lessard v. Wilton-Lindeborough Coop. Sch. Dist.*, 592 F.3d 267 (1st Cir. 2010); *E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist.*, 361 F. App’x 156 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 2064 (2010); *Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Ross*, 486 F.3d 267 (7th Cir. 2007); *Bynum v. W. Baton Rouge Parish Sch. Sys.*, 55 IDELR ¶ 68 (M.D. La. 2010); N.S.

For each case that met the selection criteria, the coding was limited to the relevant ruling or rulings (i.e., those specific to the FBA or BIP). Thus, other rulings in the case were not part of the analysis.

The first step of the analysis was separating the FBA issues from the BIP issues, and then further separating each category of cases into the aforementioned subcategories of access, appropriateness, and implementation.<sup>136</sup> The next step was coding the rulings for each of these identified issues in terms of an established outcomes scale.<sup>137</sup> Initially, based on previous studies that differentiated outcomes beyond complete wins or losses,<sup>138</sup> the coding of outcomes was according to the following scale for issue rulings,<sup>139</sup> with the designation “parent” as proxy for the child:<sup>140</sup> 1 = conclusively in favor of the parent;<sup>141</sup> 2 = inconclusively in favor of the parent;<sup>142</sup> 3 = even split between the parent and the district;<sup>143</sup> 4 = inconclusively in favor of the school district;<sup>144</sup> and 5 = con-

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v. Hawaii, 54 IDELR ¶ 250 (D. Haw. 2010); D.L. v. Waukee Cmty. Sch. Dist., 578 F. Supp. 2d 1178 (S.D. Iowa 2008).

136. See *supra* text accompanying notes 111–12. Again, the exception was that FBA did not have an implementation subcategory. *Id.*

137. The overlap between FBA and BIP categories or subcategories was notable in approximately one-fifth of the cases. As a result, the coding tended to merge not clearly differentiated rulings into the ultimate one, such as BIP for an undifferentiated FBA–BIP overlap, or appropriateness for an undifferentiated access–appropriateness overlap. Thus, the coding was relatively conservative and, in some cases, only tentative.

138. The differentiation depended on the unit of analysis as well as the purpose of the study. See, e.g., Chouhoud & Zirkel, *supra* note 43, at 368 (using a five-category outcome scale for issue rulings); William H. Lupini & Perry A. Zirkel, *An Outcomes Analysis of Education Litigation*, 17 EDUC. POL’Y, 257, 263–64 (2003) (using a seven-category scale for cases); James R. Newcomer & Perry A. Zirkel, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 EXCEPTIONAL CHILD. 469, 472 (1999) (using a five-category outcome scale for judicial review); Perry A. Zirkel & Caitlyn Lyons, *Restraining the Use of Restraints with Student with Disabilities?: An Empirical Analysis of the Case Law*, 10 CONN. PUB. INT. L. J. 323 (2011) (using a five-category scale for claim rulings).

139. Chouhoud & Zirkel, *supra* note 43, found that for specific issue rulings, rather than overall cases, the outcome categories of predominantly, as contrasted with completely, for one party or the other were not necessary.

140. The cases did not include any of the limited situations where parents were exercising their independent rights under the IDEA. See, e.g., Perry A. Zirkel, *The Problematic Progeny of Winkelman v. Parma City School District*, 248 EDUC. L. REP. 1 (2009).

141. Examples are rulings on the merits in the parent’s favor not only after a hearing, trial, or appeal but also—and more typically in judicial review under the IDEA than in hearing/review officer decisions—via granting a parent’s motion for summary judgment.

142. Exclusively limited to the judicial stage in this study, examples are rulings denying a district’s dispositive motion or, on appeal, upholding such a denial.

143. This category is limited to the relatively rare rulings denying both parties’ motions for summary judgment or awarding the parent approximately half of the relief sought.

144. Paralleling its obverse outcomes category of a “2,” examples herein were limited to court rulings denying a parent’s motion for summary judgment or, on appeal, upholding such a denial.

clusively in favor of the school district.<sup>145</sup> Although the data analysis for frequency and outcomes followed the model of previous research where the appropriate unit of analysis was one or more rulings within a case,<sup>146</sup> the near absence of rulings in the aforementioned intermediate categories (i.e., 2, 3, and 4) allowed for outcomes analysis within the simpler dichotomous scale of rulings in favor of the parent or the district (i.e., 1 or 5, respectively).<sup>147</sup>

## V. RESULTS

The total number of relevant cases for the thirteen-year period of the study<sup>148</sup> was 173, with 125 by hearing/review officers and 48 by courts.<sup>149</sup> In turn, the 173 cases yielded 206 issue rulings, with 150 by hearing/review officers and 56 by courts.<sup>150</sup> Of the 206 issue rulings, 57, or 24%, were for FBAs, and the remaining 149, or 72%, were for BIPs.

Figure 1 displays the frequency of cases and issue rulings per three-year intervals for the thirteen-year period, with the most recent interval being a straight-line projection made by tripling the initial year. The note at the bottom clarifies that the percentage in each white bar represents the proportion of these rulings issued by courts rather than by hearing/review officers.

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145. Similarly corresponding to outcomes category “1,” examples are rulings on the merits in the district’s favor either after a hearing, trial, or appeal, or via granting of a district’s motion for dismissal or summary judgment.

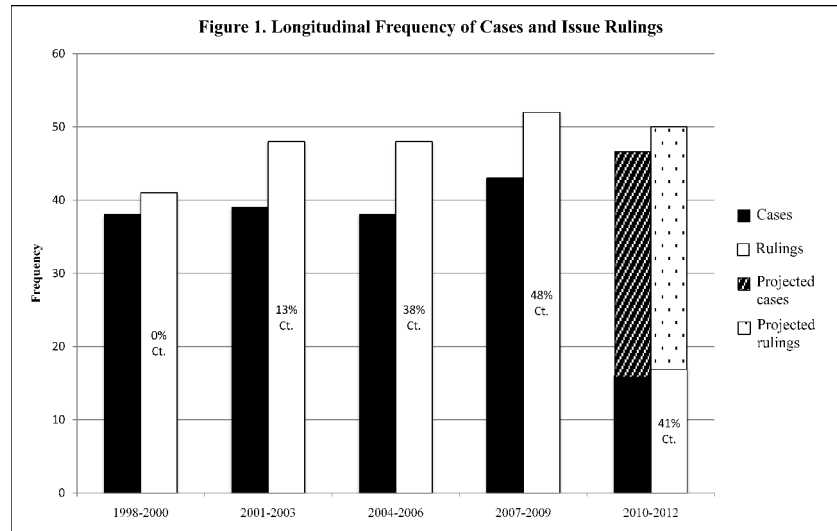
146. Chouhoud & Zirkel, *supra* note 43; *cf.* Zirkel & Lyons, *supra* note 138 (using the claim ruling as the primary unit of analysis but also providing a culminating outcomes analysis of cases because the tabulation included all of the rulings in the case).

147. The exclusion of closely related but separable rulings eliminated two potential exceptions in terms of inconclusive rulings. *See supra* note 127 and accompanying text. For the only remaining exception, Decatur Cnty. Cmty. Sch. Corp., 45 IDELR ¶ 294 (Ind. SEA 2006), the original coding of “3” for BIP implementation was resolved by separation into two rulings—a “1” for the first year and a “2” for the second year.

148. *See supra* text accompanying note 116.

149. A spreadsheet listing all of the cases and rulings is available from the author upon request.

150. The resulting ratio of relevant rulings per case was 1.19 for the total sample, 1.20 for the hearing/review officer cases, and 1.17 for the court cases.



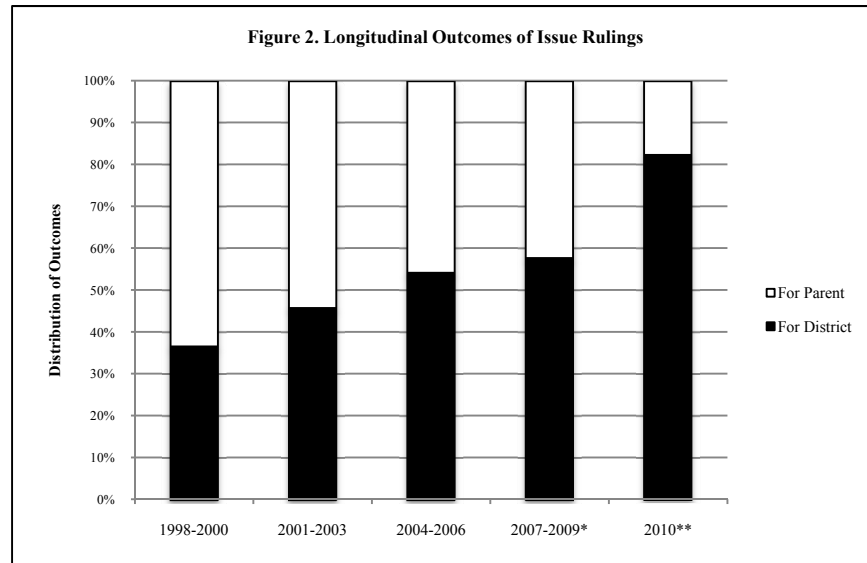
“Ct.” = Court rulings (as a percentage, with the remainder being hearing/review officer rulings).

An examination of Figure 1 reveals that the overall levels across the entire period amounted to an uneven, modestly upward trajectory. Moreover, the ratio between cases and issue rulings for each of the successive intervals oscillated within a limited range.<sup>151</sup> Finally, the proportion of rulings from courts, compared with those from hearing/review officers, increased dramatically from the initial to the most recent intervals, with the understanding that the last interval was limited to only one year.

Figure 2 presents the distribution of the combined hearing/review officer and court issue rulings for each of the successive three-year periods in terms of the two ultimate outcome categories: whether the ruling was in favor of the parent or the district. The notes at the bottom designate the aforementioned<sup>152</sup> adjustment and the limited interval for the final year.

151. Specifically, the respective ratios for the successive intervals were as follows: 1.08 for the years 1998–2000; 1.23 for the years 2001–2003; 1.26 for the years 2004–2006; 1.21 for the years 2007–2009; and 1.06 for the years 2010–2011.

152. See *supra* note 147.



\* One ruling, which was an even split for two successive annual IEPs together, was separated into two rulings—one in favor of the parent for the first year and the other in favor of the district for the second year.

\*\* Only a one-year period.

Overall, Figure 2 shows that outcomes have gradually shifted from a majority clearly favoring the plaintiff—parents to a majority clearly favoring the defendant—school districts, with the dividing point approximately marked by the 2004 amendments to the IDEA. The proportion of outcomes in the district’s favor was dramatically pronounced for the most recent interval, but this interval was limited to only one year.

Figure 3 presents the frequency distribution of the issue rulings in terms of the FBA and BIP categories and, within them, the further subcategories of access, appropriateness, and implementation.<sup>153</sup>

153. As previously explained, there were no FBA implementation rulings. *See supra* note 111.



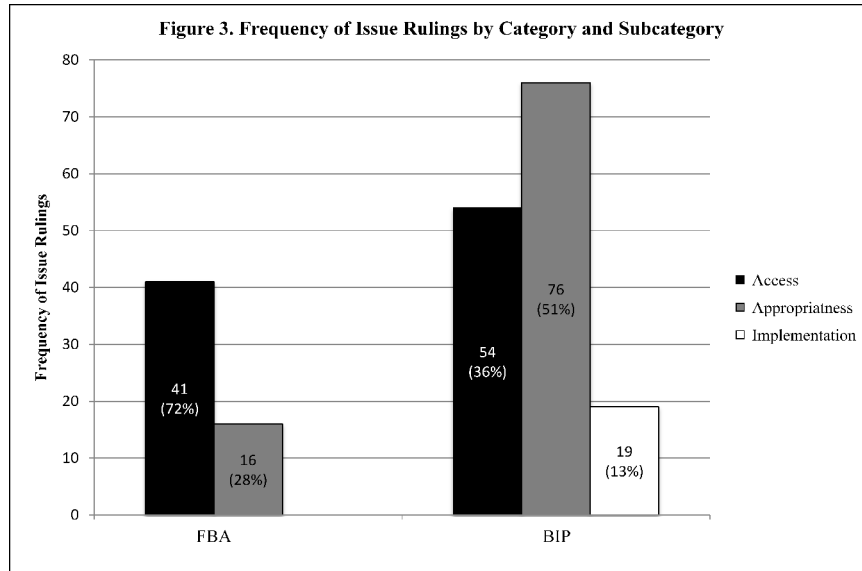
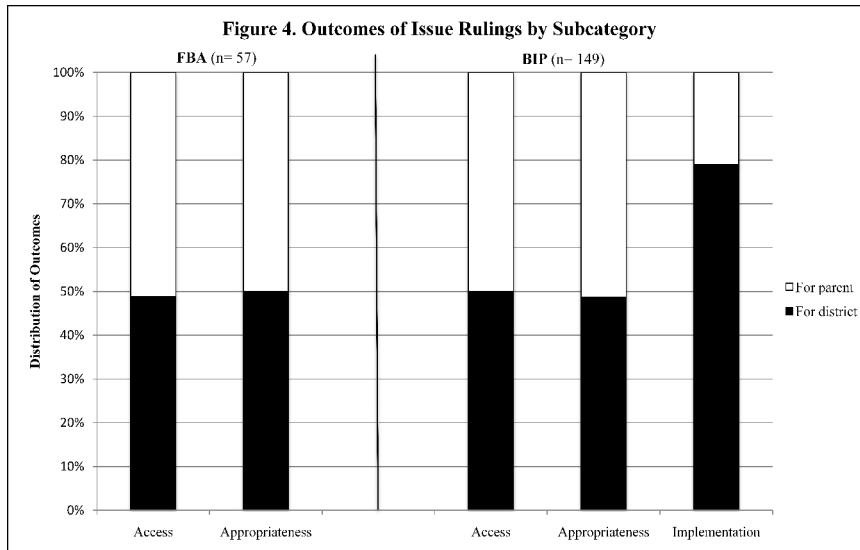


Figure 3 illustrates that the BIP category accounted for far more rulings than the FBA category<sup>154</sup> and that the primary focuses were access for FBAs and appropriateness for BIPs.

Figure 4 displays the outcomes in favor of each side for each issue subcategory—access, appropriateness, and, for BIPs, implementation.



154. More specifically, the BIP category accounted for 149, or 73%, of the 206 rulings.

Overall, Figure 4 shows that the ratio of issue rulings hovered at or near an even split between the two sides (with slight balances in favor of parents in two subcategories), except for implementation of a BIP, which heavily favored school districts. But the differentiation was tentative in light of the small number of BIP implementation rulings<sup>155</sup> and the notable overlap among the subcategories.<sup>156</sup>

Next, Table 1 presents the outcome results for FBAs and BIPs in terms of the respective hearing/review officer and judicial forums. The final column reports the chi-square ( $\chi^2$ ) analysis, which shows whether the difference in the outcomes distribution between the two forums was statistically significant (i.e., generalizable at a high level of probability).<sup>157</sup>

Table 1. Distribution of Outcomes Per Forum and Category

	Hearing/Review Officer		Court		$\chi^2$
	For Parent	For District	For Parent	For District	
FBA	25 (63%)	15 (38%)	4 (24%)	13 (76%)	$\chi^2=5.77^{a*}$
BIP	60 (55%)	50 (45%)	10 (26%)	29 (74%)	$\chi^2=9.66^{**}$
Total	85 (57%)	65 (43%)	14 (25%)	42 (75%)	$\chi^2=16.38^{**}$

<sup>a</sup> With Yates's correction, which is a conservative adjustment to chi-square when applied to 2-by-2 distributions with one or more cells with frequencies less than five.

\*  $p$  (i.e., probability) < .05

\*\*  $p$  < .01

This table shows that the hearing/review officers' FBA and BIP issue rulings favored parents, while the courts' FBA and BIP rulings favored districts. The differences between the two forums were statistically significant at the .05 and .01 probability levels, respectively. This inferential analysis suggests a high likelihood that the results for this sample

155. As Figure 3 reveals, BIP implementation accounted for nineteen issue rulings, which amounted to 13% of the BIP subtotal and 9% of the total issue rulings.

156. See *supra* note 137 and accompanying text.

157. Chi-square is a statistical procedure to determine whether the frequency counts in two or more categories in a sample (here, published FBA and BIP rulings) are differently distributed to a significant extent, i.e., that the frequency counts are not due to chance but are instead generally applicable with a high degree of probability to a population (here, all FBA and BIP rulings, including those that are not available in the Westlaw and LRP databases). See, e.g., MEREDITH D. GALL ET AL., EDUCATIONAL RESEARCH 325–27 (2007). The customary degrees of probability (designated as “p”) are .05 and .01, equating to 95% and 99%, respectively. L.R. GAY ET AL., EDUCATIONAL RESEARCH 329 (2009).

are generalizable to the target population of hearing/review officer and court decisions.<sup>158</sup>

Table 2 shows the respective outcomes of the issue rulings concerning FBAs and BIPs, along with chi-square analysis,<sup>159</sup> for the combination of the two forums.

Table 2. Distribution of Outcomes Per Category

	<b>For Parent</b>	<b>For District</b>	$\chi^2$
FBA	29 (51%)	28 (49%)	$\chi^2=0.25$ ns
BIP	70 (47%)	79 (53%)	
Total	99 (48%)	107 (52%)	

ns = not statistically significant

This table shows that the difference between the outcomes of the FBA and BIP issues rulings was not statistically significant.<sup>160</sup> Thus, the difference was most likely due to chance alone (i.e., as a result of sampling or measurement error). Additionally, Table 2 illustrates that when all of the issue rulings are analyzed together, the districts fared slightly better (52%) than the parents (48%).

Finally, the coding of the cases included notes on the role and basis of the FBA and BIP issue rulings in relation to the IDEA framework.<sup>161</sup> These notes were largely qualitative observations based on the hearing/review officer's or judge's disposition of the FBA and BIP issues. A synthesis of these observations follows, first on an overall basis and then in terms of each of the issue subcategories.

First, in most cases, the FBA–BIP analysis was only a small part of the overall case, either as one of several issues or as a component of a larger primary issue. Different from the IDEA framework, wherein an FBA and a BIP are express requirements only for disciplinary changes in placement,<sup>162</sup> the majority of the cases concerned the statutory staples of FAPE or, less frequently, LRE.<sup>163</sup>

158. See *supra* note 113. The intervening factor is the extent to which the sample is sufficiently representative of the target population. This issue has been subject to only limited and inconclusive research. See, e.g., Anastasia D'Angelo, J. Gary Lutz & Perry A. Zirkel, *Are Published IDEA Hearing Officer Decisions Representative?*, 14 J. DISABILITY POL'Y STUD. 241 (2004).

159. See *supra* note 157.

160. "Not statistically significant" means that the chi value did not approach the requisite minimum level of  $p < .05$ . See also *supra* note 157.

161. See discussion *supra* Part III; *supra* notes 65–108 and accompanying text.

162. See *supra* notes 73–75 and accompanying text.

163. See *supra* notes 6–8 and accompanying text. For a discussion of these interrelated cornerstones of the IDEA, see, e.g., the Supreme Court's landmark decision in *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). In *Rowley*, the Court elaborated

For what is here broadly referred to as “access,” hearing/review officers and courts tended to use some variation of the behavior-impeding standard.<sup>164</sup> But in the hearing/review officer cases, especially in the many states that lack a legal standard distinctly different than that of the IDEA,<sup>165</sup> the basis for the ruling tended to be rather ad hoc and often cryptic, explicitly or implicitly based on the evidence in the case, whereas the courts tended to cite and apply the standard under the IDEA, or if there was one, the standard under state law. Moreover, the courts tended to be much stricter than hearing/review officers, interpreting “consider”<sup>166</sup> and, when raised, “positive”<sup>167</sup> as not being per se requirements of access to an FBA or a BIP.<sup>168</sup> Finally, led by the Second Circuit’s recent decision in *A.C. v. Board of Education of Chappaqua Central School District*,<sup>169</sup> the federal district courts in New York have used the IDEA harmless procedural error approach to essentially nullify the effect of the state’s more rigorous standard for FBA access.<sup>170</sup>

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rated a two-part test for FAPE: (1) compliance with the procedures set forth in the IDEA, and, on the substantive side, (2) an individualized program reasonably calculated to enable the child with disabilities to receive educational benefits. *Id.* at 207–08. Although widely used in subsequent court decisions, the Court crafted this test specifically for the child in this case in relation to the LRE, or “mainstreaming,” mandate for education with nondisabled children to the maximum extent appropriate. *Id.* at 203–04. Although the Supreme Court has not specifically addressed LRE in terms of a corresponding test, several appellate courts have developed multipart frameworks that typically include a behavioral factor. *See, e.g.*, Perry A. Zirkel, *The “Inclusion” Case Law: A Factor Analysis*, 127 EDUC. L. REP. 533 (1998). When the FBA or BIP issues arise in LRE cases, if at all, it is in connection with this behavioral factor.

164. *See supra* notes 69–70 and accompanying text. In the FAPE context, the focus was on whether the behavior impeded the child’s own learning whereas in the LRE context, the focus tended to extend to the effect on other children’s learning.

165. Zirkel, *supra* note 50 and accompanying text. In addition to California and New York, which have stronger and more extensive provisions for FBAs and BIPs, Minnesota and Pennsylvania were particularly notable in terms of their stronger standard for access to FBAs and BIPs, respectively. However, inasmuch as the cases extend back to 1998, there have been at least limited changes in state laws and the IDEA during the period of this study. *See, e.g.*, Lincoln Intermediate Unit No. 12, 34 IDELR ¶ 305 (Pa. SEA 2001); Kennett Consol. Sch. Dist., 33 IDELR ¶ 54 (Pa. SEA 1999); Jim Thorpe Area Sch. Dist., 29 IDELR 320 (Pa. SEA 1998); Neshaminy Sch. Dist., 24 IDELR 493 (Pa. SEA 1998).

166. *See supra* note 69 and accompanying text.

167. *See* 20 U.S.C. § 1414(d)(3)(B)(i) (2008).

168. *See, e.g.*, Lessard v. Wilton-Lindeborough Coop. Sch. Dist., 518 F.3d 1827 (1st Cir. 2008); J.A. v. Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684 (S.D.N.Y. 2009); J.K. v. Metro. Sch. Dist. Sw. Allen Cnty., 44 IDELR ¶ 122 (N.D. Ind. 2005); Robert B. v. W. Chester Area Sch. Dist., 44 IDELR ¶ 123 (E.D. Pa. 2005); *cf.* Lake Travis Indep. Sch. Dist. v. M.L., 50 IDELR ¶ 105 (W.D. Tex. 2007) (addressing the issue jurisdictionally and only in terms of considering behavioral interventions).

169. *A.C. v. Bd. of Educ. of Chappaqua Cent. Sch. Dist.*, 553 F.3d 165 (2d Cir. 2009).

170. *M.H. v. N.Y.C. Dep’t of Educ.*, 54 IDELR ¶ 221 (S.D.N.Y. 2010); *M.N. v. N.Y.C. Dep’t of Educ.*, 54 IDELR ¶ 165 (S.D.N.Y. 2010); *Connor v. N.Y.C. Dep’t of Educ.*, 53 IDELR ¶ 192 (E.D.N.Y. 2009).

For the “appropriateness” issues, following the overriding two-dimensional view of FAPE,<sup>171</sup> both the hearing officers and the courts tended to view the FBA or BIP issues as procedural, but they ultimately relied on the substantive standard of reasonable benefit.<sup>172</sup> Absent definitions for FBAs and BIPs in the IDEA,<sup>173</sup> and absent specific standards for FBAs and BIPs in most state laws,<sup>174</sup> the basis for the hearing/review officer’s or court’s rulings, to the extent specified in the decisions, were most often evidentiary. Expert witnesses, including qualified school personnel, played a notable role in terms of providing and applying criteria. In some cases, the adjudicator cited *Rowley*,<sup>175</sup> in other cases, *Rowley* was implicit within the general harmless error procedural approach;<sup>176</sup> and in still other cases, the standard was not at all clear, with the decision only offering a cryptic conclusion incidental to other larger issues.<sup>177</sup>

Most interesting of all, the following sequence of cases provides a chronological, flipbook-style illustration for the foregoing forum comparison:<sup>178</sup> (1) the development by an Iowa hearing officer of a four-criteria test for BIP appropriateness that was composed of professional standards incorporated in a variety of previous hearing/review officer decisions;<sup>179</sup> (2) the application of this test in subsequent hearing officer decisions in two jurisdictions;<sup>180</sup> (3) the rejection of this test by the Se-

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171. See *supra* note 163. Hearing/review officers and courts in these cases tended to use the *Rowley* two-part characterization regardless of whether expressly treating the FBA or BIP issues as FAPE.

172. Prior to and during the period of this study, the courts developed and consistently used a harmless error approach when analyzing procedural violations of the IDEA. Under the harmless error approach, a procedural violation is not a per se denial of FAPE. Congress eventually codified this approach in the 2004 amendments to the IDEA. 20 U.S.C. § 1415(f)(3)(E). This approach treats a procedural violation as a denial of FAPE only if it results in the program not being reasonably calculated to yield benefit. *Id.*

173. See *supra* Part III.B.

174. Zirkel, *supra* note 50 and accompanying text.

175. See, e.g., Corpus Christi Indep. Sch. Dist., 30 IDELR 88 (Tex. SEA 1999).

176. See, e.g., Edwin K. v. Jackson, 33 IDELR ¶ 63 (N.D. Ill. 2002).

177. See, e.g., A.H. v. Dep’t of Educ. of City of N.Y., 55 IDELR ¶ 36 (2d Cir. 2010); Dumont Bd. of Educ. v. J.T., 54 IDELR ¶ 231 (D.N.J. 2010); New Haven Unified Sch., 44 IDELR ¶ 207 (Cal. SEA 2005); Acad. Sch. Dist. #20, 37 IDELR ¶ 171 (Colo. SEA 2002); E. Cent. Kan. Special Educ. Coop., 31 IDELR ¶ 256 (Kan. SEA 1999). Greater Albany Sch. Dist., 49 IDELR ¶ 56 (Or. SEA 2007); Bethlehem Area Sch. Dist., 52 IDELR ¶ 25 (Pa. SEA 2008); Connally Indep. Sch. Dist., 34 IDELR ¶ 309 (Tex. SEA 2001).

178. See *supra* text accompanying notes 157–58.

179. Mason City Cmty. Sch. Dist., 36 IDELR ¶ 50 (Iowa SEA 2001). The hearing officer was a nonattorney special education professor who authored a BIP study five years later. See Etscheidt, *supra* note 46.

180. Forrestville Valley Cmty. Unit Sch. Dist., 37 IDELR ¶ 209 (Ill. SEA 2002); Lynn-Mar Cmty. Sch. Dist., 41 IDELR ¶ 24 (Iowa SEA 2004) (rulings by different hearing officers); Mason City Cmty. Sch. Dist., 36 IDELR ¶ 50 (Iowa SEA 2001) (ruling in a different case with the same hearing officer).

venth Circuit in *Alex R. v. Forrestville Valley Community School District*,<sup>181</sup> (4) the limited moderation of the *Alex R.* rejection in a recent unpublished Iowa federal court decision, which affirmed the same Iowa hearing officer's most recent pertinent decision;<sup>182</sup> (5) the reaffirmation of *Alex R.* in other jurisdictions' judicial rulings in a more district-deferential manner;<sup>183</sup> and (6) the elimination of Iowa's part-time, largely special-education-trained hearing officers and replacement with full-time governmental administrative law judges (ALJs).<sup>184</sup>

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181. The opinion stated:

[N]either Congress nor the agency charged with devising the implementing regulations for the IDEA, the Department of Education, had created any specific substantive requirements for the [BIP] contemplated by § 1415(k)(1) or § 1414(d)(3)(B)(i). Alex does not point us to any statute or regulation that has since filled the gap, and our research has uncovered none. Alex, nevertheless, urges us to follow the lead of the administrative judge in *Mason City*, who manufactured the substantive criteria of a sufficient behavioral intervention plan based on a string of administrative opinions. We decline the invitation. Although we may interpret a statute and its implementing regulations, we may not create out of whole cloth substantive provisions for the behavioral intervention plan contemplated by [the IDEA]. In short, the District's [BIP] could not have fallen short of substantive criteria that do not exist, and so we conclude as a matter of law that it was not substantively invalid under the IDEA.

*Alex R. v. Forrestville Valley Cmty. Sch. Dist.*, 375 F.3d 603, 615 (7th Cir. 2004).

182. *Waukee Cmty. Sch. Dist. v. Isabel L.*, 51 IDELR ¶ 15 (S.D. Iowa 2008) (interpreting *Alex R.* and related decisions as rejecting substantive standards but allowing consideration of these factors within the overall and overriding determination of FAPE). For another, more confusing limitation of *Alex R.*, see *Lewis Central School District*, 42 IDELR ¶ 247 (Iowa 2005).

183. See, e.g., *Lessard v. Wilton-Lindeborough Coop. Sch. Dist.*, 518 F.3d 18 (1st Cir. 2008); *T.W. v. Unified Sch. Dist. No. 259*, 136 F. App'x 122 (10th Cir. 2005); *Lake Travis Indep. Sch. Dist. v. M.L.*, 50 IDELR ¶ 105 (W.D. Tex. 2005); *J.K. v. Metro. Sch. Dist. Sw. Allen Cnty.*, 44 IDELR ¶ 122 (N.D. Ind. 2005). Although the language excerpted from the court's decision in *Waukee Community School District*, see *supra* note 182, could be interpreted as supporting the behavior-impeding standard for a BIP, the First Circuit was more representative of the prevailing judicial interpretation:

An even more egregious misunderstanding of the IDEA's requirements undermines the claim of procedural error based on a missing behavioral plan. The IDEA only requires a behavioral plan when certain disciplinary actions are taken against a disabled child. The appellants make no claim that the necessary disciplinary predicate had transpired in this instance. The other statutory provision cited by the appellants—20 U.S.C. § 1414(d)(3)(B)(i)—also falls short of *requiring* a behavioral plan as an ubiquitous feature in every IEP. That statute, in terms, directs IEP teams to “consider, when appropriate,” formulating such plans.

*Lessard v. Wilton-Lindeborough Coop. Sch. Dist.*, 518 F.3d at 26–27 (citing 20 U.S.C. § 1415(k)(1)(A) & (B); *Alex R.*, 375 F.3d at 614); see also *J.K. v. Metro. Sch. Dist. Sw. Allen Cnty.*, 44 IDELR ¶ 122 (N.D. Ind. 2005).

184. Memorandum of Understanding Between the Iowa Department of Education and the Iowa Department of Inspections and Appeals (June 7, 2010) (on file with author). In Iowa, the ALJs work in the Administrative Hearings Division of the Department of Inspections and Appeals. See *Administrative Hearings Division*, IOWA DEP'T OF INSPECTIONS & APPEALS, <http://dia.iowa.gov/page10.html> (last visited July 6, 2010).

For the relatively few “implementation” issue rulings, the bases of the rulings were consistently evidentiary, and the approach tended to use substantial or ad hoc equitable, rather than 100%, compliance as the standard.<sup>185</sup> Although not typically cited in these rulings, court decisions in general FAPE cases have similarly adopted a less than strict standard for IEP implementation.<sup>186</sup>

## VI. DISCUSSION

The major findings in this study were that (1) the frequency of FBA and BIP cases increased modestly since the 1997 IDEA amendments; (2) the outcomes during this period shifted after approximately 2004 from a parent-favorable to a district-favorable overall balance; (3) the most frequent category and subcategory of the issue rulings were BIPs and their appropriateness, respectively; (4) the outcomes within each of the categories and subcategories were relatively balanced between parents and districts, with the exception of BIP implementation, which was relatively infrequent but heavily skewed in favor of districts; and (5) the outcomes were not significantly different between the FBA and BIP categories, but they were significantly more favorable for districts in the judicial forum than in the hearing/review officer forum for both FBAs and BIPs.

### A. Forum Difference

The most statistically and pervasively significant of these findings compared the outcomes per forum<sup>187</sup> and merits discussion prior to the other findings. FBAs and BIPs are so interrelated, both in terms of professional practice and legal treatment, that the adjudicatory outcomes would be expected to be similar. But the significantly higher number of district-favorable rulings at the judicial level compared to the hearing/review officer level is expected and helps explain and interpret the other findings of this study.

This statistically significant forum-based difference is expected because of three key institutional differences. First, although in recent years there has been a gradual move toward using judges in hearing/review

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185. See, e.g., *L. v. North Haven Bd. of Educ.*, 52 IDELR ¶ 254 (D. Conn. 2009); *Bd. of Educ. v. Michael R.*, 44 IDELR ¶ 36 (N.D. Ill. 2005), *aff'd on other grounds*, 486 F.3d 267 (7th Cir. 2007); *Wilkes-Barre Area Sch. Dist.*, 32 IDELR ¶ 17 (Pa. SEA 1999).

186. See, e.g., *Sumter Cnty. Sch. Dist. 17 v. Heffernan*, 642 F.3d 478 (4th Cir. 2011); *Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811 (9th Cir. 2007); *Melissa S. v. Sch. Dist.*, 183 F. App'x 184 (3d Cir. 2006); *Catalan v. District of Columbia*, 478 F. Supp. 2d 73 (D.D.C. 2007); *Clear Creek Indep. Sch. Dist. v. J.K.*, 400 F. Supp. 2d 991 (S.D. Tex. 2005).

187. See *supra* notes 157–58 and accompanying text.

officer proceedings under the IDEA,<sup>188</sup> the hearing officers in the majority (n=33) of the states are part-time personnel with full-time roles—for example, private attorneys—rather than professional ALJs.<sup>189</sup> Despite the formal, special education background of both groups being relatively limited,<sup>190</sup> the predominant group obviously has a less strict judicial posture. Second, the informal nature of these administrative adjudications contributes to a less strict adjudicative perspective. Finally, because the hearing officer stage is the principal and often sole source of fact finding,<sup>191</sup> expert testimony plays a much more direct role. Thus, it was not surprising that a statistically significant difference between the two forums was found. Equally unsurprising was the qualitative difference revealing that hearing/review officers, compared to courts, tended to be less strict in legal interpretation and relied more on expert testimony that reflected professional norms.<sup>192</sup>

Perhaps the best illustration of this significant forum-based finding is the difference between, and the progression from, the Iowa hearing officer's best practice decision and the Seventh Circuit's *Alex R.* ruling.<sup>193</sup> Similarly, given the hierarchal structure of the stare decisis doctrine and the comparative impact of the judicial decisions, the Second Circuit's *A.C.* decision further illustrates the cumulative tendency to shift the outcomes in the defendant–school districts' favor<sup>194</sup> unless the IDEA or state laws are amended to combat that tendency.

### B. Longitudinal Frequency

This significant forum-based difference contributes to the explanation of the first finding of the study, which was the relatively modest increase in the number of FBA and BIP cases since the 1997 amendments of the IDEA.<sup>195</sup> This increase was in the same direction, but to a lesser degree, as the longitudinal trend in special education case law general-

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188. See, e.g., Perry A. Zirkel et al., *Creeping Judicialization of Special Education Hearings: An Exploratory Study*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 27 (2007).

189. Zirkel & Scala, *supra* note 12, at 5. The number of two-tier states (i.e., those with a review officer level) has dwindled to ten, with all but New York being at the part-time level. *Id.*

190. *Id.* at 6.

191. The IDEA authorizes courts to hear additional evidence, but the clear majority of courts decide their review of hearing/review officer decisions on summary judgment. See, e.g., Andriy Krahmal, Perry A. Zirkel & Emily Kirk, "Additional Evidence" Under the Individuals with Disabilities Education Act: The Need for Rigor, 9 TEX. F. ON C.L. & C.R. 201 (2004).

192. See *supra* text accompanying notes 165–68 and 173–74.

193. See *supra* text accompanying notes 179–84.

194. See *supra* notes 169–70 and accompanying text.

195. See *supra* Figure 1.



ly.<sup>196</sup> A differentially higher trajectory might have been expected in light of this first-time recognition in the IDEA of FBAs and BIPs, as well as the increasing emphasis of this linked pair of behavioral strategies in the special education literature leading to and following this recognition.<sup>197</sup> Not surprisingly, most of the FBA and BIP issue rulings arose as a relatively small part of a larger FAPE or LRE case rather than in disciplinary change-of-placement cases<sup>198</sup> where IDEA recognition is clearest but litigation is infrequent.<sup>199</sup> But the less obvious and perhaps more powerful contributing factor was the effect of judicial precedents that were systematically more favorable to districts than the underlying hearing/review officer decisions.

The cumulative and immediately predictable effect is stronger in light of the finding of a marked increase in the proportion of case law at the judicial, rather than hearing/review officer, level during the thirteen-year period of this study.<sup>200</sup> This dramatic increase may be attributable to the time lag in moving from decisions at the administrative level to the final decision upon judicial review.<sup>201</sup> Another possible explanation contributing to this shift, which is purely speculative in the absence of available empirical evidence, is a change in the percentage of FBA and BIP cases subject to judicial review or selected for IDELR publication. Whatever the reason, the effect is contrary to the proactive direction of special education norms but with two possible exceptions. First, as the

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196. Zirkel & D'Angelo, *supra* note 44, at 740 (finding uneven growth of IDELR-published hearing/review officer decisions in three-year periods from 1977–1979 to 1998–2000); Perry A. Zirkel & Brent L. Johnson, *The “Explosion” in Education Litigation: An Updated Analysis*, 265 EDUC. L. REP. 1 (2011) (finding pronounced increase in special education court decisions in Westlaw database within ten-year periods, especially in the most recent decade). The overlap with, rather than identity of, time periods and adjudicatory forum precludes definitive comparisons.

197. But the limited scope of this recognition, as largely confirmed in the subsequent regulations, the 2004 amendments, and the relatively few state laws providing much stronger recognition, may have had a dampening effect. *See* Zirkel, *supra* note 50 and accompanying text. Another possible moderating factor is the relatively limited role of FBAs and BIPs in special education disputes compared to such high-stakes issues as tuition reimbursement. *See, e.g.*, Thomas Mayes & Perry A. Zirkel, *Special Education Tuition Reimbursement Claims: An Empirical Analysis*, 22 REMEDIAL & SPECIAL EDUC. 350 (2001) (finding marked increase in such litigation in initial period after statutory codification in IDEA 1997).

198. *See supra* text accompanying notes 162–63.

199. For example, in the ten successive updates of published court decisions under the IDEA, FAPE has by far been the largest segment of the litigation while discipline has been one of the smallest segments. *See, e.g.*, Perry A. Zirkel & Tessie Rose, *Special Education Law Update X*, 240 EDUC. L. REP. 503 (2009).

200. *See supra* Figure 1. Specifically, the percentages in the white bars represent the proportion of FBA and BIP rulings attributable to the courts instead of hearing/review officers.

201. For example, in a recent study of autism litigation, the average time between the hearing officer decision and the final decision after judicial review was approximately 2.8 years. Perry A. Zirkel, *Autism Litigation under the IDEA: A New Meaning of “Disproportionality”?*, J. SPECIAL EDUC. LEADERSHIP (forthcoming 2011).

1997 IDEA originally illustrated, legislation and regulations may be amended to incorporate professional norms. Second, school districts may opt to engage in proactive best practice as professionally appropriate or as litigation avoidance.<sup>202</sup>

### C. Longitudinal Outcomes

This forum-based difference, in combination with the increasing proportion of court rulings, appears to be the principal reason for the shift during this period from a parent-favorable to a district-favorable overall balance. In contrast, although the approximate balancing point in the outcome ratio was 2004,<sup>203</sup> the IDEA amendments of that year would not appear to be a major independent contributing factor because (1) their effective date was not until mid-2005, and the courts have predominantly rejected their retroactive application,<sup>204</sup> and (2) the IDEA's dispute resolution process is rather "ponderous."<sup>205</sup> It may be, however, that the narrowness of these amendments had a confirming effect on adjudicators.<sup>206</sup> In any event, caution is warranted because the unit of analysis for outcomes was the issue, not the case.<sup>207</sup>

### D. Categorical Frequency and Outcomes

The predominance of BIP rulings,<sup>208</sup> particularly those concerning appropriateness, is not surprising in light of (1) the more concrete and culminating nature of BIPs in the FBA-BIP process; (2) the lack of BIP criteria in the IDEA;<sup>209</sup> and (3) the overriding FAPE analysis in many

202. The alternative hypothesis—that the case law is only representative of infrequent exceptions to best practice—is much less likely because (1) there would be little reason for the continuous flow of special education legislation and regulations and the increase in litigation if prevailing practice was at this optimum level; and (2) the outcomes would be much less district favorable overall and longitudinally.

203. See *supra* Figure 2.

204. See, e.g., *Steven I. v. Cent. Bucks Sch. Dist.*, 618 F.3d 411 (3d Cir. 2010); *Bell v. Bd. of Educ. of Albuquerque Pub. Sch.*, 52 IDELR ¶ 161 (D.N.M. 2008); *Anthony v. District of Columbia*, 463 F. Supp. 2d 37 (D.D.C. 2006).

205. *Burlington Sch. Comm. v. Mass. Dep't of Educ.*, 471 U.S. 359, 370 (1985). Although the time lag is particularly pronounced for judicial review, e.g., *supra* note 201, the hearing/review officer stage often exceeds the regulatory timeline. See, e.g., *Lake Wash. Sch. Dist. No. 414 v. Office of the State Superintendent of Pub. Instruction*, 634 F.3d 1065 (9th Cir. 2011); *Dep't of Educ., State of Haw. v. T.G.*, 56 IDELR ¶ 97 (D. Haw. 2010); *O.O. v. District of Columbia*, 573 F. Supp. 2d 41 (D.D.C. 2008); *E.M. v. Pajaro Valley Unified Sch. Dist.*, 48 IDELR ¶ 39 (N.D. Cal. 2007); *Doe v. E. Greenwich Sch. Dep't*, 899 A.2d 1258 (R.I. 2006).

206. See *supra* text accompanying notes 70, 73–75.

207. See *supra* note 146 and accompanying text.

208. See *supra* Figure 3.

209. In most jurisdictions, state law has not played a major role in this respect. See Zirkel, *supra* note 50 and accompanying text.

cases.<sup>210</sup> But the fluid boundaries between and within the FBA and BIP issue categorization cautions against overreliance on these counts.<sup>211</sup>

The outcomes analysis in Figure 4 revealed that parents fared as well as or slightly better than districts for each subcategory, except for the relatively infrequent subcategory of BIP implementation. These outcomes are based on issue rulings that averaged approximately 1.2 per case<sup>212</sup> and which were sometimes only an incidental part of much larger issues.<sup>213</sup> Indeed, in an occasional case, the outcome of a marginal FBA or BIP issue was different from the outcome of the central issue.<sup>214</sup> Although not identical with respect to the unit of analysis, time period, or outcomes scale, the balance was at least modestly more parent-favorable for the FBA and BIP rulings—with the limited exception of BIP implementation—than the previous research.<sup>215</sup> The difference may be due to the lack of specific standards and ad hoc reliance on professional opinion via expert witnesses, especially in the hearing/review officer decisions.<sup>216</sup> In contrast, the relatively few implementation cases were largely matter of facts instead of opinion when the standard was rather concrete<sup>217</sup> and when the school officials had the obvious “home field” advantage in terms of the evidence and the burden of proof.

## VII. CONCLUSION

Although both the IDEA (in its next reauthorization) and state laws are a macro or policymaking solution, both in terms of providing more stringent standards for access to and appropriateness of FBAs and BIPs, this model is unlikely to be used to its fullest extent in light of the current political climate. The height of the professional push for, as well as policymaking receptivity to, such proactive approaches to improving behavior was in the 1997 IDEA amendments. Since then, the focus has been on academic improvement as illustrated by the No Child Left Behind

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210. See *supra* text accompanying notes 163, 171.

211. Approximately one-fifth of the cases presented issue identification at the margin between categories or subcategories thus leading to tentative counts. See *supra* note 137.

212. See *supra* note 150 and accompanying text.

213. See *supra* text accompanying notes 163–64.

214. See, e.g., E. Cent. Kan. Special Educ. Coop., 31 IDELR ¶ 256 (Kan. SEA 1999) (ruling not only in favor of the parent for the BIP issue but also in favor of the district for the larger primary issue of LRE).

215. See, e.g., Zirkel & D’Angelo, *supra* 44, at 744–47 (previous studies and hearing/review officer and court decisions from 1989 to 2000). All of these other studies used the case rather than the issue category or subcategory as the unit of analysis. Moreover, the majority were limited to court decisions.

216. See *supra* text accompanying notes 165, 173–74.

217. See *supra* text accompanying note 186.

Act<sup>218</sup> and on cutbacks in governmental resources for public education, including the emphasis on proactive reforms and interventions.<sup>219</sup>

A more feasible and potentially favorable solution,<sup>220</sup> especially in light of the individualized nature of the IDEA and evolving science and art of special education, is a more coherent case-by-case application of the available standards. Specifically, what is roughly referred to here as “access,” representing when a child is entitled to an FBA or a BIP under the IDEA, could be reasonably decided—in terms of being more predictable and parsimonious<sup>221</sup>—via the well-established IDEA concept of, and standard for, “related services.”<sup>222</sup> First, this IDEA concept has a broad definition that is sufficiently ample and flexible to cover FBAs and BIPs. More specifically, the IDEA regulations define “related services” in relevant part as “developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education.”<sup>223</sup> The long and nonexhaustive list of examples includes “psychological services,” which in turn are defined by the IDEA regulations to include administering assessment procedures and interpreting assessment results; “[o]btaining, integrating, and interpreting information about child behavior”; and “[a]ssisting in developing positive behavioral inter-

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218. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.). For a discussion of the effects of this Act, see, e.g., Sandy Kress et al., *When Performance Matters: The Past, Present, and Future of Consequential Accountability in Public Education*, 48 HARV. J. ON LEGIS. 185 (2011); James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932 (2004). For highlights of the Act’s interactions with the IDEA, see Perry A. Zirkel, *What Does It Mean for Students with Disabilities*, 185 EDUC. L. REP. 804 (2004).

219. For samples of the widespread recognition of the effects of the economy on public education, see John Dayton et al., *Brother, Can You Spare a Dime?: Contemplating the Future of School Funding Litigation in Tough Economic Times*, 258 EDUC. L. REP. 937 (2010); Monica Teixeira de Sousa, *A Race to the Bottom?: President Obama’s Incomplete and Conservative Strategy for Reforming Education in Struggling Schools or the Perils of Ignoring Poverty*, 39 STETSON L. REV. 629 (2010).

220. More careful experimentation in the form of enacting specific and stringent state special-education laws, with accompanying careful research and scholarship, is warranted before adding to the many mandates of the IDEA. See, e.g., *Battle v. Pennsylvania*, 629 F.2d 239, 269 (3d Cir. 1980) (“Hard decisions of resource allocation, like the determinations of educational policy are best left to the states, in the first instance.”).

221. Cost is a recognized, though not primary or uniform, factor in adjudicating special education cases. See, e.g., Leslie A. Collins & Perry A. Zirkel, *To What Extent, If Any, May Cost Be a Factor in Special Education Cases?*, 71 EDUC. L. REP. 11 (1992). This federal requirement serves as a minimum foundation upon which both state law and local education agency choice may add.

222. 20 U.S.C. § 1402 (2009).

223. *Id.* § 1401. Showing the wide boundaries of this term, the list includes, for example, orientation and mobility services; recreation, including therapeutic recreation; school health services; and parent counseling and training. *Id.*

vention strategies.”<sup>224</sup> Second, the “required . . . [for] benefit from special education” element of the definition<sup>225</sup> provides a necessity standard that has proven to be a reasonable test<sup>226</sup> for determining whether an individual child with a disability is entitled to a particular related service.<sup>227</sup> This necessity standard, which is keyed to the child’s special education progress, is clearly an improvement over the current ad hoc, absent, or incorrect standard practice among both hearing/review officers and courts in the many states that do not specify the behavior-impeding test.<sup>228</sup> On the other hand, the Second Circuit’s approach of treating an express behavior-impeding standard of access as merely procedural<sup>229</sup> and thus subject to the IDEA’s harmless-error approach for FAPE<sup>230</sup> would appear to run counter to the IDEA’s state-adding building block of “cooperative federalism.”<sup>231</sup> An access standard for an FBA or a BIP is as much or more substantive as it is procedural, which is more directly a matter of eligibility than FAPE.

In contrast, for “appropriateness,” the predominant but not universal approach<sup>232</sup> of applying the *Rowley* standard of reasonably calculated for educational benefit<sup>233</sup> uses an available and time-tested standard that is preferable to an ad hoc approach, which would be either lacking a specific standard or based on professional norms not adopted by legislation

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224. 34 C.F.R. § 300.34(c)(10) (2009). Other separately defined illustrations include “counseling services,” “rehabilitation counseling,” and “social work services.” *Id.* §§ 300.23(c)(14), 300.34(c)(12), 300.343(c)(2). For the corresponding IDEA regulation, see 34 C.F.R. § 300.34(a).

225. *See supra* text accompanying note 223.

226. *See* 20 U.S.C. § 1402.

227. *See, e.g., DeKalb Cnty. Sch. Dist. v. M.T.V.*, 164 F. App’x 900 (11th Cir. 2006) (ruling that vision therapy was necessary for this student to benefit from special education); *Sherman v. Mamaroneck Union Free Sch. Dist.*, 340 F.3d 87 (2d Cir. 2003) (ruling that a TI-82 calculator rather than the TI-92 was appropriate for a high school student with a specific learning disability in math); *M.K. v. Sergi*, 554 F. Supp. 2d 175 (D. Conn. 2008) (rejecting wraparound services as unnecessary to the student’s progress); *District of Columbia v. Ramirez*, 377 F. Supp. 2d 63 (D.D.C. 2005) (ruling that door-to-door transportation, including aide, was necessary for this student to receive FAPE); *Aaron M. v. Yomtoob*, 38 IDELR ¶ 122 (N.D. Ill. 2003) (ruling that parent was entitled to six, not twelve, trips per year for parent training at her child’s residential placement); *Roslyn Union Free Sch. Dist. v. Univ. of the State of N.Y.*, 711 N.Y.S.2d 582 (App. Div. 2000) (ruling that transportation from extracurricular activity to home for this child was unnecessary for FAPE).

228. In the FBA and BIP rulings to date, it is not uncommon for hearing/review officers, and to a lesser extent courts, to either misinterpret the IDEA or create a new behavior-impeding test. *See supra* notes 164–68 and accompanying text.

229. *See, e.g., Schaffer v. Weast*, 546 U.S. 49, 52 (2005); *D.D. v. N.Y.C. Bd. of Educ.*, 480 F.3d 138, 139 (2d Cir. 2007); *Taylor v. Vt. Dep’t of Educ.*, 313 F.3d 768, 777 (1st Cir. 2002).

230. *See supra* note 172.

231. *See, e.g., Bay Shore Union Free Sch. Dist. v. Kain*, 485 F.3d 730, 733–34 (2d Cir. 2007); *Evans v. Evans*, 818 F. Supp. 1215, 1223 (N.D. Ind. 1993) (recognizing that states may add requirements to the IDEA’s foundation).

232. *See supra* notes 171–72 and accompanying text.

233. *See supra* note 163.

or regulations. It is also preferable in the stead of the other extreme: the *Alex R.* eviscerating approach, which leaves an FBA or a BIP as a potentially empty exercise unless the IDEA is amended or state laws fill the gap.<sup>234</sup>

Finally, the present approach for evaluating an implementation challenge to a BIP seems to be a fitting application of the more general approach for such IEP and FAPE cases, which uses a standard of reasonable or equitable compliance rather than 100% compliance.<sup>235</sup> Thus, absent an amendment to the IDEA, a more rigorous optimal standard is appropriately left to state law or local policy.<sup>236</sup>

In sum, this quantitative and qualitative analysis of the FBA and BIP case law reveals the need for a more consistent and coherent approach to the access, appropriateness, and implementation issues of these interrelated behavioral features of special education under the IDEA and related state laws. Although the application must be adjudicated on an individualized basis, the standards must be clearer and more consistent based on the available and pertinent concepts of the IDEA. State laws that incorporate higher standards similarly require more defensible adjudication with the separate desiderata of professional norms left to local discretion to the extent that the next IDEA reauthorization and future state laws do not expressly adopt them.

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234. See *Alex R. v. Forrestville Valley Cmty. Sch. Dist.*, 375 F.3d 603, 615 (7th Cir. 2004).

235. See *supra* note 186.

236. Parents have the alternative of resorting to the state's complaint resolution process, which tends to be more oriented toward strict compliance. See Zirkel & McGuire, *supra* note 12, at 104–05.