

No. 19-35134

**In The United States
Court of Appeals for the Ninth Circuit**

**BUTTE SCHOOL DISTRICT NO. 1,
*Plaintiff-Appellee,***

v.

**C.S. and STUART MCCARVEL, in his capacity
as originator of the C.S. due process complaint.
*Defendants-Appellants***

**MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE COUNCIL
OF PARENT ATTORNEYS IN SUPPORT OF APPELLANTS**

Pursuant to Fed. R. App. P. 29, **Council of Parent Attorneys and Advocates (COPAA)**, (*Amicus Curiae*), hereby respectfully move for leave to file the attached brief as *Amicus curiae* in support of Plaintiffs-Appellants, C.S. and Stuart McCarvel, C.S.'s judicially appointed representative and parent under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1401(23), who have filed the Notice of Appeal in this case. This motion is accompanied by *Amicus'* proposed brief as required by Fed R. App. P. 29(b).

ARGUMENT

A. Interests of Proposed Amicus Curiae

COPAA is a not-for-profit organization for parents of children with disabilities, their attorneys and advocates. COPAA believes effective educational programs for children with disabilities can only be developed and implemented with collaboration between parents and educators as equal parties. COPAA does not represent children but provides resources, training, and information for parents, advocates, and attorneys to assist in obtaining the free appropriate public education (FAPE) such children are entitled to under IDEA.. COPAA's attorney members represent children in civil rights matters. COPAA also supports individuals with disabilities, their parents, and advocates in attempts to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §1983) (Section 1983), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504) and the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. (ADA).

COPAA brings to this Court the unique perspective of parents and advocates for children with disabilities. COPAA has previously filed as *amicus curiae* in the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017); *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017); *Forest Grove School District. v. T.A.*, 557 U.S. 230 (2009); *Board of*

Education of New York v. Tom F., 552 U.S. 1 (2007); *Arlington Central School District Board. of Education v. Murphy*, 548 U.S. 291 (2006); *Schaffer v. Weast*, 546 U.S. 49 (2005); and *Winkelman v. Parma City School District*, 550 U.S. 516 (2006), and in numerous cases in the United States Courts of Appeal.

Many children with disabilities experience significant challenges. Whether these children eventually gain employment, live independently, and become productive citizens depends in large measure on whether they secure their right to the free appropriate public education guaranteed under the IDEA and other educational policies. Indeed, the core of the IDEA is its codified goal that “all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living” 20 U.S.C. § 1400(d)(1)(A) .

COPAA ’s interest in this case stems from its deep commitment to all children with disabilities to obtain needed special education services. Having filed a brief *amicus curiae* in *Andrew F.*, COPAA seeks to have the decision implemented fully and consistently nationwide. Further, COPAA is also deeply concerned that students with behaviors that interfere with their ability to access education receive both appropriate evaluations in the area of Functional Behavioral Analysis and appropriate Behavioral Intervention Plans, and that the Behavioral

Intervention Plans are reviewed frequently to see if they are effective in reducing the interfering behavior, and, if the interfering behavior continues, the Behavior Intervention Plans are adjusted so as to increase the likelihood of success in improving the behaviors.

Based upon its experience, *Amicus* offers the Court a unique and important view on these issues. *Amicus* therefore respectfully requests that it be granted permission to submit the attached *Amicus Curiae* brief. *Amicus* requested consent to file this Motion and accompanying *Amicus Curiae* brief from counsel for both parties. Appellants consented to this brief; Appellee, Butte School District, declined to consent.

B. Why An Amicus Curiae Brief from COPAA is Relevant and Desirable

This *Amicus Curiae* brief from COPAA is both relevant and desirable. *See* Fed. R. App. P. 29(b)(2). The legal issues presented in the appeal are of great importance to COPAA and its members because they work with many children who have disabilities that interfere with their education. Accordingly, when evaluating whether a school district has denied a student a free appropriate public education (FAPE) by failing to implement an IEP, *Endrew F.* teaches that courts must consider students' ability to "make progress appropriate in light of the child's circumstances." *Id.* But this inquiry goes beyond an evaluation of a student's underlying capacity to learn, and courts have long been instructed to consider not

only underlying aptitude but also disabling conditions and presentations that may be depressing a student's ability to access instruction. For example, for students with maladaptive behaviors that are present for a significant period of time, schools are instructed to develop what is referred to as a behavioral implementation plan (BIP). Moreover, such programming is (as all other elements of an educational program) to be evaluated against baselines and data to demonstrate the effectiveness of the BIP, and school districts violate the IDEA when they fail to revisit the BIP and use data to revise the BIP so as to make it more likely to address negative behaviors.

Under the IDEA, though, the focus on broader ability to access learning goes beyond just the BIP process. In some circumstances where a student's disability profile and presentation are such that a student experiences school aversion, school districts (as part of the BIP and IEP processes) must address the school aversion behaviors and cannot rely on other unrelated educational policies to excuse itself from its obligation to provide a FAPE. For example, as was the case below, schools do not employ inappropriate behavioral interventions, particularly when this mismatched intervention actually increases the unwanted school aversion and avoidance behaviors. More broadly speaking, though, schools cannot use the results of an inappropriate intervention and an inappropriate educational program

as grounds that it has no obligation to provide services to the student and disenroll the student.

Amicus offer the Court relevant information not brought to Court's attention by the parties. *See Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 133 (3d Cir. 2002). *See also Funbus Sys., Inc. v. Cal. Pub. Util. Comm'n*, 801 F.2d 1120, 1124-25 (9th Cir. 1986).

Amicus states that the issue in this case meriting intervention from this Court is whether the district court below erred. The district court below erred in holding that a Functional Behavior Analysis (FBA) was not an evaluation under IDEA and in holding that the school district had provided a free appropriate public education even though it did not perform an appropriate FBA and did not appropriately address the student's behaviors, including school aversion. The evaluation and assessment procedures in IDEA are crucial for delivery of appropriate services,. Therefore, the violations that occurred in this case directly implicate the statute's primary purpose, which is to ensure that school districts accepting federal funds meet all the educational needs of students with disabilities. For this reason, *Amicus* respectfully submits that the Court should vacate the judgment of the district court and enter judgment in favor of Appellants.

CONCLUSION

For the foregoing reasons, COPAA respectfully request that the Court grant their motion to file the attached brief *Amicus Curiae* in support of Appellant's Request for Reversal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on the 10th day of September 2019. I certify that all participants are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/Selene Almazan Altobelli

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/s/Selene AlmazanAltobelli
Selene Almazan-Altobelli

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

BRIEF OF *AMICUS CURIAE*
COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC.
IN SUPPORT OF DEFENDANTS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 the following disclosure is made on behalf of these entities:

Council of Parent Attorneys and Advocates

1. No amicus is a publicly held corporation or other publicly held entity;
2. No amicus has parent corporations; and
3. No amicus has 10% or more of stock owned by a corporation.

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STATEMENT OF INTEREST OF THE AMICUS

Council of Parent Attorneys and Advocates (COPAA) is a not-for-profit organization for parents of children with disabilities, their attorneys and advocates. COPAA believes effective educational programs for children with disabilities can only be developed and implemented with collaboration between parents and educators as equal parties.

COPAA's attorney members represent children in civil rights matters. COPAA also supports individuals with disabilities, their parents, and advocates, in seeking to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, § 1,17 Stat. 13 (codified as amended at 42 U.S.C. § 1983), Section 504 of the Rehabilitation Act of 1973, (Section 504) and the Americans with Disabilities Act, et seq. (ADA).

COPAA's primary goal is to secure appropriate educational services for children with disabilities in accordance with national policy. COPAA provides resources, training, and information for parents, advocates, and attorneys to assist them in obtaining the free appropriate public education such children are entitled to under the Individuals with Disabilities Education Act (IDEA or Act), *et seq.*¹

¹ "Improving educational results for children with disabilities is an essential element of [the U.S.] national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1) (2018).

COPAA brings to this Court the unique perspective of parents, advocates, and attorneys for children with disabilities. COPAA has previously filed as *amicus curiae* in the United States Supreme Court in *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017); *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017); *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009); *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007); *Bd. of Educ. v. Tom F.*, 552 U.S. 1 (2007); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006); and *Schaffer v. Weast*, 546 U.S. 49 (2005); and in numerous cases in the United States Courts of Appeal.

Many children with disabilities experience significant challenges. Whether these children eventually gain employment, live independently, and become productive citizens depends in large measure on whether they secure their right to the free appropriate public education guaranteed under the IDEA and other educational policies. Indeed, the core of the IDEA is its codified goal that “all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living” 20 U.S.C. § 1400(d)(1)(A) .

COPAA ’s interest in this case stems from its deep commitment to all children with disabilities to obtain needed special education services. Having filed

a brief *amicus curiae* in *Andrew F.*, COPAA seeks to have the decision implemented fully and consistently nationwide. Further, COPAA is also deeply concerned that students with behaviors that interfere with their ability to access education receive both appropriate evaluations in the area of Functional Behavioral Analysis and appropriate Behavioral Intervention Plans, and that the Behavioral Intervention Plans are reviewed frequently to see if they are effective in reducing the interfering behavior, and, if the interfering behavior continues, the Behavior Intervention Plans are adjusted so as to increase the likelihood of success in improving the behaviors.

Amicus has moved for permission to file this brief. Counsel for Appellants has consented to this brief, and counsel for Appellee has declined to provide consent for this brief.²

Amicus adopts the Statement of Facts contained in Appellant's Brief at 4-12.

Amicus adopts the Statement of the Issues contained in Appellant's Brief at 3.

² Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, *Amicus* states that: (A) there is no party, or counsel for a party in the pending appeal who authored the amicus brief in whole or in part; (B) there is no party or counsel for a party in the pending appeal who contributed money that was intended to fund preparing or submitting the brief; and (C) no person or entity contributed money that was intended to fund preparing or submitting the brief, other than *Amicus* and its members.

SUMMARY OF ARGUMENT

The Supreme Court has made clear that the IEPs of children with disabilities must be “appropriately ambitious” to enable them to make progress. *Endrew F.*, 137 S. Ct. at 1000. The Supreme Court held that IDEA “requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances,” and programs that provided merely “some” progress were not adequate. *Id.* at 1001. Instead, the Court explained that children with disabilities (regardless of the severity of their disability) are to be challenged to reach *their potential* just as their non-disabled peers are challenged in accordance with their own potential to master the broad general education curriculum set by each state’s educational agency.

Accordingly, when evaluating whether a school district has denied a student a free appropriate public education (FAPE) by failing to implement an IEP, *Endrew F.* teaches that courts must consider students’ ability to “make progress appropriate in light of the child’s circumstances.” *Id.* But this inquiry goes beyond an evaluation of a student’s underlying capacity to learn, and courts have long been instructed to consider not only underlying aptitude but also disabling conditions and presentations that may be depressing a student’s ability to access instruction. For example, for students with maladaptive behaviors that are present for a significant period of time, schools are instructed to develop what is referred to

as a behavioral implementation plan (BIP). Moreover, such programming is (as all other elements of an educational program) to be evaluated against baselines and data to demonstrate the effectiveness of the BIP, and school districts violate the IDEA when they fail to revisit the BIP and use data to revise the BIP so as to make it more likely to address negative behaviors.

Under the IDEA, though, the focus on broader ability to access learning goes beyond just the BIP process. In some circumstances where a student's disability profile and presentation are such that a student experiences school aversion, school districts (as part of the BIP and IEP processes) must address the school aversion behaviors and cannot rely on other unrelated educational policies to excuse itself from its obligation to provide a FAPE. For example, as was the case below, schools do not employ inappropriate behavioral interventions, particularly when this mismatched intervention actually increases the unwanted school aversion and avoidance behaviors. More broadly speaking, though, schools cannot use the results of an inappropriate intervention and an inappropriate educational program as grounds that it has no obligation to provide services to the student and disenroll the student.

ARGUMENT

I. *ENDREW F.* ADDRESSED THE FAPE STANDARD FOR EDUCATING STUDENTS WITH DISABILITIES AND HELD THAT PLANNING MUST BE REASONABLY AMBITIOUS

IDEA provides federal assistance to states that educate children with disabilities. *Endrew F.*, 137 S. Ct. at 993. To receive the funds, states must provide FAPE to all eligible children. *Id.* (citing 20 U.S.C. § 1412(a)(1)). The instruction offered must be ‘specially designed’ to meet a child’s ‘unique needs’ through an ‘[IEP].’” *Id.* at 999 (quoting 20 U.S.C. §§ 1401(29) & (14)).

In *Endrew F.*, the Supreme Court rejected the Tenth Circuit’s low standard for a free appropriate public education (FAPE); that standard allowed a school district to meet the FAPE requirement by providing “merely . . . more than *de minimis*” educational benefit. *Id.* at 991. The Supreme Court instead held that: “The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.* at 1001. The Court held emphasized that the IEP must be “appropriately ambitious,” and the objectives must be “challenging.” *Id.* at 1000.

Further, the Supreme Court emphasized the importance of compliance with IDEA’s procedures. The Supreme Court rejected the argument that such provisions governing the IEPs required components “impose only procedural requirements – a checklist of items the IEP must address – not a substantive standard enforceable in court.” *Id.* As the Supreme Court explained, the “procedures are there for a reason.” *Id.* They provide insight into what it means to meet the unique needs of a child with a disability. *Id.*

As the Supreme Court recognized, the IEP is the roadmap to the child's academic and functional advancement, "constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Id.* at 999 (citing 20 U.S.C. §§ 1414(d)(1)(A)(i)(I)-(IV), (d)(3)(A)(i)-(iv)). The IEP must be drafted in compliance with a detailed set of procedures, which emphasize collaboration among parents and educators and careful consideration of the child's individual circumstances. *See Id.* at 994.

Every IEP must include "a statement of the child's present levels of academic achievement and functional performance," describe "how the child's disability affects the child's involvement and progress in the general education curriculum," and set out "measurable annual goals, including academic and functional goals," along with a "description of how the child's progress toward meeting" those goals will be measured. 20 U.S.C. § 1414(d)(1)(A)(i)(I)-(III). The IEP also must describe the "special education and related services . . . that will be provided" so that the child may "advance appropriately toward attaining the annual goals" and, when possible, "be involved in and make progress in the general education curriculum." 20 U.S.C. § 1414(d)(1)(A)(i)(IV).

If the parents of the child are dissatisfied with the IEP, or with the manner in which the IEP is implemented, they are entitled to an impartial due process hearing to be conducted by the State or local educational agency. *Walker Cty. Sch. Dist. v.*

Bennett, 203 F.3d 1293, 1294 (11th Cir. 2000) "Any party aggrieved by the result of the administrative proceedings in the state system" may bring a civil action in a district court. 20 U.S.C. § 1415(i)(2)(A). The court "(i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C).

II. *ENDREW F.*'S MANDATE THAT IEPs BE APPROPRIATELY AMBITIOUS AND HAVE CHALLENGING OBJECTIVES APPLIES TO STUDENTS WHOSE DISABILITIES INVOLVE CHALLENGING BEHAVIORS, AND, THEREFORE, REQUIRES THAT SCHOOL DISTRICTS ADDRESS MALADAPTIVE BEHAVIORS WITH AN APPROPRIATE FBA AND BEHAVIOR PLAN

A significant number of students with disabilities present with challenging behaviors that interfere with their ability to learn. For these students, *Endrew F.* mandates that their IEPs be appropriately ambitious and address their challenging behaviors with challenging goals designed to reduce the interfering behaviors. Thus, these students required Behavior Intervention Plans based on scientifically valid educational programs.

Because a student's interfering behaviors serve a function for that student, it is important to identify the purpose of the behavior. Once the function of the behavior is understood, a function-based intervention can be designed to decrease

the interfering behavior and instead increase appropriate behavior.³ A Functional Behavior Assessment (FBA) is a specialized evaluation in which specific environmental factors are manipulated systematically to develop a hypothesis regarding the function the behavior serves, analyzing the occurrence of the problem behavior and environmental factors.

A. The Requirements Surrounding FBAs are Well Understood

When a child’s “behavior impedes the child’s learning or that of others,” the IEP team must “consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.” 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i). FBAs are an evaluation under the IDEA that become necessary in certain circumstances where an IEP team and, or, parents need information to better understand a student’s educational needs and how those needs are impacted by a student’s behavior. *See Harris v. District of Columbia*, 561 F. Supp. 2d 63, 67–68 (D.D.C. 2008); *see also Letter to Gallo*, at p. 2 (April 2, 2013) (“FBA is generally understood to be an individualized evaluation of a child in accordance with 34 CFR §§300.301 through 300.311 to assist in determining whether the child is, or continues to be, a child with a disability.”) Failure to conduct an FBA can constitute a substantive denial of FAPE if fundamental

³ *See* Brittany Pennington, Elizabeth Pokorski, Skip. Kumm, & Brittany I. Sterrett, Practice Guide: School Based Functional Analysis at 4 (US. Dep’t of Educ., Office of Special Educational Programs 2017), <https://files.eric.ed.gov/fulltext/ED578082.pdf> (last viewed Sept. 8, 2019).

aspects of a student's presentation are not assessed, *see Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1119 (9th Cir. 2016), but it can also constitute a procedural failure when the failure interferes with the parent's ability to participate in the IEP process, *see E.S. v. Conejo Valley Unified Sch. Dist.*, No. CV 17-2629 SS, 2018 WL 3630297, at *14 (C.D. Cal. July 27, 2018).

The FBA reveals information about the antecedents, consequences, and frequency of challenging behavior. *See Neosho R V Sch. Dist. v. Clark*, 315 F.3d 1022, 1026 (8th Cir. 2003). FBAs also help to identify any co-occurring variables. Conducting proper FBAs doubles the success rate of an intervention. Andrea Cohen, *National Association of School Psychology Fact Sheet on Positive Behavioral Supports*, http://www.nasponline.org/resources/factsheets/pbs_fs.aspx. With this information, IEP teams are able to develop appropriate plans for how to target and eliminate negative behaviors, and how to build appropriate replacement behaviors.

An FBA is a process for analyzing the cause and purpose of a specific behavior exhibited by a student. Its purpose is to determine the reasons for the student's behavior and to develop a comprehensive treatment plan to manage and reduce the behavior.⁴ There are four main functions for behavior: “attention,

⁴ Mary M. Quinn et al., *Center for Effective Collaboration & Practice, Amer. Inst. for Research, Addressing Student Problem Behavior: An IEP Team's Introduction*

escape, tangible reimbursement, and sensor/automatic enforcement.”⁵ Some behaviors may “have a single function, but in others, challenging behaviors have multiple functions.”⁶ Thus, a student who gets sent to the office when he kicks or hits during class is able to escape an undesired task by that behavior.⁷ Knowing that the behavior serves the purpose of escape, a BIP can be designed to teach the student a socially appropriate method of escaping the undesired task, such as requesting a break, and also figure out a method of keeping the student engaged in educational tasks. Federal law is, unfortunately, well behind what is commonly understood to be best practices when it comes to behavior planning.⁸ The only codified rules regarding FBAs deal with when an IEP team has determined that certain conduct is a manifestation of a student’s disability. *See* 34 C.F.R. § 300.530 (e-f). However, this approach is reactive and is an outlier from the IDEA’s otherwise proactive approach to educational planning. As such, states across the country have been clarified FBA provisions at the state level and exceeded the requirements of the IDEA in either statute or state regulation.⁹

to Functional Behavior Assessment & Behavior Intervention Plan, Center for Effective Collaboration & Practice 3 (1998).

⁵ Pennington, *supra* n. 2 at 4.

⁶ *Id.* at 4

⁷ *Id.* at 11 Table 1.

⁸ *See* Heidi von Ravenswberg and Allison Blakely, Positive Behavior Intervention & Supports: OSEP Technical Assistance Center, *When to use Functional Behavioral Assessment? A State-by-State Analysis of the Law*, October 2015, p. 2.

⁹ *Id.*

Under the IDEA, at minimum, an FBA must be conducted when a student with an IEP is suspended for more than 10 consecutive school days or is otherwise subjected to a disciplinary change in placement. 20 U.S.C. § 1415(k)(1), (10); 34 C.F.R. § 300.520(b). Additionally, if a student's behavior impedes his/her learning or the learning of others, the IEP Team is required to consider the use of positive behavioral supports and other strategies to address the behavior. 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.346(a)(2)(i). It is best practice for an IEP Team to conduct an FBA and develop a behavior plan even in the absence of these requirements. Further, here, the district had agreed to conduct an FBA, and, therefore, it was required to implement its plan of providing an FBA.

The person(s) conducting the FBA should be highly trained in collecting data and conducting this type of assessment.¹⁰ The evaluator identifies the target behavior that is the focus of the FBA evaluation.¹¹ The evaluator should review information from a variety of sources, such as questionnaires, behavior charts, and interviews with the student, parents and his/her teachers. The evaluator must observe the events leading up to the behavior (antecedents) and the results of the behavior (consequences). These observations should occur in various settings. The evaluator also must record and collect systematic data to show the

¹⁰ Quinn, *supra* note 3.

¹¹ Pennington, *supra* n. 2 at 5. Note that Functional Analysis is the term for a Functional Behavior Assessment used amongst behaviorists.

characteristics of the environment that may contribute to the occurrence of a behavior. The student's IEP Team must then review the information gathered during the FBA and develop a hypothesis as to the function or functions of the student's behavior.

The BIP and FBA must be incorporated into the IEP, which in turn must be provided to the child's parents in advance of the commencement of the school year. *See* 20 U.S.C. § 1414(d)(1)(A)(i)(IV). An IEP's failure to provide an FBA and BIP to address behaviors impeding learning may itself constitute the denial of a FAPE. *See Danielle G. v. N.Y. City Dep't of Educ.*, No. 06-cv-2145(CBA), 2008 U.S. Dist. LEXIS 60192 (E.D.N.Y. Aug. 7, 2008), at *29-31 (reversing findings of IHO and SRO and holding that IEP's failure to include an FBA and BIP, among other deficiencies, deprived student of a FAPE); *Lauren P. v. Wissahickon Sch. Dist.*, No. 05-5196, 2007 U.S. Dist. LEXIS 44945, at *28-29 (E.D. Pa. June 20, 2007) (ordering reimbursement of tuition where failure to create a BIP constituted denial of a FAPE), *aff'd in part, rev'd in part on other grounds*, 310 F. App'x 552 (3d Cir. 2009). This principle is supported by the official commentary to the federal regulations, which expressly states, "a failure to ... consider and address [behaviors impeding learning] in developing and implementing the child's IEP would constitute a denial of [a] FAPE to the child." 34 C.F.R. Part 300, Appendix A, Notice of Interpretation, Section IV, Question 38.

B. An FBA Is an Evaluation Under IDEA

Because an FBA is an evaluation under the IDEA, the district court erred in rejecting the plaintiffs' claim that the district failed to conduct a proper functional behavior analysis on the ground that an FBA is not an evaluation under IDEA. *See In re Butte Sch. Dist. No. 1*, 14-60-BU-SHE, 2019 U.S. LEXIS 13311 (D. Mont. Jan. 28, 2019). More than a decade ago, the federal district court for the District of Columbia held that an FBA was an evaluation under IDEA in a well-reasoned decision that analyzed both the federal regulation and the purpose served by the FBA. *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 67-68 (D.D.C. 2008). See also *Cobb Cnty. Sch. Dist. v. D.B.*, 1:14-CV-02794-RWS, 2015 U.S. Dist. LEXIS 129855 (N.D. Ga. Sept. 28, 2015). Thus, the federal district court for the Northern District of Georgia found that its holding that an FBA is an educational evaluation under IDEA "comports with IDEA's statutory framework and its implementing regulations." 2015 U.S. Dist. LEXIS 129855, at *18. The federal regulations define the term evaluation as "procedures used in accordance with §§ 300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs." 34 C.F.R. § 300.315. That definition does not require that every individual evaluation or assessment itself be "comprehensive" in order to be considered an evaluation. *See* 34 C.F.R. § 300.315. An FBA can be used both to

determine whether the child has a disability and the nature and extent of special education and related services that the child needs regarding the child's behavior, and, therefore qualifies as an evaluation under 34 C.F.R. § 300.315.

That an FBA is an evaluation under the IDEA is important for reasons far beyond this case. Because an FBA is an evaluation under IDEA, as a general rule, school districts are required to provide notice before doing the evaluation and to obtain parental consent for the evaluation. 20 U.S.C. § 1414(b)(1) & (c)(3); 34 C.F.R. § 300.300. Because an FBA is an evaluation under IDEA, the FBA must use a variety of assessment tools to gather information; not use a single measure to do the assessment; and “use technically sound instruments.” 20 U.S.C. § 1414(b). Because an FBA is an evaluation under IDEA, it may not discriminate; it must be provided in the language and form “most likely to yield information”; it must use valid and reliable instruments; it must be conducted by trained professionals; and it must be administered using the instructions required by the testing instruments;. 20 U.S.C. § 1414 (b)(3)(A). Because an FBA is an evaluation under IDEA, a copy of the evaluation must be provided to parents. 20 U.S.C. § 1414(b)(4)(B). Because an FBA is an evaluation under IDEA, parents who disagree with a school district's FBA may be entitled to public funding for an Independent Educational Evaluation of an FBA. 34 C.F.R. § 300.502; *see Harris*, 561 F. Supp. 2d at 69.

As the *Harris* court noted, “The FBA is essential to addressing a child’s behavioral difficulties, and, as such, it plays an integral role in the development of an IEP.” 561 F. Supp. 2d at 68. Further, “the information gleaned from the assessment is central to formulating an IEP tailored to the needs of individual disabled children.” *Id.* Thus, “the FBA’s fundamental connection to the quality of a disabled child’s education compels this Court’s determination that an FBA is an “educational evaluation” for the purposes of Section 300. *Id.*

In reaching its determination that an FBA is not an educational evaluation, the district court did not consider *Harris* or *Cobb* or any other precedent construing the term evaluation. It also did not consider any of the professional literature setting out the requirements for an FBA. Rather, the district court held that an FBA was too narrow, being focused entirely on behavior, to serve as an evaluation, asserting that a reevaluation is concerned with “far more” than behavior, “including a child’s intelligence, academic performance, and physical ability.” *In re Butte Sch. Dist. No. 1*, at *18. By that logic, any evaluation that does not include a child’s intelligence or academic performance would not be considered an evaluation, and, thus, numerous evaluations commonly used to assess students would not be considered “evaluations” under IDEA, including evaluations for related services, such as occupational therapy evaluations and physical therapy evaluations.

In fact, the 2004 amendments to IDEA made clear that once a child has been determined eligible for a special education, additional evaluations are not required at all. Thus, the statute provides that no additional evaluations are needed, even at a three year reevaluation period, if “no additional data are needed to determine whether the child continues to be a child with a disability, and to determine the child’s educational needs.” 20 U.S.C. § 1414(c)(4). Thus, the school district could determine that a particular child only needed an FBA and did not need any other assessments or evaluations in order to determine the child’s educational needs. Thus, the fact that a particular evaluation is not comprehensive does not make it any less an evaluation under IDEA.

The district court did not address the merits of Plaintiffs’ claims that the district failed to conduct a proper FBA, instead finding that an FBA was not an evaluation under IDEA. As demonstrated above, an FBA is indeed an evaluation under IDEA, and, therefore, the district’s failure to conduct a proper FBA with appropriately trained staff violated IDEA.

Notably, in *Cobb*, the court relied on the hearing officer’s decision to find that a school district’s FBA was inappropriate because its data collection “was never going to provide a reliable enough conclusion as to the functions of [the student’s] serious and problematic behavior.” 2015 U.S. Dist. 129855, at *20. In that case, the school district’s FBA did not provide “data about the functions of

[the student's] problem behaviors and encourage positive behaviors.” *Id.* at 20. The court found that the function of the behavior was “highly relevant, if not crucial, to determining how to reduce or eliminate problem behaviors.” *Id.* at 20-21. The court found that the student’s serious violent and aggressive behaviors required “a more definitive identification of the functions of these behaviors.” *Id.* at 21. The district’s FBA did not take data on escape/avoidance and access to preferred items. *Id.* It also “did not collect data as to the consequences of [the student’s] behavior.” *Id.* The court found that, “without a thorough and accurate evaluation of [the student’s] behavior, the District cannot create an IEP that ensures that [the student] will receive a free appropriate public education.” *Id.* at 25.

C. Complete and Appropriate FBAs Are Often Needed to Develop Behavioral Improvement Plans to Address a Student’s Behavioral Problems

The FBA is a unique evaluation because it looks beyond the student’s behaviors and focuses on identifying significant, student-specific social, affective, cognitive, and/or environmental factors associated with the occurrence and non-occurrence of the specific behaviors. George Sugai, et al., *Applying Positive Behavior Support and Functional Behavioral Assessments in Schools* http://digitalcommons.calpoly.edu/cgi/viewcontent.cgi?article=1031&context=gse_fac, 8-9 (2000) (last viewed Sept. 8, 2019). The FBA presents a broad

perspective, and better understanding, of the function or purpose behind student behavior i.e. why a student engages in the behavior.

Function based interventions are more likely to be effective than those interventions that are not based on an FBA, and "premature efforts to treat problem behavior before seeking an understanding of the purposes it serves for a person can be inefficient, ineffective, and even harmful." John O. Cooper, Timothy E. Heron, & William L. Heward, *Applied Behavior Analysis* (2nd ed.) (2007). Research demonstrates that positive behavior supports are effective in reducing problem behavior in one-half to two thirds of the cases, and success rates nearly double when intervention is based on a prior functional assessment. F. Charles Mace, *The significance and future of functional analysis methodologies*. 27 J. Applied Behavior Analysis, 385-92 (1994).

Systems of positive behavioral supports are based on the theory that a student exhibits challenging behavior because the student gains something positive or escapes something negative through the behavior. In order to effectively address that behavior, it is necessary to determine its benefit or function.¹² By identifying the purpose served by the behavior, school staff can alter the

¹² PBIS is effective in reducing problem behavior in one-half to two-thirds of cases. The success of these interventions nearly doubles when based on a functional behavioral assessment. See Andrea Cohn, *Positive Behavioral Supports – Information for Educators* (2008), available at http://www.nasponline.org/resources/factsheets/pbs_fs.aspx.

environment, teach new skills, and encourage the student to adopt a more appropriate behavior that serves the same function as the inappropriate one. Identifying the purpose of the behavior is typically accomplished through an FBA.

D. The Information from an FBA Is Crucial to Developing an Appropriate Behavioral Intervention Plan that Addresses the Student's Behavior

After collecting data and developing a hypothesis about the function of the student's behavior, the IEP Team can create a Behavioral Intervention Plan (BIP). The BIP should include positive behavioral strategies, supplementary aids and services, and other supports to address the student's inappropriate behavior. The interventions and supports in a student's BIP must be tailored to address the function of the student's behavior and to replace it with more appropriate behaviors that serve that function. These interventions may include teaching the student alternate skills or replacement behaviors (e.g., conflict resolution, anger management or appropriate ways to request help)¹³ that serve the same function for the student.¹⁴ Modifications to curriculum or classroom assignments may help avert certain behaviors.¹⁵ Supports that are designed to address the behavior

¹³ Jo Webber and Brenda Scheuermann, *Accentuate the Positive: Eliminate the Negative!*, 24 *Teaching Exceptional Children* 13 (1991).

¹⁴ *Id.*

¹⁵ Dennis R. Knapczyk, *Reducing aggressive behaviors in special and regular class settings by training alternative social responses*, 14 *Behavioral Disorders* 27 (1988); Alan Polling and Charlotte Ryan, *Differential reinforcement of other behavior schedules: Therapeutic applications*, 6 *Behavior Modification* 3 (1982).

outside of the immediate context in which it occurs should also be included in the BIP. These may include the services of a counselor or school psychologist to help the student address academic or personal issues that contribute to his/her inappropriate behaviors, peer tutors,¹⁶ and involvement in community agencies or social service organizations.

It is a best practice for the BIP to include specific methods for praising the student in order to reinforce the positive behaviors and ultimately eliminate the inappropriate ones.¹⁷ Research shows that school personnel should reinforce appropriate behavior at least twice as often as the problem behavior was reinforced.¹⁸ The method of reinforcement should be developed in cooperation with the student, based on his/her strengths and preferences. Finally, best practice also requires the IEP Team to monitor the effectiveness of the BIP and to modify it as necessary.

¹⁶ Quinn, *supra* note 3 at 11-12. See also Concepcion Blake et al., *Middle School Students With Serious Emotional Disturbances as Social Skills Trainers & Reinforcers for Peers with SED*, 25 *Behavioral Disorders* 280 (2000).

¹⁷ Paul A. Alberto and Anne C. Troutman, *Applied behavior analysis for teachers* (Merrill/Prentice Hall ed., 9th ed. 2013); C.M. Charles, *Building classroom discipline: From models to practice* (Longman, Inc. ed., 11th ed. 2013); Geoffrey Colvin and Mike Lazar, *The effective elementary classroom: Managing for success* (Sopris West ed., 1997); Edward J. Kameenui and Craig B. Darch, *Instructional classroom management: A proactive approach to behavior management* (Longman, Inc. 2d ed., 2003); Mary M. Kerr and C. Michael Nelson, *Strategies for managing problem behaviors in the classroom* (Merrill ed., 6th ed. 2010); Geoffrey Colvin et al., *Precorrection: An instructional approach for managing predictable behaviors*, 28 *Intervention in School & Clinic* 143 (1993).

¹⁸ Quinn, *supra* note 3, at 12.

The goal of a well-executed FBA is to result in an effective BIP that meets the support needs of students. In a 2005 study, researchers compared the effectiveness of plans based on a FBA versus behavior intervention plans that were not based on FBA information for two middle school students.¹⁹ At baseline, problem behaviors were observed in 49% of intervals for one student. Implementation of a function-based Behavior Implementation Plan (BIP) resulted in an immediate and stable reduction to 9% of intervals. Introduction of the non-function-based BIP resulted in an immediate increase to baseline levels of problem behavior; with the re-introduction of function-based supports there was an immediate decrease to 6% of intervals. Very similar results were reported for the second student with both students experiencing low levels and low variability in problem behaviors during function-based interventions. Comparable results were produced in a 2004 study regarding examination of FBAs conducted on three elementary school students. Researchers found that interventions based on functional assessment were more effective than alternative approaches for all three

¹⁹ Kimberly Ingram, Teri Lewis-Palmer and George Sugai, *Function-based intervention planning: Comparing the effectiveness of FBA indicated and contra-indicated intervention plans*. 7 J. Positive Behavior Interventions, 224-236 (2005).

students.²⁰ These findings highlight the necessary and critical role of FBAs in the development of BIPs.

E. IDEA Requires that BIPs Address Behavior Through Positive Behavior Support

IDEA mandates the use of positive behavioral supports where a child's behavior impedes the child's learning. 20 U.S.C. § 1414(d)(3)(B)(i). The development of behavioral intervention services stem from a FBA. 20 U.S.C. § 1415(k)(1)(D)(ii). Based upon the results of the FBA, a school district creates a BIP, which is a plan designed to manage the interfering behaviors. The BIP must include a "baseline measure of the problem behavior; ... intervention strategies; ... [and] a schedule to measure the effectiveness of the interventions" Sugai, *supra*.

The BIP develops strategies to address these behaviors based upon the FBAs analysis as to why the student exhibits the behaviors. Thus, the creation of the BIP is dependent upon the FBA, much as the creation of the IEP is dependent upon evaluations and observations.

Accordingly, the FBA and BIP assist parents and school officials at IEP meetings to select interventions and strategies that directly address the problem

²⁰ Lori L. Newcomer and Timothy J. Lewis, *Functional Behavioral Assessment: An Investigation of Assessment Reliability and Effectiveness of Function-Based Interventions*, 12 (3) *Journal of Emotional & Behavioral Disorders*, 168-181 (2004).

behavior. *Harris v. D.C.*, at 68. Because the FBA provides information “central to formulating an IEP tailored to the needs of individual disabled children,” “it plays an integral role in the development of an IEP” and has “a fundamental connection to the quality of a disabled child’s education.” *Id.*

At the outset, when an IEP Team is developing an IEP for a student whose behavior impedes his or her learning or the learning of others, the team must “consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.” 34 C.F.R. § 300.324(a)(2)(i). This provision is important for several reasons. First, it requires the IEP Team to be proactive in considering how to meet the needs of a student with behavior challenges. Second, the provision requires consideration of *positive* interventions, supports, and strategies. Third, although the actual requirement regarding FBAs and BIPs is lodged in the discipline provisions of the IDEA, an IEP team cannot identify appropriate positive interventions, supports, and strategies for a student with behavior challenges without conducting a functional behavioral assessment. That assessment should then result in a behavioral intervention plan that includes positive behavioral interventions, supports, and strategies. If this provision is implemented appropriately, a student with behavior challenges should receive a functional behavioral assessment and behavioral intervention plan designed to

address his or her behavior *before* being disciplined and *before* an emergency situation leading to use of restraint or seclusion arises.

F. The Planning Process Is Ongoing, and When Maladaptive Behavior Continues Despite Implementation of a BIP, IDEA Requires that the BIP Be Revised Based on Data Obtained from Implementation

But having a BIP and collecting on behavior is insufficient to provide FAPE if the maladaptive behavior continues and no changes are made in the BIP. Thus, “If minimal progress occurs, the plan and possibly the assessment need to be reevaluated.”²¹ The student’s Behavior Support Team is responsible for evaluating the BIP on a regular basis because, “[w]ithout regular evaluation there are no objective means by which to determine if an intervention has been successful or if the efforts of the team have been worthwhile.”²² Thus, “[r]egular evaluation enables the team to make impartial, data-based decisions.”²³

Here, the BIP did not address the school refusal behavior. In light of the serious and prolonged school refusal behavior and its devastating impact on the student’s ability to benefit from education, the BIP should have forthrightly addressed the school aversion. Further, if the school aversion continues despite the

²¹ Laura A. Riffel, *Writing Behavior Intervention Plans (BIP) based on Functional Behavior Assessments (FBA): Making Data Based Decisions to Change Behavior* 14 (2007), www.pbis.org/common/cms/files/pbisresources/fba2bip4chicagoriffel.doc (last viewed Sept. 8, 2019).

²² *Id.* at p. 16

²³ *Id.*

BIP created following an FBA, the District was required to go back to the drawing board and review the available data to figure out how the BIP may be changed so that it has a greater likelihood of improving the maladaptive behavior.

G. The District Court’s Decision Indicates that the District Did Not Provide an FBA of the Behaviors that Needed to be Addressed and It Did Not Provide an Appropriate BIP

In this case, it is undisputed that the student had serious behavioral problems that interfered with his ability to benefit from education. The district court specifically found that the student’s “repeated and extreme inappropriate behavior and disruptive conduct greatly exacerbated the Difficulties the district faced” in providing the student with FAPE. *In Re Butte*, at *31-32. The court noted that his behavior resulted in frequent, sometimes daily “class evaluations due to sexually inappropriate or aggressive behavior and repeated acts of actual or threatened violence.” *Id.* at *32. Thus, these were the specific behaviors that needed to be targeted in a BIP. Yet, there was no FBA that provided a hypothesis about the function of these behaviors. Further, despite finding these extreme behaviors interfered with the students’ ability to benefit from education, the district court erred in finding that the district’s behavioral intervention plan met the dictates of IDEA.

It was the district, not the plaintiffs, that evinced “an egregious misunderstanding of the IDEA’s requirements.” *Id.* at *18. Having agreed to

provide an FBA, the district was required to provide an FBA that met the requirements of IDEA, including hiring an appropriately trained professional to carry out the evaluation. Further, the BIP needed to address those behaviors that were interfering with the student's ability to benefit from education. That the student's behaviors continued to interfere with his education (and that of his peers) indicated that the BIP was not working and needed to be changed. That a district has devoted some effort to addressing a student's behavior does not give it a free pass from IDEA violations if it does not adjust its approach when the BIP has proven ineffective. *See Lauren P.*, 2007 U.S. Dist. LEXIS 44945 at *23. Thus, when a student's interfering behavior persists despite an IEP designed to address the behavior, the IEP's failure to effect change in the student's behavior requires the district to make changes to the IEP so as to make it more likely that the IEP will change the student's behavior. *See Larson v. Indep. Sch. Dist. No. 361, 02-3611 (DWF/RLE)*, Civil No. 02-4095 (DWF/RLE), 2004 U.S. Dist. LEXIS 3322, at *39-40 (D. Minn. Mar. 2, 2004). Thus, the student's continued interfering behavior does not excuse the district from providing the student with FAPE but rather provides grounds for the district to take action to tweak its BIP so that it is reasonably calculated to improve the student's behavior.

CONCLUSION

The evaluation and assessment procedures in IDEA are crucial for delivery of appropriate services, as well as meaningful parental participation in the IEP process. Therefore, the violations that occurred in this case directly implicate the statute's primary purpose, which is to ensure that school districts accepting federal funds meet all the educational needs of students with disabilities. For this reason, Amicus respectfully submits that the Court should vacate the judgment of the district court and enter judgment in favor of Appellants.

Dated September 10, 2019

Respectfully submitted,

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**CERTIFICATION OF COMPLIANCE PURSUANT TO
FED. R. APP. 32(a)(7)(C)**

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached amicus brief is proportionately spaced, has a typeface of 14 points and contains 6,112 words.

Dated: September 10, 2019

/s/ Selene Almazan-Altobelli
Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I certify that on September 10, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF if they are registered users

/s/ Selene Almazan-Altobelli
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