

# Post – Hughes Bill

Behavior Intervention Plans  
Legal Update  
February 19, 2014

Schools Legal Service  
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# Legal Authority

- ▶ Federal Law

Individuals with Disabilities Education Act  
(IDEA) 20 United States Code section 1400

- \* Federal Regulations



# Legal Authority

- ▶ California Law
- ▶ Education Code
- ▶ Title 5 of the California Code of Regulations (CCR)
- ▶ Assembly Bill 86 (AB 86)
  - Urgency Legislation Effective July 1, 2013

# Legal Authority

- ▶ California Law – AB 86
  - Education Omnibus Trailer Bill related to education finance
  - Repeals the “Hughes Bill” – AB 2586 (1990)
    - Amends Education Code sections 56520 – 56525
    - Repeals specific sections of Title 5 Regulations
  - Aligns California law with Federal law (IDEA)
    - Eliminates behavior intervention requirements that exceed the IDEA such as Functional Analysis Assessments (FAA)
    - Eliminates mandated cost claims related to FAAs/ Behavioral Intervention Plans (BIP)

# Legal Authority

## ▶ California Law – AB 86

- Directs the Superintendent of Public Instruction to Repeal specific sections of Title 5 Regulations (Ed. Code § 56523)
  - 3001(d): Definition of Behavioral Emergency
  - 3001(e): Definition of Behavioral Intervention
  - 3001(f): Definition of Behavioral Intervention Case Manager (BICM)
  - 3001(g): Definition of Behavioral Intervention Plan
  - 3001(ab): Definition of Serious Behavior Problems
  - 3052: Designated Positive Behavioral Interventions

# Legal Authority

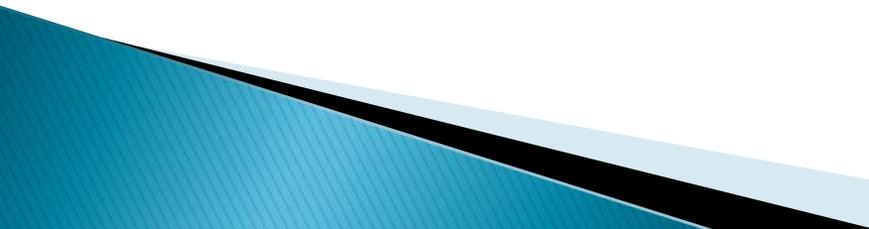
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  - 3001(g): Definition of Behavioral Intervention Plan
  - 3001(ab): Definition of Serious Behavior Problems
  - 3052: Designated Positive Behavioral Interventions

# AB 86 – California’s Legislative Intent

- ▶ Children exhibiting serious behavioral challenges receive timely and appropriate assessments and positive supports and interventions in accordance with the IDEA
- ▶ When behavior interventions, support and other strategies are used, they must be used in consideration of the student’s physical freedom and social interaction and be administered in a manner that respects human dignity and personal privacy and ensures the student’s right to placement in the least restrictive environment (LRE) (Ed. Code § 56520)

# What are the Changes?

- ▶ Instead of conducting an FAA, school personnel will conduct a Functional Behavioral Assessment (FBA) consistent with the IDEA when developing a BIP
  - ▶ A BICM is no longer required to monitor the BIP or consult with school staff or parents
    - Which qualified school staff will assume this role?
    - We strongly recommend that only COBIS (Continuum of Behavior Interventions and Supports) trained or Board Certified Behavior Analysts (BCBA) conduct and monitor the BIP
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# What are the Changes?

- ▶ A BIP is developed consistent with IDEA requirements
  - What is the fate of Behavior Support Plans (BSP)?
  - BSPs must be eliminated within one year's time
  - What to do in place of a BSP:
    - Two examples of what occurs after a student has had a BSP
      - BSP is eliminated and goal(s) and objective(s) are prepared in its place
      - Local educational agency (LEA) offers an FBA, gets consent for the FBA, performs the FBA and writes a BIP

# What are the Changes?

- ▶ Emergency Interventions are found in Education Code section 56521
  - This incorporated the requirements of 5 C.C.R. section 3052 which was repealed. (Yes, you still must comply!)
  - Used to control unpredictable, spontaneous behavior that poses clear and present danger of serious physical harm to the student or others that cannot be immediately prevented by a response less restrictive than the temporary application of a technique used to contain the behavior. (Behavior not in the FBA/BIP)

# Obligation to Conduct an FBA/ Develop a BIP Under the IDEA

- ▶ The IDEA identifies two circumstances in which the individualized education program (IEP) team must consider a student's need for the use of positive behavioral interventions and supports, and other strategies to address behavior –
  - As part of **Special Factors** in the IEP
  - As part of **Disciplinary Action**
- ▶ However, prior to handling the behavior via a BIP, LEA must consider Early Intervention

# Obligation to Conduct an FBA/ Develop a BIP Under the IDEA

## ▶ IEP Special Factors

- When the student's behavior impedes his/her own learning, or the learning of others, consider the use of positive behavioral interventions and supports, and other strategies to address that behavior
- Conduct FBA
- Develop BIP
- 20 U.S.C. section 1414(d)(3)(B)(i)
- 34 C.F.R. section 300.324(a)(2)(i)

# Obligation to Conduct an FBA/ Develop a BIP Under the IDEA

## ▶ **Disciplinary Removal**

- When the student has been removed from his/her current educational placement for 10 school days due to a behavioral or disciplinary offense; and
- If the behavior is determined to be a manifestation of the student's disability
- You **MUST** offer an FBA and write a BIP
  - 20 U.S.C. section 1415(k)(1)(D)(ii) and (k)(1)(F)
  - 34 C.F.R. section 300.530(d)(ii) and (f)(i)

# Obligation to Develop a BIP Under the IDEA

- ▶ The IDEA does not define “behavioral intervention” and does not impose any specific requirements for how to conduct or implement an FBA or a BIP
- ▶ However, we are going to make strong recommendations for how to conduct an FBA and write a BIP

# Definitions – IDEA

- ▶ FBA – not specifically defined in the IDEA or Federal Regulations
  - An FBA is a process to determine an explanation for the purpose behind a specific problem behavior
  - When there is a disciplinary removal for 10 school days in the same school year, an FBA must be conducted and behavioral intervention services must be developed to address the behavior violation so that it does not recur
    - 34 C.F.R. section 300.530(d)(ii)

# Definition – IDEA

- ▶ Manifestation Determination
  - If the conduct was a manifestation of the disability, the IEP team must conduct an FBA if it was not previously done, and implement a BIP or review the BIP and modify as necessary to address the behavior
  - The general purpose of an FBA is to provide the IEP team with additional information, analysis and strategies for dealing with undesirable behavior when such behavior is interfering with the student's education
    - 34 C.F.R. section 300.530(f)

# IDEA and California Law

- ▶ IEP team must consider behavior as part of Special Factors
  - 34 C.F.R. section 300.324 (a)(2)(i); Education Code section 56341.1(b)(1)
- ▶ If behavior impedes student's learning or that of others, consider use of positive behavioral interventions and supports, and other strategies to address behaviors
  - Curriculum changes and adaptations
  - Classroom structure
  - Instructional organization and management
  - Behavior goals
  - Conduct FBA/develop BIP

# IDEA and California Law

- ▶ Disciplinary Removals
  - When the student has been removed from his/her current educational placement for 10 school days due to a behavioral or disciplinary offense
  - If the behavior is determined to be a manifestation of the student's disability
    - 20 U.S.C. section 1415(k)(1)(D)(ii) and (k)(1)(F)
    - 34 C.F.R. section 300.530 (d)(ii) and (f)(i)
  - You **MUST** conduct an FBA and develop BIP

# IDEA and California Law

- ▶ What will an FBA look like?
  - Not specifically defined in the IDEA
  - Assessment plan and parental consent required
  - We recommend including the same components of an FAA as we know it – SELPA recommends also
    - A description of the nature and severity of the behavior(s) in objective and measurable terms
    - A description of the behavior(s) that includes baseline data and an analysis of the antecedents and consequences that maintain the behavior, and a functional analysis of the behavior across all appropriate settings in which it occurs

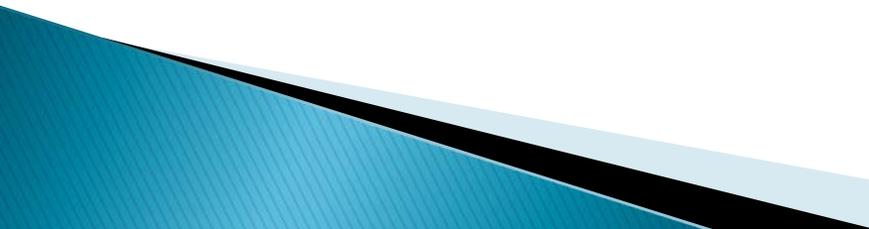
# IDEA and California Law

- ▶ What will an FBA look like?
  - It will include systematic observation of the immediate antecedent events associated with each instance of the display or the targeted inappropriate behavior
  - KCSOS–SELPA recommends 10–15 hours of observation
  - Also, KCSOS–SELPA recommends the assessor must re–observe the student if the antecedent cannot be determined

# IDEA and California Law

- ▶ What will an FBA look like?
  - Systematic observation and analysis of the consequences following the display of the behavior to determine the function the behavior serves for the individual, i.e., to identify the specific environmental or physiological outcomes produced by the behavior
    - The communicative intent of the behavior is identified in terms of what the individual is either requesting or protesting through the display of the behavior
  - Ecological analysis of the setting in which the behavior occurs most frequently

# IDEA and California Law

- ▶ Review of records for health and medical factors which may influence behaviors (medication levels, sleep cycles, health, diet)
  - ▶ Review of the history of the behavior to include the effectiveness of previously-used behavioral interventions
  - ▶ A description of the nature and severity of the targeted behavior(s) in objective and measurable terms
  - ▶ Use only one behavior for each BIP!  
(Elopement vs. fighting vs. not working)
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# IDEA and California Law

- ▶ What will an FBA look like?
  - We recommend a description of the targeted behavior(s) that includes baseline data and an analysis of the antecedents and consequences that maintain the targeted behavior, and that functional analysis of the behavior across all appropriate settings in which it occurs
  - A description of the rate of alternative behaviors, their antecedents and consequences
  - Recommendations for consideration by the IEP team which may include a proposed BIP
    - Prior to that, you should be looking at Goals & Objectives, refer back to Tier 1, refer back to Tier 2, and lessons plans

# IDEA and California Law

- ▶ What will an FBA look like?
  - How frequently will a new FBA need to take place?
    - Whenever Behavioral Emergency Reports (BER) show a challenging behavior is not being addressed
    - Previously unseen new challenging behaviors are not being addressed
  - How frequently will the BIP need to be reviewed?
    - Quarterly (when progress on goals are also monitored)
    - Annually
    - When ineffective

# IDEA and California Law

- ▶ Who can conduct an FBA/Develop a BIP?
  - AB 86 does not establish any specific training or credential requirements
  - Definition of a BICM has been repealed (5 C.C.R. §3001(f))
  - A BCBA may conduct behavior assessment and provide behavior intervention services; however, an LEA is not required to use a BCBA (Ed. Code § 56525)
  - The State Superintendent shall explore current training requirements for teachers to ensure sufficient training is available in behavior interventions (Ed. Code section 56524). The Superintendent has not made any recommendations on this yet

# IDEA and California Law

## ▶ Who can conduct an FBA/Develop a BIP?

### *Qualified Personnel*

- Qualified Personnel means that a person has met federal and state certification, licensing, registration, or other comparable requirements which apply to the area in which he/she is providing special education or related services – or in the absence of such requirements, the CDE approved or recognized requirements, and adheres to the standard of professional practice established in Federal/State law or regulation, including the standards in the California Business and Professions Code (5 C.C.R. section 3001(z))
- Personnel trained in behavior analysis with an emphasis on positive behavioral interventions.
- SLS and KCSOS SELPA recommend that only COBIS trained or BCBAs should conduct FBAs and develop BIPs.

# IDEA and California Law

- ▶ Who can conduct an FBA?
  - Only BCBA's or COBIS trained personnel

# IDEA and California Law

- ▶ What will a BIP look like? Stay the same?
  - Yes, the BIP will stay the same in the KCSOS–SELPA
  - A written document developed when the individual exhibits behavior problems that interfere with the implementation of the goals and objectives of the IEP
  - Will it become part of the IEP?
    - IDEA does not specify if it becomes part of the IEP
    - We recommend that it **MUST** become part of the IEP
      - Otherwise, teachers, related services personnel and others will not be aware of it and will not implement it

# IDEA and California Law

- ▶ What will a BIP look like?
  - Include a summary of relevant and determinative information gathered from the FBA
  - Objective and measureable description of the targeted maladaptive behaviors and replacement positive behaviors
  - The individual's goals and objectives specific to the BIP
  - Personnel must transfer to SIRAS the behavioral goals and objectives that are on the BIP
  - No one will look at and implement the behavioral goals and objectives if they are not on a stand-alone goal and objective

# IDEA and California Law

- ▶ What will a BIP look like?
    - A detailed description of the behavioral interventions to be used and the circumstances for their use
    - Specific schedules for recording the frequency of the use of the interventions and the frequency of the targeted and replacement behaviors, including specific criteria for discontinuing the use of the intervention for lack of effectiveness or replacing it with an identified and specific alternative
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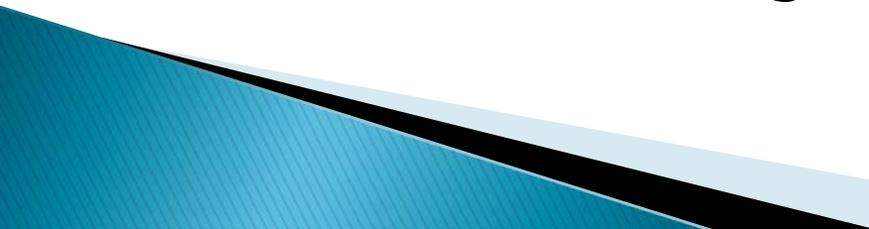
# IDEA and California Law

- ▶ What will a BIP look like?
  - Include criteria by which the procedure will be faded and phased out or less intense/frequent restrictive behavioral intervention schedules or techniques will be used
  - You must provide a copy to the LEA's employees and related service providers that are responsible for implementation of the BIP in the educational setting

# IDEA and California Law

- ▶ What will a BIP look like?
  - We do not recommend including those behavioral interventions which will be used in the home, residential facility, work site or other non-educational settings
  - We recommend specifying dates for periodic review by the IEP team of the efficacy of the program
    - Quarterly
    - Annually
    - When necessary

# Emergency Interventions - Education Code section 56521.1

- ▶ Emergency interventions may only be used to control unpredictable, spontaneous behavior that poses clear and present danger of serious physical harm to the student, or others, and that cannot be immediately prevented by a response less restrictive than the temporary application of a technique used to contain the behavior
  - ▶ Cannot be used as a substitute for the systematic BIP that is designed to change, replace, modify, or eliminate a targeted behavior
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# Emergency Interventions – Education Code section 56521.1

- ▶ Emergency Interventions shall not include:
  - Locked seclusion, unless in a facility permitted by State law to use a locked room
  - Employment of a device, material, or object that simultaneously immobilizes all four extremities, except techniques such as prone containment may be used as an emergency intervention by **trained staff**
  - An amount of force that exceeds that which is reasonable and necessary under the circumstances

# Behavioral Emergency Report – Education Code section 56521.1

- ▶ To prevent emergency interventions from being used in lieu of planned, systematic behavioral interventions, the parent, guardian and residential care provider, if appropriate, shall be notified within one school day:
  - If an emergency intervention is used; or
  - Serious property damage occurs
- ▶ A BER shall immediately be completed and maintained in the student's file and sent to the SELPA

# Behavioral Emergency Report – Education Code section 56521.1

- ▶ The BER shall include all of the following:
  - Name and age of student
  - Setting and location of student
  - Name of staff or other persons involved
  - Description of the incident and the emergency intervention used, and whether the student is currently engaged in systematic BIP
  - Details of any injuries sustained by the student or others, including staff

# Behavioral Emergency Report – Education Code section 56521.1

- ▶ If the BER is written for a student who does not have a BIP, the designated responsible administrator, shall, within two days, schedule an IEP team meeting to:
  - Discuss the BER, recommend an FBA is necessary and draft a BIP if the FBA is conducted
  - The IEP meeting is recommended to be held within 10 school days of the incident for which the BER was written
- ▶ The IEP team shall document the reasons for not conducting the FBA, not developing an interim plan, or both

# Behavioral Emergency Report – Education Code section 56521.1

- ▶ If a BER is written for a student who has a positive BIP, an incident involving a previously unseen serious behavior problem, or where a previously designed intervention is ineffective, it shall be referred to the IEP team to review and determine if the incident constitutes a need to modify the positive BIP

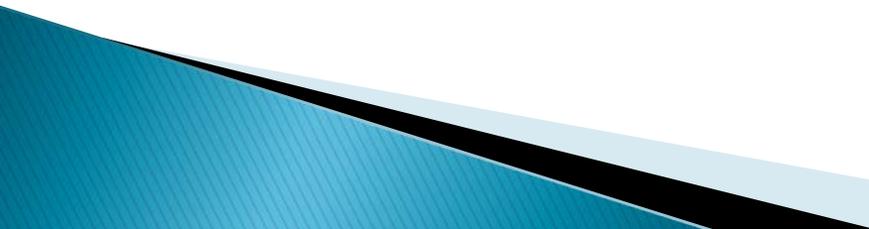
# Prohibited Interventions – Education Code section 56521.1

- ▶ The following interventions are prohibited:
  - An intervention that is designed to, or likely to cause physical pain, including, but not limited to electric shock
  - An intervention that involves the release of noxious, toxic, or otherwise unpleasant sprays, mists, or substances in proximity to the face of the individual
  - An intervention that denies adequate sleep, food, water, shelter, bedding, physical comfort, or access to bathroom facilities

# Prohibited Interventions – Education Code section 56521.2

- ▶ The following interventions are prohibited:
  - An intervention that is designed to subject, used to subject, or likely to subject the individual to verbal abuse, ridicule, or humiliation, or that can be expected to cause excessive emotional trauma
  - Restrictive interventions that employ a device, material, or objects that simultaneously immobilize all four extremities, including prone containment, except that prone containment or similar techniques may be used by trained personnel as a limited emergency intervention

# Prohibited Interventions – Education Code section 56521.2

- ▶ The following interventions are prohibited:
    - Locked seclusion, unless in a facility otherwise licensed or permitted by State law to use a locked room
    - An intervention that precludes adequate supervision of the individual
    - An intervention that deprives the individual of one or more of his/her senses
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# Due Process Hearing Issues

- ▶ Failure to appropriately address behavior that impedes a student's learning can result in a denial of a free appropriate public education (FAPE)
- ▶ *Student v. Patterson Joint Unified Sch. Dist.*
  - OAH Case No. 2009110397
- ▶ *Student v. Oakdale Joint Unified Sch. Dist.*
  - OAH Case No. 2010050392
  - Law effective 7/1/2013

# Due Process Hearing Issues

## ▶ BIP

- Is the classroom environment an antecedent for the behavior?
- Are the current strategies, and/or behavior goals effective?
- Do the behavior problems warrant an assessment via an FBA? Are they typical or non-typical behaviors?
- Document behavioral incidents
  - Parent Contact Log
  - Data Collection Chart
    - Frequency/intensity/antecedents

# Due Process Hearing Issues

- ▶ Appropriateness of FBA
  - Specific data
  - Observations across environments
  - Analysis
- ▶ Requests for independent educational evaluations in behavior – yes, parents can request an IEE for an FBA
- ▶ Implementation of BIP – refusal of consent
  - If the parent does not consent to the BIP, then you cannot implement it

# Due Process Hearing Issues

- ▶ Failure to conduct FBA and develop BIP can result in a denial of FAPE
  - Compensatory education
  - Ensure that Intensive Social Emotional Services (ISES) and ISES goals and objectives are separate from the BIP; however, staff needs to work with each other to resolve the student's behavioral issues

# Due Process Hearing Issues

## ▶ OAH Website

- <http://www.dgs.ca.gov/oah/SpecialEducation/Programs.aspx>
- <http://www.dgs.ca.gov/oah/SpecialEducation/searchDO.aspx>

# QUESTIONS



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