

*This Practice Brief was developed as result of the roundtable dialogue that occurred at the 2019 PBIS Leadership Forum in Chicago, IL.*

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## Rationale

After years of litigation on the rights of students with disabilities to have access to public education, Congress passed the Education of Children for All Handicapped Act (Public Law 94-142, 1975), the precursor to the current law: The Individuals with Disabilities Act (IDEA). This act has been reauthorized several times, most recently in 2004. For the purpose of this practice brief, IDEA will be used to identify the law of special education.

The IDEA includes key principles for the education of students with disabilities, ranging from where a student should be educated (e.g., Least Restrictive Environment) to the development of an Individualized Education Program (IEP) crafted by an IEP team that includes parents as equal members. The most important legal principle of the IDEA is the Free Appropriate Public Education (FAPE) mandate. FAPE supports the education of students with disabilities at no cost, ideally in their neighborhood public schools as appropriate.

There have been several court cases that have clarified the Congressional intent and purpose of the IDEA. Two of the most notable were about FAPE and the degree of educational benefit to which a student with disability was entitled. Under *Rowley*, it was claimed that a student who was deaf was not receiving FAPE when the school did not provide certain services (i.e., an interpreter). The Court set a rule for determining FAPE that ensured that the school/district was following the procedural rules while making sure the student received an educational “benefit:”

“First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?” (*Rowley*, 1982, p. 206-207).

After *Rowley*, Courts grappled with what was meant by “benefit” (e.g., was merely the minimal sufficient?). In 2018, the case of *Andrew F.* was heard at the Supreme Court when it was claimed that a student with autism was

†This document is not intended to provide comprehensive legal guidance. Districts/schools should consult with their district’s legal resources for deciding on legal actions and procedures.

not receiving FAPE because he was not receiving an educational benefit under his IEP. His parents argued that both academic and behavioral needs were not met in his public school as he had the class, climb over furniture and other students, and occasionally run away from school...He was afflicted by severe fears of common-place things like flies, spills and public restrooms” (*Andrew F.*, 2017, p. 7).

Despite the behaviors, Andrew’s IEP did not address any behavioral concerns. When his parents placed him into a private school, both academic and behavioral needs were addressed and Andrew began to make progress. When the public school refused to adopt the interventions from the private school upon his potential return to public school, Andrew’s parents re-enrolled him at the private school and sued the district, claiming a denial of FAPE. Ultimately, the Supreme Court reaffirmed the first part of the Rowley test but shifted the second part to consider progress when determining if the student is receiving an educational benefit:

“To meet its substantive obligation under IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances” (*Andrew F.*, 2017, p. 11).

Additionally, as the behavioral needs of Andrew were not being addressed, this, in part, was one of the potential violations of FAPE that was reaffirmed when it was sent back to the lower district court. Andrew’s family was provided reimbursement for tuition and other costs (e.g., “reasonable attorney fees;” *Andrew F.*, 2018, p. 22). *Andrew F.* is an important case to keep in mind when considering the education of students with disabilities, including those with behavioral challenges.

## MTSS & IDEA

There are additional legal and policy considerations that are important to recognize in the context of Multi-tiered Systems of Support (MTSS), such as Positive Behavioral Interventions and Supports (PBIS).

MTSS was designed, in part, to address the education of at risk students. The goal was to identify and provide services to students based on their level of need. Tier 1 (universal) applies to most students (approximately 80%), Tier 2 (secondary) is for students that need additional supports, such as small group instruction (approximately 15%), and Tier 3 (individual) is for students that need the most intense, one-on-one support (approximately 5%). When the system works as intended, schools are able to more effectively address academic and behavioral needs.

Within IDEA itself, MTSS is included when addressing evaluation for eligibility and identification of students with disabilities. MTSS, designated a scientific, research-based intervention, was a response to the severe discrepancy model used in special education evaluations where a student would not be identified as in need of special education services until approximately 3<sup>rd</sup> grade, when the discrepancy could be detected, promoting a “wait to

fail” response. The tiered model of MTSS was added as a way to help at risk students by identifying and addressing their needs earlier, before they might fall behind. As well, the re-authorization of IDEA in 2004 incorporated funding for early intervening services that included screening, etc., for students not yet identified as needing special education (IDEA, 20 U.S.C. § 1413(f)). These features of early intervention tend to align with core features of MTSS (e.g., focus on early intervention, screening).

There is some potential conflict with this tiered identification process in the balance between students receiving services through a MTSS system and the school’s Child Find obligation to identify students in need of special education. This has resulted in schools not knowing *when* they should evaluate a student if that student is receiving tiered supports through MTSS. This attempt to balance the goals of the MTSS system with the legal directive of Child Find can be difficult for schools/districts to navigate.

Additionally the U.S. DOE has issued guidance letters on MTSS (called Response to Intervention (RTI) in the letters). Such guidelines, which often come in the form of Dear Colleague Letters, do not create law or add to existing law. Rather, they help provide guidance on the way a governmental entity (here the U.S. Department of Education) is likely to interpret the law. For example, if a parent requests an evaluation for special education, that request must be acted upon even if a student is progressing through the tiers. If the school does not think the student requires special education, they must follow procedural obligations of notification under IDEA for the parents, which could lead to a filing of a due process hearing. Schools should exercise extreme caution in denying a parent request for a special education evaluation and refer to their district and state legal teams for further guidance.

## PBIS & IDEA

Positive Behavioral Interventions and Supports (PBIS) is specifically named in IDEA, beginning with the reauthorization of 1997, as well as in key guidance documents from the Department of Education. Notably, the IDEA states that the IEP team *shall consider* positive behavioral interventions and supports, and other strategies, when a student has behavior needs that impact their learning or the learning of others (20 U.S.C. § 1414(d)(3)(B)(i)). State Educational Agencies are authorized to “provide training in the methods...positive behavioral interventions and supports to improve student behavior in the classroom” (IDEA, 20 U.S.C. § 1454(a)(3)(B)(iii)(I)). Furthermore, when a student is subject to a disciplinary procedure that results in a change of placement, a manifest determination must be held within 10 days to determine if the behavior was related to the disability or a failure to implement the Individual Education Program (IEP; 20 U.S.C. § 1415(K)(1)(E(i)) and if it was related, the IEP team shall conduct a functional behavior assessment and implement a behavioral intervention plan if there has not been one done for the student previously, or review or modify the behavioral intervention plan as needed to support the student (20 U.S.C. § 1415(K)(1)(F)).

Finally, the tiered aspect of PBIS is directly referred to in the Dear Colleague Letter of August 16, 2016 (see link below). In this Letter, PBIS as a tiered system of addressing behavior, is suggested to address behavioral needs of students in special education (Dear Colleague Letter, 8/1/16, p. 5). Additionally, the Letter states that when the behavioral needs of a student are not met and if there is not a consideration of “the inclusion of positive behavioral interventions and supports in response to behavior that impeded the child’s learning or that of others” there might be a violation of FAPE (Dear Colleague, 8/1/16, p. 9).

## Frequently Asked Questions<sup>2</sup>

**Q:** *My school uses MTSS. We have a student who is going through the MTSS process. His parents have asked for a special education evaluation. Can we wait until he has gone through MTSS before evaluating for special education?*

**A:** No! If a parent requests an evaluation for special education the school cannot say they need to go through MTSS first. This was addressed in the Dear Colleague letter described above. If the school believes the student is benefitting from MTSS, a school/district might refuse to evaluate but must supply written notice to the parent so the parent is aware of their rights, which might include a due process hearing. Additionally the school district should have data showing that the student is benefitting from the MTSS.

**Q:** *We have a student who is in Tier 3 of our MTSS system. We think she might need special education but we are not sure. What should we do?*

**A:** This is not a simple answer. The school/district has an obligation under Child Find to evaluate any student they think might need special education. However, how do we know if the student is benefitting? What does our system look like? First we need to look at the data and on-going progress monitoring. If the school decides that an evaluation is needed, we can use the data from the MTSS process to help determine eligibility. We might also check to see what our state and district guidelines suggest for MTSS as well as best practice for any curriculum we might be using to determine time-lines for effectiveness. In short, this is a difficult question and involves multiple layers of consideration.

**Q:** *One of the students in our school has an IEP for autism. All of his goals are academic. Lately we are finding that this student is having behavioral challenges. The student gets up and walks out of class without permission, and if they are asked to stop work they like to do and do another task, they have a temper tantrum. What should we do?*

<sup>2</sup>This document is not intended to provide comprehensive legal guidance. Districts/schools should consult with their district’s legal resources for deciding on legal actions and procedures.

**A:** A student should have their needs met, both academic and behavioral through the IEP. If the student has behavioral needs, perhaps it is time to ask for the IEP team to come together (with the parents) and consider if they need to evaluate and include specific behavioral goals. Ideally this student might benefit from a functional behavior assessment that considers why the behavior is occurring that is tied to a behavior support plan that addresses how to address the behavior effectively. Remember that in the Endrew case we saw similar behaviors and this was one reason that the Court found a denial of FAPE for Endrew. It is important to consider behavioral needs for students with disabilities regardless of the disability category.

## Resources

### General

- Resource list by topic under IDEA: <https://sites.ed.gov/idea/topic-areas/>
- Resource for Law and Policy from U.S. DOE: <https://www2.ed.gov/policy/landing.jhtml?src=go>

### RTI/MTSS

- OSEP Memo 11-07 on Response to Intervention (RTI). January 21, 2011. RTI cannot form the basis to delay/deny special education for evaluation: <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osep11-07rtimemo.pdf>
- OSEP Memo 16-07 on Response to Intervention (RTI) and Preschool Services. April 29, 2016. RTI cannot form the basis to delay/deny special education for evaluation for preschoolers: <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/oseptipreschoolmemo4-29-16.pdf>
- Question-and-Answer Documents on RTI, including the use of funds for students with special education evaluation: [https://sites.ed.gov/idea/files/07-0021.RTI\\_.pdf](https://sites.ed.gov/idea/files/07-0021.RTI_.pdf)

### PBIS

- Dear Colleague Letter (8-01-2016) discusses behavioral supports for students with disabilities, including using PBIS and the potential of a procedural or substantive denial of FAPE because the IEP team did not consider PBIS to respond to student's behavior: <https://www2.ed.gov/policy/gen/guid/school-discipline/files/dcl-on-pbis-in-ieps--08-01-2016.pdf>
- Summary of PBIS guidance letter for stakeholders: <https://www2.ed.gov/policy/gen/guid/school-discipline/files/dcl-summary-for-stakeholders.pdf>

## References

Board of Education of Hendrick Hudson Central School District v. Rowley (*Rowley*), 458 U.S. 176 (1982).

Education for all Handicapped Children Act, Pub. L. No. 94-142 (1975).

Endrew F. v. Douglas Country School District (*Endrew F.*), 580 U.S. (2017).

Endrew F. v. Douglas Country School District (*Endrew F.*), Civ. Action No. 12-cv-2620-LTB (D. Colo. February 12, 2018).

Individuals with Disabilities Act, 20 U.S.C. §§ Section 1414 *et seq.* (2006 & Supp. V. 2011).

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