

**COMPLAINT FILED BEFORE THE NEW YORK STATE EDUCATION  
DEPARTMENT BY ADVOCATES FOR CHILDREN OF NEW YORK, INC. AGAINST  
THE NEW YORK CITY DEPARTMENT OF EDUCATION**

1. Each year, students with disabilities are disproportionately suspended from New York City public schools. Even more students with disabilities in New York City public schools are otherwise removed from their classroom for extended periods of time as a reaction to problem behavior. As a result of this form of discipline, students with disabilities are losing valuable instruction time when they should be receiving the appropriate positive supports to address their behavior.

2. New York Education law and regulations mandate that schools provide the necessary positive behavioral supports for students with disabilities. N.Y. Educ. § 4402(j); 8 N.Y.C.R.R. § 200. To that end, the New York State Education Department has issued a number of mandates to ensure that schools identify individual students' behavioral challenges that impede learning, develop strategies to address the causes and triggers of each student's concerning behavior, and implement positive behavioral supports to address students' individual behavioral needs. 8 N.Y.C.R.R. §§ 200.1(mmm), 200.1(r), 200.4, 200.22, 201.3; The University of the State of New York Memorandum on Functional Behavior Assessments, May 2011; The University of the State of New York Memorandum on Behavior Improvement Plans, May 2011.

3. Key to ensuring that all students with disabilities receive the necessary behavioral supports is the identification of students' individual behavioral needs through Functional Behavioral Assessments ("FBAs"), which the law requires under certain circumstances. The purpose of the FBA is to observe a student's behavior in different educational settings at different times of day with different people in order to understand what causes the challenging behavior and determine what supports could assist the student to avoid that behavior. Amy

Bobrow, *Problem Behaviors in the Classroom: What They Mean and How to Help—Functional Behavioral Assessment*, 7 Child Study Center Letter 2 (Nov./Dec. 2002).

4. As the Court of Appeals for the Second Circuit recently recognized, “The failure to conduct an adequate FBA ... may prevent the [Committee on Special Education] from obtaining necessary information about the student’s behaviors, leading to their being addressed in the [Individualized Education Program] inadequately or not at all....The entire purpose of an FBA is to ensure that the IEP’s drafters have sufficient information about the student’s behaviors to craft a plan that will appropriately address those behaviors.” *R.E. v. New York City Dep’t of Educ.*, 694 F.3d 167, 190 (2d Cir. 2012).

5. If the FBA concludes that a student’s behavior is impeding learning, the school should develop a Behavior Intervention Plan (“BIP”) to address those behaviors. 8 N.Y.C.R.R. §§ 200.4(d)(3), 200.22(b)(1)(i). The BIP identifies the behavioral concerns specific to the individual student and creates a plan to address and prevent the concerning behavior. By addressing the triggers and causes for the student’s challenging behavior identified in the FBA, the BIP is able to serve two purposes: first, the BIP creates a plan so that all members of the school staff consistently address the student’s behavior proactively during the school day to try to prevent the concerning behavior from occurring at all. Second, the BIP creates a plan for the school to implement if the student exhibits the concerning behavior so that behavior does not escalate. Lee Kern, *Addressing Persistent Challenging Practices*, [http://www.challengingbehavior.org/do/resources/documents/rph\\_pers\\_chall\\_beh.pdf](http://www.challengingbehavior.org/do/resources/documents/rph_pers_chall_beh.pdf) (visited Mar. 20, 2013); 8 N.Y.C.R.R. § 200.22(b)(4).

6. FBAs and BIPs are critical to ensure that students receive necessary supports when their behaviors interfere with their learning rather than being removed from the classroom for

disciplinary reasons. Absent a BIP that provides positive support and intervention for a student's behavior, students are often suspended or removed from the classroom and lose valuable instructional time. Losen, Daniel J. *Discipline Policies, Successful Schools, and Racial Justice*, p. 16, Boulder, CO: National Education Policy Center (2011) ("Suspending students reduces instructional time and often results in those most in need of adult supervision being left unsupervised."). With an appropriate BIP based on an appropriate FBA, concerning behaviors occur less, allowing all students to learn better. Lee Kern & Nathan Clemens, *Antecedent Strategies to Promote Appropriate Classroom Behavior*, 44 *Psychology in the Schools* 65, 65 (2007).

7. Advocates for Children of New York, Inc. ("AFC") represents and assists hundreds of New York City public school students in connection with their suspensions and thousands of students in connection with their special education needs each year. AFC works with many families of students whose behaviors are impeding their ability to learn, and many of those students have never had FBAs or do not have BIPs. To the extent that students have BIPs, most of those BIPs do not provide individualized strategies for improving the students' behaviors or positive interventions to support the student.

8. The New York City Department of Education ("DOE") has failed to ensure that its schools are conducting FBAs and creating BIPs as required by law. Indeed, the DOE appears to have no system of oversight or accountability with regard to FBAs or BIPs to ensure that all DOE schools consistently conduct FBAs and create BIPs for students with disabilities who need them as required by New York State law and regulations. As a result of this pervasive and systemic failure, the DOE has denied and continues to deny these students with disabilities appropriate educations.

9. AFC is therefore bringing this complaint on behalf of the parents and guardians of students with disabilities for whom the DOE did not provide an FBA or BIP when required by New York law and regulations or whose FBAs and BIPs did not meet the requirements of New York state law and regulations.

10. AFC requests that the New York State Education Department (“NYSED”) order the DOE to:

- a. develop an accountability structure to ensure that all DOE schools, Children First Networks and Committees on Special Education (“CSEs”) conduct FBAs and develop BIPs to the full extent required by New York law;
- b. identify those schools that are not conducting FBAs and BIPs in full accordance with state legal requirements and develop a plan to ensure that those schools conduct FBAs and BIPs in appropriate situations;
- c. create a mandatory comprehensive training on FBAs and BIPs (including specific instructions on when to develop FBAs and BIPs, what should be included in FBAs and BIPs, and how to implement BIPs) for all DOE staff responsible for (1) determining whether FBAs and BIPs are necessary, (2) conducting appropriate FBAs and creating and implementing appropriate BIPs, and (3) supervising all DOE staff responsible for conducting FBAs or implementing BIPs;
- d. provide to DOE schools the resources (including professionals experienced in FBAs, BIPs, and positive behavioral supports) necessary to allow schools to conduct appropriate FBAs and develop appropriate BIPs; and
- e. provide mandatory training about positive behavior supports to all DOE staff responsible for ordering, creating, implementing, or supervising FBAs and BIPs.

**STUDENTS WITH DISABILITIES ARE BEING DENIED APPROPRIATE FBAS AND BIPS**

11. New York City public schools are not conducting FBAs or developing BIPs in a consistent manner to ensure that students with disabilities receive the needed behavioral supports. The DOE's failure to instruct and oversee schools and CSEs as to the requirements of FBAs and BIPs, including when they must be considered, developed, or implemented, and what they must include, has resulted in the deprivation of an appropriate education for many students with disabilities who have spent years without the appropriate behavioral supports and suffered a detrimental impact on learning. Without appropriate behavioral plans, individualized for each student's specific needs, students' challenging behaviors have gone unaddressed, often resulting in suspensions, removals from the classroom, and even unnecessary trips to the emergency room. These interruptions of instruction can be diminished, if not largely avoided, if schools develop individualized and appropriate BIPs based on FBAs that fully observe and assess the behavior and recommend positive supports that consider the triggers and needs of the specific student with a disability. See Lee Kern & Nathan Clemens, *Antecedent Strategies to Promote Appropriate Classroom Behavior*, 44 *Psychology in the Schools* 65 (2007); Lynette Chandler, Carol Dahlquist, Alan Repp, & Carol Feltz, *The Effects of Team-Based Functional Assessment on the Behavior of Students in Classroom Settings*, 66 *Exceptional Children* (1999); Ruth Ervin, George DuPaul, Lee Kern & Patrick Friman, *Classroom-Based Functional and Adjunctive Assessments: Proactive Approaches to Intervention Selection for Adolescents with Attention Deficit Hyperactivity Disorder*, 31 *Journal of Applied Behavior Analysis* 65, 74 (1998).

## The Legal Requirements

### The Requirement to Conduct FBAs

12. New York regulations contemplate that a school conduct an FBA for any student “whose behavior impedes his or her learning or that of others, as necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities.” 8

N.Y.C.R.R. § 200.4(b). NYSED issued guidelines making clear that an FBA is needed when:

- a student with a disability is exhibiting persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions;
- the student’s behavior places the student or others at risk of harm or injury;
- the CSE or Committee on Preschool Special Education (CPSE) is considering more restrictive programs or placements as a result of the student’s behavior; and/or
- the student is subject to disciplinary actions and a determination has been made that the behavior is related to the student’s disability.

The University of the State of New York Memorandum on Functional Behavior Assessments, May 2011 (“NYSED FBA Memo”); 8 N.Y.C.R.R. § 200.4(b)(1)(v).

13. NYSED has explained that the FBA “*must* include, but is not limited to:

- information obtained from direct observation of the student;
- information from the student, the student’s teacher(s) and/or related service provider(s); and
- a review of available data and information from the student’s record and other sources including any relevant information provided by the student’s parent.

The FBA cannot be based solely on the student’s history of presenting problem behavior.”

NYSED FBA Memo (emphasis added); 8 N.Y.C.R.R. § 200.22(a)(2) A school must obtain parental consent before conducting an FBA. *See* NYSED FBA Memo; 8 N.Y.C.R.R. § 200.5.

14. FBAs must:

- provide a baseline of the student's problem behaviors, across activities, settings, people and times of the day, with regard to:
  - frequency (how often a behavior occurs)
  - duration (the length of time the behavior lasts)
  - intensity (how severe the behavior is)
  - latency (how long it takes for a behavior to begin after a specific verbal demand or event has occurred)
- include the information on why the student engages in behaviors that impede learning and how the student’s behavior relates to the environment in sufficient detail to form the basis for a behavioral intervention plan for the student that addresses:
  - antecedent behaviors;
  - reinforcing consequences of the behavior;
  - recommendations for teaching alternative skills or behaviors; and
  - assessment of student preferences for reinforcement.

*Id.* 8 N.Y.C.R.R. § 200.22(a)(3).

The Requirement to Develop Individualized BIPs

15. Under New York regulations, the DOE must consider strategies to address behavior that impedes learning, such as when “(i) the student exhibits persistent behaviors that impede his or

her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior.” 8 N.Y.C.R.R. § 200.22(b)(1).

16. In order to effectively address a student’s specific concerning behaviors, BIPs must be based on the results of an appropriate FBA. 8 N.Y.C.R.R. § 200.1(mmm); The University of the State of New York Memorandum on Behavior Improvement Plans, May 2011 (“NYSED BIP Memo”).

17. Regulations mandate that BIPs address

- (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors. Such baseline shall, to the extent practicable, include data taken across activities, settings, people and times of the day. The baseline data shall be used as a standard to establish performance criteria and against which to evaluate intervention effectiveness;
- (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and
- (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals.

8 N.Y.C.R.R. § 200.22(b)(4).

18. The BIP must detail “regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals,” the results of which are to be reported to



the student's parents. 8 N.Y.C.R.R. § 200.22(b)(5). In addition, the school must review the BIP with the parent at annual IEP meetings. NYSED BIP Memo; 8 N.Y.C.R.R. §§ 200.22(b)(2), 200.22(b)(5).

**The Experiences of Current Students Demonstrate that DOE Schools Are Not Complying with the Legal Requirements for FBAs and BIPs**

19. The twenty affidavits attached to this complaint from parents and guardians of NYC public school students demonstrate that DOE schools are failing to do all of the following: (1) conduct FBAs when required, (2) create BIPs when needed, and (3) conduct appropriate FBAs and create appropriate BIPs that provide support to students. The parents and guardians who signed these affidavits all have children with disabilities who attend DOE schools. All of the students described in the affidavits also have behavioral challenges that interfere with their learning, and their schools have failed to provide appropriate BIPs for them, either because the schools failed to conduct an FBA or create a BIP altogether, or because the FBA and BIP that were developed did not include strategies to address the student's individual behavior needs.

20. These failures by DOE schools to create appropriate FBAs and BIPs are not limited to the twenty students described in the affidavits and below. The students described in the affidavits attend community and specialized schools across New York City across a broad range of grade levels, and thus are representative of the class of students with disabilities who are not receiving appropriate FBAs and BIPs due to a systemic failure by DOE schools.

**J.P.**

21. J.P. is a five-year-old student currently attending kindergarten in a general education classroom in a community school. (Affidavit of T.D. dated Mar. 13, 2013 ("T.D. Aff."), ¶ 1.) Like many of the more than 60,000 students who entered DOE kindergarten classes in September 2012, J.P. was very excited to start school and to meet new friends. Only a few days

after J.P. started kindergarten, as described below, his school excluded him from class-time, leaving him feeling ostracized. (*Id.* ¶ 10.)

22. During J.P.'s first week of kindergarten, J.P.'s mother received several phone calls from the assistant principal, who told her that J.P. was getting out of his seat without permission and playing with his shoelaces. After only two days of school, the school informed J.P.'s mother that due to J.P.'s behavior, the school was placing J.P. on a truncated schedule, meaning that the school was limiting J.P. to only half a day of school, while his classmates attended school for a full day. (*Id.* ¶ 2.) Since the third day of school, J.P. has remained on this half-day schedule, despite several requests by his parent to allow J.P. to attend school for the full day. (*Id.* ¶ 3.)

23. Having already cut J.P.'s time in school, the school's failure to address J.P.'s needs appropriately exacerbated, resulting in the further exclusion of J.P. and his family from the school. Midway through September 2012 – after only a couple of weeks of kindergarten and without the consent or knowledge of J.P.'s parents or any opportunity for J.P.'s parents to provide relevant information – staff at the school conducted an FBA of J.P. (*Id.* ¶¶ 4-8.)

24. The manner in which the FBA was completed does not comply with NYSED's guidance and standards for FBAs and BIPs. In addition to conducting the assessment on one day, September 17, 2012, the evaluator failed to gather information from a direct observation of J.P. 8 N.Y.C.R.R. § 200.22(a)(2). Instead, the *only* data collected according to the FBA were "Anecdotal, behavior sheets, notes to parents." The FBA is a two page form with questions answered with unspecific one-line sentences or phrases. In response to the question asking the evaluator to identify an antecedent event to J.P.'s behavior, the FBA unhelpfully states that J.P.'s misbehavior begins "immediately upon arrival and continues throughout the day." In response to another question, the FBA states that the only presumed purpose for J.P.'s behavior is that "J.P.

wants his own way and to do what he pleases.” The FBA form also asked the evaluator to describe the expected behavior changes in measurable and objective terms, to which the evaluator merely responded that “[J.P.] will reduce his negative behavior.” (T.D. Aff. ¶ 5, Ex. A.)

25. On September 19, 2012, also without J.P.’s parents’ knowledge or input, the school created a BIP. (*Id.* ¶ 4.) Like the FBA, the BIP did not comply with legal requirements or state guidance for developing BIPs. In particular, it did not contain any individualized information that would address J.P.’s specific behaviors. The BIP lacks the baseline measure of the problem behavior and contains no strategies to prevent the occurrence of the target behavior. 8 N.Y.C.R.R. § 200.22(b)(4). The BIP instead lists as methods and criteria for outcome management: “[J.P.] will earn happy faces, rewards and verbal praise for his positive appropriate behavior.” The BIP also does not include any information as to which school staff are responsible for implementing the behavior plan. (T.D. Aff. ¶ 6, Ex. B.)

26. Not only were the FBA and BIP deficient themselves, but the FBA was conducted on one day when school staff were entirely unfamiliar with J.P. and when the staff did not yet have sufficient observational data to create a thorough and meaningful FBA and BIP. (*Id.* ¶ 7; 8 N.Y.C.R.R. §§ 200.22(a)(2), 200.22(b)(4))

27. On March 8, 2013 the school held an IEP meeting for J.P. During this IEP meeting, his mother expressed concerns that the FBA was vague and did not explain the triggers for J.P.’s behavior in any detail. The school staff refused to conduct a more appropriate FBA or develop a more appropriate BIP, explaining, “we are not behavioral specialists.” (T.D. Aff. ¶ 9.)

28. As a result of the DOE’s failure to conduct an appropriate FBA and create an appropriate BIP, J.P. has not received the appropriate behavioral support in school and has lost valuable

instruction time. (*Id.* ¶ 11.) Equally as concerning, J.P. now feels like an outcast at the school. (*Id.* ¶ 10.) Now, as he waits to go to his classroom, he is sad, feeling not welcome at the school. (*Id.*)

**A.D.**

29. A.D. is a five-year-old student who attends kindergarten at a community school in Brooklyn. He is diagnosed with autism and Attention Deficit Hyperactivity Disorder (“ADHD”). (Affidavit of M.M. 3 dated Mar. 13, 2013 (“M.M. 3 Aff.”) ¶¶ 1, 4.) Since he started kindergarten, A.D. has struggled to learn and his behavior has regressed due to his school’s failure to provide appropriate behavioral supports.

30. A.D. started kindergarten in September 2012. In August 2012, the DOE drafted an IEP to discuss A.D.’s unique educational and behavioral needs. As part of A.D.’s IEP, the DOE committed to provide A.D. with a 12:1:1 classroom environment. Additionally, the IEP stated that a BIP had been drafted. (*Id.* ¶ 5, Ex. A.)

31. The FBA and BIP that the DOE drafted, however, do not comply with NYSED’s guidance and standards for FBAs and BIPs. The FBA was conducted only on one day during the summer, rather than over multiple settings. (*Id.* ¶ 6, Ex. B; 8 N.Y.C.R.R. § 200.22(a); NYSED FBA Memo.) The only observational data listed as being used to prepare the FBA was “Review the records” contrary to the requirements of 8 N.Y.C.R.R. § 200.22(a)(2). Without any detail, the FBA described the frequency of the behavior as “often.” Without providing any specific triggers that would assist in generating individualized strategies to address the behavior in a BIP, the FBA vaguely described the triggers for A.D.’s behavior as “[d]iagnosed with autism, can be overstimulated auditorily and visually.” (M.M. 3 Aff. ¶ 6, Ex. B; 8 N.Y.C.R.R. § 200.22(a)(3).) Similarly, the BIP listed no strategy for the school to help A.D. address his behaviors, and the

only methods and criteria for outcome measurement listed were “observations, behavior rating scales.” (M.M. 3 Aff. ¶ 6, Ex. C; 8 N.Y.C.R.R. § 200.22(b)(4).)

32. In October 2012, A.D.’s school started to send home reports stating that A.D. was behaving badly. According to the school, he was getting into fights with other kids and using bad language. His behavior at home had also gotten worse. When his mother went to the school to find out why A.D.’s behavior was getting worse, she learned that, in violation of his IEP that required a 12:1:1 placement, A.D. had been moved to a much larger 25-student classroom in October. (M.M. 3 Aff. ¶ 7.)

33. As a result of the school’s failure to meet A.D.’s behavioral and educational needs, his academic performance has significantly decreased. During September 2012, A.D. was performing well academically. Now, he has trouble remembering letters and numbers. (*Id.* ¶ 8.)

34. In January, the school placed A.D. in an 8:1:1 classroom. (*Id.* ¶ 7.) Two months later, A.D. continues to struggle with his behavior in school. Although he is performing better now that he is back in a smaller classroom, he has more trouble staying seated, he argues more, and is more disrespectful than he was before his months in the 25-student classroom. In addition, he continues to react physically in the classroom, which he did not do before his placement in the larger class. These behaviors are impeding A.D.’s ability to learn. (*Id.* ¶ 9.)

35. A.D.’s school is not providing A.D. with appropriate supports or even following the vague steps outlined in his BIP. In fact, at the March 2013 parent-teacher conference, the school staff stated that they were unaware that A.D.’s IEP stated that he needed a BIP. (*Id.* ¶ 10.)

36. As a result of the school’s inability to provide A.D. with appropriate behavioral and educational supports, his ability to achieve academically has been severely diminished. (*Id.* ¶ 12.)

**S.M.**

37. S.M. is a five-year-old kindergarten student attending an elementary school in the Bronx. He loves to learn and participates in many extracurricular activities such as swimming, music and soccer. As a kindergarten student, he is already reading Level E books and he enjoys speaking with adults. (Affidavit of C.E. dated Mar. 20, 2013 (“C.E. Aff.”) ¶¶ 1, 2.)

38. S.M.’s behavior problems began when he started kindergarten this past September. He pushed other students. He refused or was unable to stay seated. Because of his difficulty behaving in class, his mother requested that S.M. be transferred into a different teacher’s classroom several weeks into the school year, but the school kept him in the same classroom. (*Id.* ¶ 3.)

39. S.M.’s behavior had not improved by the end of September 2012. The principal told S.M.’s mother that kindergarten was not mandatory, that S.M. was not mature enough to be in school, and that S.M. would be best off staying home until the start of first grade. The principal then pressured S.M.’s mother to withdraw S.M. (*Id.* ¶ 4.)

40. After a meeting with the school principal and the district Superintendent on October 1, 2012, the district offered to let S.M. attend school from 8:20 A.M. to 12:00 P.M, but would not let him attend a full day. S.M.’s mother agreed because she wanted S.M. to be in school as much as possible. (*Id.* ¶ 5.)

41. After the meeting, the school transferred S.M. to a different kindergarten classroom within the building. (*Id.* ¶ 6.)

42. After a request from S.M.’s mother to evaluate S.M. for special education, the school conducted a psycho-educational evaluation and a social history evaluation in November 2012. The social history evaluation noted that S.M. was defiant, disrespectful, and refused to follow

classroom rules. In addition, the evaluation noted that S.M. was receiving at-risk counseling and reflected the classroom change due to S.M.'s behavior. The evaluation stated that S.M. can be "defiant and unruly" and that he refuses to follow rules in the lunchroom and unstructured environments. Despite the behavioral issues S.M. was having in school, the school did not conduct an FBA as one of the initial evaluations for S.M. (*Id.* ¶ 7; 8 N.Y.C.R.R. § 200.4(b)(1)(v).)

43. The school gave S.M. a five-day in-school suspension on November 19, 2012. (C.E. Aff. ¶ 8.)

44. The school held a meeting on December 14, 2012 to discuss the evaluations, and, in spite of his significant behavioral issues, determined that S.M. wasn't eligible for special education services. At this meeting, the school stated that it needed to implement a BIP to address S.M.'s continual behavior problems, yet the school did not conduct an FBA or create a BIP. (*Id.* ¶ 9; 8 N.Y.C.R.R. §§ 200.1(mmm), 200.4(b)(1)(v), 200.22(b)(1).)

45. The school kept S.M. on his half-day schedule for several months. Finally, at his mother's request, the school returned S.M. to a full-day schedule on February 15, 2013. (C.E. Aff. ¶ 10.)

46. Despite his ongoing behavior problems, the DOE has still not performed an FBA or created a BIP for S.M. (*Id.* ¶ 11; 8 N.Y.C.R.R. §§ 200.4(b)(1)(v), 200.22(b)(1).)

47. As a result of the DOE's failure to conduct a necessary FBA and create a BIP this school year, S.M. has not received the appropriate behavioral support in school. Rather than conduct an appropriate FBA and develop an appropriate BIP, the school instead limited his time in school, resulting in S.M. missing a tremendous amount of instruction. (C.E. Aff. ¶ 12.)

#### **D.B.1**

48. D.B.1 is a six-year-old student who attends an elementary school in Brooklyn. (Affidavit of M.M. 2 dated Mar. 13, 2013 (“M.M. 2 Aff.”), ¶ 1.) He is diagnosed with ADHD. (*Id.* ¶ 2.)

49. D.B.1 started preschool at his elementary school in September 2010. D.B.1 was taking medication to treat his ADHD and had few problems through the year. However, D.B.1 began to exhibit problems managing his emotions during the final month of the school year. When he got upset, he turned over furniture and threw things on the ground. D.B.1’s mother asked the school several times that D.B.1 be evaluated for special education services and wrote a letter to that effect. His mother was never given any formal notification that special educational services had been denied, and to her knowledge, no formal evaluations were performed. (*Id.* ¶ 3.)

50. D.B.1 returned to the same school for kindergarten in September 2011. He continued his pattern of acting out that he had started at the end of preschool. D.B.1 continued to turn over furniture and throw things on the ground on a regular basis. Because the problems happened so frequently and were so severely affecting D.B.1’s learning experience, his mother repeatedly asked the school to evaluate D.B.1. The school never performed any evaluations, including an FBA of D.B.1. (*Id.* ¶ 4; 8 N.Y.C.R.R. § 200.4(b)(1)(v))

51. When D.B.1 returned to the same school for first grade in September 2012, his behavior deteriorated quickly. D.B.1 responded physically to other students and D.B.1 frequently tried to leave the classroom without permission. D.B.1’s teacher called his mother several times a week to ask for assistance with D.B.1 in class and his mother has spent between two hours to a full day in D.B.1’s classroom an average of three days a week. When his mother is not actually at school, the school calls regularly to ask for help or to pick D.B.1 up. (M.M.2 Aff. ¶ 5.)



52. D.B.1's mother has continued to request that evaluations be done and services be provided. She has made these requests to D.B.1's teachers, the guidance counselor, his dean, the School Based Support Team ("SBST"), the assistant principal, the principal, and DOE. (*Id.* ¶ 6.)

53. Despite his ongoing behavior problems, as of March 13, 2013, the DOE had yet to conduct an FBA or create a BIP for D.B.1. (*Id.* ¶ 7; 8 N.Y.C.R.R. §§ 200.4(b)(1)(v), 200.22(b)(1).)

54. On February 5, 2013, the school sent a Promotion-In-Doubt letter, stating that because D.B.1 was not performing at grade level, he may not be promoted to the second grade. However, D.B.1 has not received the appropriate behavioral support in school because of the DOE's failure to conduct necessary evaluations, including an FBA. (*Id.* ¶ 8.)

55. As a result of the school's inability to provide D.B.1 with appropriate behavioral supports, he has missed a tremendous amount of instruction, stalling his educational growth and thus contributing to the possibility that D.B.1 will have to repeat the first grade next year. (*Id.* ¶ 9.)

#### **M.L.**

56. M.L. is an eight-year-old student who attends elementary school in Manhattan. (Affidavit of M.L. dated Mar. 19, 2013 ("M.L. Aff."), ¶ 1.)

57. M.L. began experiencing behavioral problems in second grade, when he started attending his current school. These problems included leaving his seat and walking around the classroom without permission. He also struggled to focus on his academic work, and his grades suffered as a result of his behaviors and his lack of focus. (*Id.* ¶ 3.)

58. Faced with the threat of a superintendent's suspension, M.L.'s mother requested that

M.L. be assigned a 1:1 paraprofessional to assist him with focus and his behaviors. The school did not, however, develop an IEP, or conduct an FBA. (*Id.*; 8 N.Y.C.R.R. § 200.4(b)(1)(v).)

59. Despite the assistance of a paraprofessional, M.L. was suspended from school on four separate occasions during his second grade year because of his behavior. After one of the suspensions, M.L.'s teacher a letter to the school detailing the ineffectiveness of the current interventions at addressing M.L.'s behaviors. The letter also conveyed concerns about the impact his behavior was having on his academic progress. The school did not conduct a FBA or create a BIP in response to the letter. (M.L. Aff. ¶ 4, Ex. A; 8 N.Y.C.R.R. §§ 200.4(b)(1)(v), 200.22(b)(1).)

60. Because of her concerns about how his behaviors were affecting his learning, M.L.'s mother agreed to have him evaluated for special education. He was diagnosed with ADHD. (M.L. Aff. ¶ 5.)

61. The school developed an IEP on April 27, 2012. Despite the fact that M.L. had already been suspended numerous times because of his behaviors, the school did not conduct an FBA or create a BIP. (*Id.* ¶ 6; 8 N.Y.C.R.R. §§ 200.4(b)(1)(v), 200.22(b)(1).)

62. M.L. has continued to experience behavioral challenges this year in third grade. He has been suspended twice this school year, resulting in him being repeatedly removed from the classroom. (M.L. Aff. ¶ 7, Ex. B.)

63. In or around December 2012, the school began keeping a "behavior chart" on M.L. The chart assigns a number based on whether M.L. "used kind words," "stayed in seat/spot," or "followed all directions." The behavior chart does not contain any strategies or supports to address M.L.'s behaviors. (*Id.* ¶ 8; 8 N.Y.C.R.R. § 200.22(b)(4).)

64. An IEP meeting was held at the end of January. During the IEP meeting M.L.'s mother

again requested that the school develop a BIP for M.L. The school responded by stating that the “real problem” was that M.L. was late to school a lot and that he “just didn’t care.” M.L.’s 1:1 paraprofessional stated that M.L. “deserves to be harshly punished,” and his SETSS teacher added that he “is not capable of learning and will never learn.” The school did not conduct an FBA or create a BIP for M.L. in response to his mother’s requests. (M.L. Aff. ¶ 10; 8 N.Y.C.R.R. §§ 200.4(b)(1)(v), 200.22(b)(1).)

65. In February 2013, M.L.’s mother provided the school with a list of suggestions to be included in a BIP from an independent organization with familiarity with M.L. and his behaviors. The school did not conduct an FBA or create a BIP in response to these suggestions. (M.L. Aff. ¶ 11.)

66. On March 11, 2013, the M.L. was suspended again. (*Id.* ¶ 12.)

67. On or around March 13, 2013, the school sent a letter scheduling a meeting to review an FBA and BIP. M.L.’s mother was not informed when the FBA was conducted or when the BIP was created, and both were developed without her input. (*Id.* ¶ 13; 8 N.Y.C.R.R. §200.22(a)(2).) To date, M.L.’s mother has not seen or received copies of the FBA and BIP. (M.L. Aff. ¶ 13; 8 N.Y.C.R.R. §§ 200.22(b)(5).) In March 2013, AFC requested that the DOE produce a copy of M.L.’s entire educational record. The produced records did not include an FBA or BIP.

68. M.L. has continued to struggle academically and experience behavioral challenges and has missed valuable instructional time. (M.L. Aff. ¶ 14.)

### **J.B.**

69. J.B. is a nine-year-old student who attends the fourth grade at an elementary school in the Bronx. (Affidavit of J.R. dated Mar. 20, 2013 (“J.R. Aff.”), ¶ 1.)

70. J.B. began the first half of the first grade in a general education class. From the

beginning of the school year, J.B. was exhibiting behavioral issues that were interfering with his instruction and the school was calling his mother on a daily basis. Teachers reported that he would scream frequently and throw objects in the classroom. J.B. was first referred to special education midway through the first grade because of his behavioral issues in kindergarten and through the first half of the first grade. (*Id.* ¶¶ 2, 3.)

71. After evaluations were done, the DOE classified J.B. with an Other Health Impairment, recommended a 12:1:1 special class and placed J.B. at the elementary school he currently attends. Although the DOE did not conduct a FBA, 8 N.Y.C.R.R. § 200.4(b)(1)(v), the DOE nevertheless created a BIP. 8 N.Y.C.R.R. § 200.1(mmm). With no FBA conducted prior to the BIP, the DOE was unable to have a meaningful analysis of J.B.'s behavior, leading to an inappropriate BIP. (J.R. Aff. ¶ 4; 8 N.Y.C.R.R. § 200.1(mmm).)

72. The BIP created on October 30, 2009 lacked a baseline measure of the alleged problem behavior, including the frequency, duration, intensity and latency of the target behavior. 8 N.Y.C.R.R. §200.22(b)(4). The BIP only generally described the concerning behavior that J.B. engages in as, "Physical aggression towards others (teacher and peers), lack of focus during instructional time and throws *[sic]* school property." (J.R. Aff. ¶ 5, Ex. A; 8 N.Y.C.R.R. §200.1(mmm).) The BIP was also completely devoid of a schedule to measure the effectiveness of the interventions at scheduled intervals in order to facilitate discussion with J.B.'s mother. (J.R. Aff. ¶. 6, Ex. A; 8 N.Y.C.R.R. § 200.22(b)(4).)

73. Without an appropriate BIP, J.B. did not receive necessary behavioral supports and struggled through the rest of first grade. (J.R. Aff. ¶ 7.)

74. In February 2011, while he was in the second grade, the DOE conducted an FBA

because of J.B.'s continued behavioral issues at school. The DOE did not seek input from J.B. or his mother to prepare the FBA. (*Id.* ¶ 8, Ex. B; 8 N.Y.C.R.R. § 200.22(a)(2).)

75. The FBA described J.B.'s targeted inappropriate behavior as *inter alia*, "Due to [J.B.]'s breakdowns or lack of ability to accept criticism, he is unable to complete classroom tasks." In addition, the FBA noted that "When [J.B.] is in crisis, his work is not completed." (J.R. Aff. ¶ 9, Ex. B.) Rather than provide a baseline of behavior across activities, settings, people and times of the day, the FBA described the duration of the behavior as "continuous." (*Id.* ¶ 10, Ex. B; 8 N.Y.C.R.R. § 200.22(a)(3).)

76. The BIP that was subsequently created on February 28, 2011 did not provide the baseline measure of the behavior, including the frequency, duration, intensity and latency. 8 N.Y.C.R.R. § 200.22(b)(4). The BIP also did not include intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior. *Id.* Instead, it merely listed the target behavior, the expected behavior changes and the methods/criteria for outcome measurement. (J.R. Aff. ¶ 11, Ex. C.)

77. J.B. entered the third grade in the fall of 2011 and the behavioral issues continued. In early December 2011, the school called Emergency Medical Services ("EMS") because J.B. was throwing objects in the classroom. The school also called J.B.'s father to pick up J.B. from school, but did not tell J.B.'s parents that EMS had been called. When J.B.'s father arrived at the school, he was told that he could not take J.B. home because EMS had not yet arrived. J.B.'s mother arrived at the school a few minutes later and found J.B. calm, sitting in his classroom. Ultimately, the school allowed his mother to take J.B. home and she took him to see his treating psychologist. (*Id.* ¶ 12.)

78. In March 2012, while in the third grade in a 12:1:1 classroom, the DOE held an IEP meeting and determined that J.B.'s needs could be met more appropriately in a non-public school ("NPS"). However, several weeks after J.B.'s educational documents were sent to the Central Based Support Team ("CBST"), CBST rejected the case. Instead, the DOE recommended a District 75 school for J.B. (*Id.* ¶ 14.)

79. When J.B.'s mother visited the offered District 75 school, the school staff told her that after reading J.B.'s IEPs, evaluations, FBA, and BIPs, they would have to call 911 on a regular basis because of J.B.'s behavior. As a result, J.B.'s mother rejected the offered placement and kept J.B. at his current school. (*Id.* ¶ 15.)

80. During this time, J.B.'s mother quit her job because of the number of phone calls she was receiving from the school. The school was calling J.B.'s mother or father on a daily basis, asking that they pick J.B. up from school. From March 2012 to June 2012, J.B.'s mother sat in J.B.'s school every day to ensure that she was nearby in case J.B. was having a behavioral problem. (*Id.* ¶ 16.)

81. On December 19, 2012, while J.B. was in the fourth grade, the school held an IEP meeting. The IEP described J.B. as a student who could be "explosive, verbally and physically aggressive and defiant to both adults and his classroom peers." The IEP also noted that, "[J.B.]'s intense aggressive and unsafe behaviors severely interfere with his academic functioning and impede the learning of others." According to the IEP, a BIP was created but his mother has not received one. (*Id.* ¶ 17; 8 N.Y.C.R.R. § 200.5.) The DOE recommended that J.B. remain in a 12:1:1 with a full-time crisis paraprofessional.

82. Since the IEP meeting in December 2012, J.B.'s behavioral issues have continued. As a result of at least three behavioral incidents in January through March, J.B. was removed from the classroom and suspended. (J.R. Aff. ¶¶ 18-21, Ex. D-F.)

83. In mid-February, J.B.'s mother received a Promotion-in-Doubt letter from J.B.'s school. (*Id.* ¶ 22.)

84. Over the past several years, the DOE has failed to conduct a comprehensive and appropriate FBA; therefore, the resulting BIPs, when done, have likewise been inappropriate because they have not provided the appropriate behavioral support. 8 N.Y.C.R.R. §§ 200.1(r), 200.22(b)(1). Due to this failure, J.B. has spent a considerable amount of time outside of the classroom, resulting in him losing instruction and possibly causing him to be held back a grade. (J.R. Aff. ¶ 23.)

**D.S.**

85. D.S. is a fifth grade student, classified as having an emotional disturbance and diagnosed with ADHD. (Affidavit of S.S. dated Mar. 13, 2013 ("S.S. Aff."), ¶ 1.) As a result of his ADHD, D.S. is very impulsive. He is unable to sit still through school lessons and gets up in the middle of instruction, which negatively impacts his ability to learn. (*Id.* ¶ 3.) His school, however, has never conducted an appropriate FBA or developed an appropriate BIP.

86. D.S. started having behavior problems in school in 2008 when he was in first grade. Because his behavior prevented him from passing, he repeated the first grade. (*Id.* ¶ 2.)

87. In April 2009, while D.S. was repeating the first grade, the school finally conducted an FBA. (*Id.* ¶ 5, Ex. A.) The FBA was conducted on one day. The FBA stated merely that that D.S.'s "noncompliant" behaviors "happen frequently throughout the school day. It should also be noted that they occur during different periods of the school day" without any detail as to what

behaviors occur where and at what time. The FBA did not specify information on why the student engages in behaviors that impede learning and how the student's behavior relates to the environment "in sufficient detail to form the basis for a behavior intervention plan." 8 N.Y.C.R.R. § 200.22(a)(3). Nor did the FBA identify antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors, or an assessment of the student preferences for reinforcement. *See id.* Indeed, the FBA described the behaviors of a different student and lists the name of a different student, suggesting that the FBA was copied from another student's FBA and was not individualized for D.S. (S.S. Aff. ¶ 5, Ex. A.)

88. The school created a BIP on the same day as the FBA. The BIP fails to give any real strategies for changing D.S.'s behavior. Without describing the interventions to prevent the concerning behavior, the BIP vaguely states that D.S. "will learn appropriate ways to interact with others" and "When [D.S.] begins to make noises with his mouth, he will be removed from the group until he demonstrates self-control." It also states that directions will be given in "a variety of ways in order to increase the probability of understanding" without giving any detail of how and in what ways the directions will be given. (*Id.* ¶ 6, Ex. B; 8 N.Y.C.R.R. § 200.22(b)(4).)

89. During the 2009-2010 school year, D.S. received two principal's suspensions of more than 5 days each. (*Id.* ¶ 7.)

90. A 2010 psychological evaluation report noted that D.S.'s behavior interferes with his academic success because he gets up impulsively. Additionally, the supervising school psychologist noted at D.S.'s June 2010 IEP meeting that it was very important that there be an FBA and a BIP implemented for D.S. Despite these recommendations, D.S.'s school did not



conduct a new FBA or create a new BIP. (*Id.* ¶ 8; 8 N.Y.C.R.R. §§ 200.4(b)(1)(v), 200.22(b)(1).)

91. D.S. is still having problems focusing in class due to his ADHD, for which he requires considerable support. Recent teacher reports have indicated that he is acting out more in class and continues to be very impulsive. The school's failure to conduct an appropriate FBA and create an appropriate BIP has severely impeded his education. (*Id.* ¶ 9.)

**R.G.**

92. R.G. is a fifth grade student classified as having an emotional disturbance. (Affidavit of L.G. dated Mar. 18, 2013 ("L.G. Aff."), ¶¶ 1, 2.) Since kindergarten, R.G. has had outbursts, subjecting himself or others in the classroom to harm. (*Id.* ¶ 3.) These outbursts can be triggered when R.G. is faced with academic work that he perceives as too difficult, or if he does not receive help from an adult soon after requesting it. (*Id.* ¶ 3.) Despite the persistence of these behaviors, and their impact on R.G.'s ability to learn, his school failed to conduct an FBA for the four years that R.G. attended kindergarten, first, second, and third grades, and the DOE has never developed a BIP. (*Id.* ¶ 4.) Without behavioral supports, R.G. has struggled in school, and has been removed from the class repeatedly, including suspensions and removals by EMS. (*Id.* ¶¶ 5, 9, 10, 11, 13.)

93. On January 20, 2012, when R.G. was in fourth grade, he received a 2 day in-house suspension for trying to leave the classroom without permission and moving desks and throwing objects. After the attorney representing R.G. in connection with his suspension contacted R.G.'s school, the school conducted an FBA for the first time in January 2012. (*Id.* ¶¶ 5, 6, Ex. A.)

94. R.G.'s FBA hypothesizes that he engages in target behavior in order to avoid situations that make him feel anxious or inferior and to get immediate adult attention. The FBA suggests

the use of positive reinforcement techniques, individualized support, removing R.G. from anxiety-provoking situation, using “scripted scenarios” to shape behavior, counseling, time-out and parent/family involvement. Even though R.G. had already been suspended and lost instructional time because of his behavior and his FBA recommended behavior interventions, the school did not develop a BIP to implement those interventions, and R.G.’s behavior continued to escalate. (*Id.* ¶¶ 7, 8, Ex. B; 8 N.Y.C.R.R. § 200.22(b)(1).)

95. On February 2, 2012, R.G.’s school called EMS and issued R.G. a Principal’s Suspension for kicking, biting, and punching the guidance counselor. (*Id.* ¶ 9, Ex. C.) After this incident, R.G.’s fourth grade classroom teacher issued reports stating that he refused to participate in class or complete classwork. These reports also stated that R.G. walked out of the classroom and hit and kicked classroom furniture and other students in the class. (*Id.* ¶ 10, Ex. D and E.) Despite these incidents, the school still did not create a BIP. (*Id.* ¶ 14.)

96. During another incident when R.G. was in fourth grade, his teacher called the assistant principal to remove him from class because she said R.G. was being disruptive. When the assistant principal arrived, she grabbed R.G. by the arm and yanked him out of the classroom. R.G. became agitated and told the assistant principal to let him go. When the assistant principal did not let go, R.G. became increasingly upset and tried to free himself from her grip. When he finally did, he hit his head against a window. The school called an ambulance, which took R.G. to the hospital where he was evaluated by a psychiatrist. (*Id.* ¶ 11, Ex. F.)

97. The psychiatrist who evaluated R.G. at the hospital concluded that the assistant principal’s aggression exacerbated R.G.’s hostility because R.G.’s response to aggressive behavior is to become increasingly aggressive. R.G. received a superintendent’s suspension in response to this incident. (*Id.* ¶¶ 12, 13.)

98. State regulations contemplate that a school develop a BIP if a student's behaviors impede his or her learning or if his or her behavior creates a risk of harm or injury to anyone. 8 N.Y.C.R.R. §200.22(b)(1). R.G.'s behaviors went further than creating a risk of injury—he was actually injured and taken to the hospital. Yet the DOE failed to create a BIP for R.G. (L.G. Aff. ¶ 14.)

99. As a result of the DOE's failure to create a BIP, R.G. continues to lack appropriate behavioral supports in school, which impedes his academic progress and has caused him to lose substantial instruction time. (*Id.* ¶ 15.)

#### **G.N.**

100. G.N. is twelve years old and currently repeating the sixth grade in a District 75 school. G.N. is classified as having an emotional disturbance and is diagnosed with ADHD, Disruptive Behavior Disorder, and Oppositional Defiant Disorder. He has had difficulty focusing in class since he was in kindergarten. (Affidavit of M.N. dated Mar. 12, 2013 ("M.N. Aff."), ¶¶ 1, 3.) Nevertheless, G.N.'s school did not conduct an FBA until he was in sixth grade. (*Id.* ¶ 10.) In addition, G.N.'s school failed to create an appropriate BIP. (*Id.* ¶¶ 2, 5, 10, 11.)

101. In October 2007, when G.N. was in the second grade, the DOE moved G.N. from a community school to a placement in District 75. The DOE did not conduct an FBA or create a BIP for G.N. before moving G.N. to this more restrictive placement. (*Id.* ¶ 5; 8 N.Y.C.R.R. §200.22(b)(1)(iii).) As a result, the DOE did not have any evaluation of the behavior in the school environment that caused the DOE to move G.N. to a more restrictive environment.

102. In September 2011, G.N. started sixth grade and started having numerous behavioral incidents on the bus. Sometimes the incidents were as frequent as two or more times

in a week. This was brought to the attention of the school at an IEP meeting held in September 2011, at which time G.N. was switched to a smaller bus, but the problems persisted. (*Id.* ¶ 6.)

103. On September 27, 2011, the school conducted an FBA in one day. (*Id.* ¶ 7, Ex. B.)

104. On September 15, 2011, the school created a BIP for G.N. Although a BIP must be “based on the results of a functional behavioral assessment,” 8 N.Y.C.R.R. § 200.1(mmm), the school created the BIP on September 15, 2011, before the FBA was conducted. The BIP did not develop any strategies for addressing G.N.’s challenging behaviors. (M.N. Aff. ¶ 8, Ex. C; 8 N.Y.C.R.R. §200.22(b)(4).)

105. Instead of any individualized strategies to address G.N.’s challenging behavior, the BIP states only that G.N. “responds impulsively to certain situations that trigger anger/frustration” and does not describe any of these situations or identify any potential triggers. While the FBA noted that G.N. is “easily distracted” and “often responds impulsively to certain situations resulting in verbal and physical altercations with peers,” the BIP did not provide any individualized strategies to address G.N.’s specific behavior. The only plan for measuring changes in this behavior in the BIP was to award G.N. “daily points for appropriate behavior,” which is a school-wide system for measuring all students’ behavior that was already implemented at the time the BIP was created, and did not work to change G.N.’s behavior before or after the BIP. (*Id.* ¶ 8, Ex. C.)

106. G.N. continued to have behavioral incidents on the bus. Whenever a behavioral incident occurred on the bus, G.N. was “suspended” from the bus, meaning that the bus did not pick him up the following day. G.N. was “suspended” from the bus several times in this manner.

However, because these informal suspensions were made at the discretion of the bus operator, there was no formal documentation of the suspensions. (*Id.* ¶ 9.)

107. After the FBA and the BIP were created, G.N. failed to meet the school-wide behavioral levels for 32 out of 41 weeks for the 2011-2012 school year. (*Id.* ¶ 12.) He also received a Superintendent suspension. (*Id.* ¶ 11.) G.N.'s behavioral challenges impacted his ability to focus in the classroom, which resulted in his failure to pass the sixth grade state exams. Despite G.N.'s clear need for appropriate behavioral supports in order to address the behaviors that are impeding his academic progress, the school did not conduct a new FBA or create a new BIP. (*Id.* ¶¶ 12, 13; *see* 8 N.Y.C.R.R. §§ 200.4(b)(1)(v), 200.22(b)(1).)

108. As a result of the DOE's continued failure to provide necessary behavioral supports, G.N.'s academic progress continues to be hindered. (*Id.* ¶ 13.)

#### **T.H.**

109. T.H. is a seventh grade student in District 75, classified as having an emotional disturbance. (Affidavit of T.H. dated Mar. 20, 2013 ("T.H. Aff."), ¶ 1.) T.H. has had behavioral challenges since elementary school. T.H.'s first IEP was created when he was in second grade, and, although he was struggling with behaviors, his school did not conduct an FBA at that time. (*Id.* ¶ 2.)

110. T.H. attended a new school from 2009-2012, for his second year of the fourth grade, as well as fifth and sixth grade. While there, he was suspended multiple times for his behavior. (*Id.* ¶ 5.)

111. The DOE conducted an FBA in March 2011. The FBA did not provide any specific information about T.H.'s behavior upon which the school could develop interventions to prevent the behavior or its triggers. 8 N.Y.C.R.R. §§ 200.1(r); 200.22(a)(3). Instead, in

describing the baseline behavior, the FBA stated that the behavior occurred “daily,” “often,” and lasted from “15 minutes to several hours.” The FBA failed to identify the triggers for T.H.’s behavior, 8 N.Y.C.R.R. §200.22(a)(3), stating instead, “At any given time he may decide to act out.” The FBA listed the reinforcers of T.H.’s behavior as “[T.H.] likes to be free of rules. He likes have things his way most of the time.” In describing what might trigger or escalate T.H.’s negative behavior, the FBA did not provide any constructive information by which strategies could be developed, stating instead, “[T.H.] does not like school work, school rules, being told what to do, and consequence for his negative behavior.” (T.H. Aff. ¶ 7, Ex. A.)

112. T.H.’s school also developed a BIP in 2011. The BIP’s behavior plan consisted of the following two steps: (1) “Reinforce positive behaviors” and (2) “Try to keep [T.H.] on task. Keep him focused and constantly supervised.” (*Id.* ¶ 8, Ex. B.) It did not include a description of the targeted behavior or any hypothesis as to why the behavior occurs. 8 N.Y.C.R.R. §200.1(mmm). The BIP did not mention any behavioral triggers or consequences that may reinforce the targeted behavior. 8 N.Y.C.R.R. §200.22(a)(3). The BIP did not discuss what alternative skills and behaviors would be taught, and how any known triggers for the behavior would be addressed. 8 N.Y.C.R.R. §200.22(b)(4). It included no mechanism for assessing which strategies may be successful in reinforcing positive behaviors, and no baseline data on the frequency, duration, intensity, or latency of the behavior was collected. 8 N.Y.C.R.R. §§200.22(a)(3), 200.22(b)(4).

113. Although T.H. continues to struggle with his behavior, he has not received a new FBA or BIP since 2011. (T.H. Aff. ¶ 10.) As a result of the DOE’s failure to create a substantive and appropriate FBA and BIP for T.H., T.H. missed valuable instructional time while being disciplined for his behaviors and failed to progress academically. (*Id.* ¶ 11.)

**J.L.**

114. J.L. is a 13 year old seventh grade student who is currently serving a Superintendent's suspension. (Affidavit of C.L. dated Mar. 20, 2013 ("C.L. Aff."), ¶ 1.) J.L. is a strong-willed teenager with a soft heart. He is curious and likes to explore. He needs to have instructions constantly repeated, but will ultimately do what is asked. Sadly, because the school regularly disciplines J.L. for his behavior, J.L. has lost interest in school. (*Id.* ¶ 17.)

115. J.L. was first evaluated for special education services when he was in second grade because he was having behavioral problems in school. The School Based Support Team at his elementary school recommended a smaller setting, so J.L. was transferred to District 75, where he was placed in a 12:1:1 class. (*Id.* ¶ 2.)

116. Since then, J.L. has been in a series of school placements in an attempt to find the appropriate one that can address his academic abilities and behavioral challenges. (*Id.* ¶¶ 4-9.)

117. J.L. is currently in seventh grade in a 12:1 class. As he has in the past, J.L. is struggling with his behavior in school. For example, he has problems focusing in class and will sometimes become involved in altercations with other students. Administrators at the school describe J.L. as disrespectful to the teachers and the deans and have said that he does not belong at the school. (*Id.* ¶¶ 9, 10.)

118. In March 2012, J.L.'s school conducted an FBA and developed a BIP for J.L., after the school had suspended J.L. twice for insubordination. (*Id.* ¶ 12.) The school did not seek J.L.'s parents' input in developing either the FBA or the BIP. (*Id.*; 8 N.Y.C.R.R. §§ 200.22(a)(2).)

119. However, both the FBA and the BIP were inadequate. The FBA, which was performed on one day, stated that the J.L.'s behavior is triggered "Anytime [J.L.] feels

inadequate or challenged,” without identification of what made J.L. feel “inadequate or challenged.” Also without specificity, the FBA stated that the targeted behavior occurs “daily” and its duration and intensity “varies.” The FBA listed J.L.’s expected behavior changes as “respond appropriately to both adults and peers and refrain from seeking negative attention.” (C.L. Aff. ¶ 13, Ex. A.)

120. J.L.’s BIP, created on the same day as the FBA, does not contain any individualized strategies for addressing his behavior. 8 N.Y.C.R.R. § 200.22(b)(4). The only tool on J.L.’s BIP for measuring outcomes is “observation by adult staff.” The BIP describes J.L.’s expected behavioral changes as “follow all classroom rules and routines,” “control his impulse to act out and seek peer mediation,” and “refrain from seeking out negative attention.” The BIP does not provide any strategies on how the school will assist J.L. in reaching these expected behavioral changes. (C.L. Aff. ¶ 14, Ex. B; 8 N.Y.C.R.R. § 200.22(b)(4).)

121. J.L. has been suspended five times from his current school, including a superintendent’s suspension for 30 days that he is currently serving. (*Id.* ¶ 15.)

122. J.L. is supposed to have a paraprofessional with him at all times. However, the paraprofessional is sometimes sent to work with other students. Notably, every time J.L. has been involved in an incident that led to a suspension, his paraprofessional has not been with him at the time of the incident. (*Id.* ¶ 11.)

123. J.L.’s parents have tried to work with his school to develop behavioral strategies, but the school has refused to work with his parents. (*Id.* ¶ 16.)

124. Instead of creating a substantive BIP with individualized strategies for J.L.’s behavioral needs, J.L.’s school has continually suspended him for his behavior. (*Id.* ¶ 18.) As a result, J.L. has lost instruction and interest in school. (*Id.* ¶ 17.) J.L.’s schools’ failures to



provide appropriate behavioral supports developed through an appropriate FBA have harmed J.L.'s ability to achieve in school.

**C.J.**

125. C.J. is a fourteen year old student who attends middle school in the Bronx. (Affidavit of C.J. dated Mar. 19, 2013 ("C.J. Aff."), ¶ 1). C.J. began struggling with behavioral problems during elementary school. He was suspended for approximately two weeks during fourth and fifth grade because of his behaviors. Although C.J. was experiencing behavioral challenges, the DOE did not evaluate him for special education or create an IEP at that time. (*Id.* ¶ 2; 8 N.Y.C.R.R. § 200.4(a).)

126. After being repeatedly removed from the classroom as a result of his behaviors, C.J. was referred for a special education evaluation while he was in sixth grade. He was diagnosed with ADHD and classified as emotionally disturbed. Although C.J.'s behavior was impeding his learning, the DOE failed to conduct an FBA or create a BIP. (C.J. Aff. ¶ 3; 8 N.Y.C.R.R. §§ 200.4(b)(1)(v), 200.22(b)(1).)

127. During seventh grade, C.J.'s behaviors continued. C.J. would frequently walk out of class or talk back to teachers when he got frustrated. The school repeatedly asked his mother not to bring C.J. to school because of his behaviors. When C.J. would attend school, the school would ask that C.J.'s mother pick him up. C.J. was formally suspended at least six times between November and February of his seventh grade year. (C.J. Aff. ¶ 4, Ex. A; 8 N.Y.C.R.R. §§ 200.4(b)(1)(v), 200.22(b)(1).)

128. The school developed an IEP on May 17, 2012. The IEP notes that "[b]ehavior issues currently set limits on [C.J.]'s performance levels in class." (C.J. Aff. ¶ 5, Ex. B.)

129. C.J. is currently in the eighth grade. Since sixth grade, he has had fifteen principal's suspensions and eight superintendent's suspensions as a result of his behaviors. He is currently serving a ninety day suspension. Despite the fact that C.J. is a student with an IEP being excluded from the classroom for months at a time, the school never informed his parent that it had developed an FBA or a BIP for him. (*Id.* ¶ 6; 8 N.Y.C.R.R. § 200.22(a)(2).)

130. In March 2013, C.J.'s school provided copies of an FBA and BIP from May 2012 to his mother's attorney. The school did not solicit his mother's input in conducting the FBA or creating the BIP, and his mother was not aware that either document existed. (C.J. Aff. ¶ 7; 8 N.Y.C.R.R. § 200.22(a)(2).) According to the documents produced in March 2013 in response to a request for C.J.'s entire educational record, the May 2012 FBA and BIP are the only FBA and BIP that the DOE has prepared for C.J.

131. The FBA, dated May 1, 2012, is vague and unspecific. 8 N.Y.C.R.R. § 200.1(r). It describes the frequency of C.J.'s behaviors as "daily," and the setting as "all classes and school areas." The FBA states that the trigger for the behavior is "student walks into the class or area where other students are." (C.J. Aff. ¶ 8, Ex. D.) Without elaboration, this act is one that C.J. would do solely by virtue of attending school or walking into a classroom.

132. The BIP, dated May 3, 2012, contains no concrete plan or strategies to assist C.J. in managing his behaviors. 8 N.Y.C.R.R. § 200.22(b)(4). The expected behavior changes include, without any specificity, "use appropriate language" and "use appropriate strategies" to get the attention of others. There are no outcome measurements. 8 N.Y.C.R.R. §200.22(b)(4). Instead, the BIP states that "teachers and support staff will communicate behaviors expectations for the period in a calm non-threatening tone," and "teachers will allow him to seek out counselor or take a work break if he continues to have difficulty controlling his behavior."

Because the FBA did not identify any specific triggers for C.J.'s concerning behavior, the BIP does not provide any strategies to prevent C.J.'s behavior when faced with the triggers for his behavior. (C.J. Aff. ¶ 9, Ex. E; 8 N.Y.C.R.R. § 200.22(b)(4).)

133. As a result of the DOE's failure to provide appropriate behavioral supports, C.J. has been repeatedly removed from his classroom instruction, is missing large amounts of school, and is being harmed academically. (C.J. Aff. ¶ 10.)

#### **Q.C.**

134. Q.C. is a ninth grade student who attends high school in Manhattan. (Affidavit of L.C. dated Mar. 18, 2013 ("L.C. Aff."), ¶ 1.) When she was in the first grade, Q.C. was evaluated for special education because she had a short attention span. She would constantly wander around the classroom, and distract other students with her talking. She would also sometimes skip lines when reading, which caused her to become confused and affected her reading comprehension levels. After evaluations, Q.C. was diagnosed with ADHD. (*Id.* ¶¶ 2, 3.)

135. The school developed an IEP after the evaluation. The school found she was academically prepared for the second grade, but would be held back because she was not mature enough socially to progress to the next grade. Her IEP recommended that she be placed in a Collaborative Team Teaching ("CTT") class and receive Special Education Teacher Support Services ("SETSS") and counseling. The school did not perform a FBA or BIP at that time. (*Id.* ¶ 4; 8 N.Y.C.R.R. §200.22(b)(1).)

136. Q.C. repeated the first grade. Q.C. continued experiencing behavior problems during her second year of first grade. The school did not develop an FBA or BIP despite Q.C.'s ongoing behavioral challenges. (L.C. Aff. ¶ 5; 8 N.Y.C.R.R. §§ 200.4(b)(1)(v), 200.22(b)(1).)

137. Q.C. attended the same school through the fifth grade. When she moved to middle school for the sixth grade, her behavior problems continued. In the eighth grade, Q.C. was suspended for three days. No FBA or BIP was created after this incident. (*Id.* ¶ 6.)

138. Q.C.'s behavior problems persisted, even after she moved to her high school. In or around November 2012, the principal threatened to suspend Q.C. for cursing at a teacher and for not going to class. Q.C. allegedly responded angrily. Q.C. was suspended for 10 days. The school found that Q.C.'s behavior was a manifestation of her disability. (*Id.* ¶¶ 7, 8.)

139. On December 7, 2012, the school held an IEP meeting. (*Id.* ¶ 9.) The IEP states that Q.C. is failing most of her classes. It also notes that "[Q.C.] does not show self-control, is generally non-cooperative, and is a distractive influence in class. Use of inappropriate language and conduct issues were also reported." (*Id.*, Ex. A.)

140. An FBA and a BIP, both dated December 7, 2012, were attached to the IEP, but the school did not obtain input from Q.C.'s parent prior to the development of the FBA and BIP. (*Id.* ¶ 10; 8 N.Y.C.R.R. § 200.22(a)(2).)

141. The FBA is vague and unspecific. 8 N.Y.C.R.R. §§ 200.1(r), 200.22(a). In violation of 8 N.Y.C.R.R. § 200.22(a), the FBA was based entirely on reports and not on classroom observations or information from the student or parent. The frequency of Q.C.'s behaviors is listed as "all classes," and the duration states simply "ongoing." The FBA describes the triggers for Q.C.'s behavior solely as, "Q.C. shows a non-cooperative attitude in all classes, regardless of activities." For environmental conditions that may affect the behavior, the FBA states that "Q.C. has been diagnosed with ADHD," and that she "has a long history of social/emotional problems." The FBA highlights the DOE's failure to provide appropriate

supports, stating that the only intervention that has been attempted is the receipt of outside mental health services. (L.C. Aff. ¶ 11, Ex. B.)

142. The BIP is similarly inadequate. The BIP contemplates that a 1:1 paraprofessional will be employed and that “Q.C. will complete 65% of assignments for 5 consecutive weeks.” No details are provided about how Q.C. will complete her assignments, especially because she is behind academically. (*Id.* ¶ 12, Ex. C; 8 N.Y.C.R.R. §200.22(b)(4).)

143. The school has informed Q.C.’s parent that Q.C. is in danger of not being promoted to the tenth grade next year. However, the school began providing the full program on Q.C.’s IEP only during the third marking period this school year. Q.C.’s school still is not providing the appropriate behavioral supports for Q.C. (L.C. Aff. ¶ 13.)

144. Q.C. continues to have her behavior and attention challenges go unaddressed by her school. As a result of the DOE’s failure to provide appropriate behavioral supports, Q.C. continues to struggle academically and is in danger of having to repeat the ninth grade. (*Id.* ¶ 14.)

#### **L.M.**

145. L.M. is a tenth grade student classified with a Learning Disability. (Affidavit of S.W. dated Mar. 18, 2013 (“S.W. Aff.”), ¶ 1.)

146. The DOE first evaluated L.M. in 2004 when he was in third grade at a community school in Brooklyn. (*Id.* ¶ 2.) His initial IEP noted that L.M. required additional behavioral management support; however, the school did not conduct an FBA or create a BIP. (*Id.* ¶ 2, Ex. A.)

147. Without the supports he required, L.M.’s behavior continued to escalate until he was placed on a Superintendent’s suspension for bringing a stun-pen to school and shocking

another child with it. (*Id.* ¶¶ 3, 4.) While on suspension, L.M.’s behavior further escalated, and he started a fire in the boy’s bathroom. (*Id.* ¶ 5.) The DOE did not conduct an FBA for L.M. in connection with his suspension. (*Id.* ¶ 6; 8 N.Y.C.R.R. § 200.4(b)(1)(v).)

148. At his next IEP meeting in 2005, L.M.’s classification was changed from Learning Disability to Emotional Disturbance. The school did not perform an FBA, but did develop a basic BIP. (S.W. Aff. ¶ 7; 8 N.Y.C.R.R. §200.1 (mmm).) The BIP stated merely that L.M. will use “self-monitoring” on a daily basis, and teaching staff and L.M. will identify “triggers within the classroom” that “set him off” most often. Without an FBA, the BIP contained no additional information about what these “triggers” could be. The BIP also stated that a “calming down” plan should be created with L.M. but again gave no specific information as to what such a plan would look like or include. (S.W. Aff. ¶ 7, Ex. B.) Given the seriousness of L.M.’s behaviors, this plan was woefully inadequate. 8 N.Y.C.R.R. §§ 200.22(a)(3), 200.22(b)(4).

149. In 2006, L.M.’s school created another BIP, which was again substantially insufficient. The school created the BIP without an FBA and stated that a “counseling, behavior modification chart, student contracts and voluntary time out” would be used to change L.M.’s behavior without giving any specific strategies to prevent the behaviors when faced with triggering settings. (S.W. Aff. ¶ 8, Ex. C; 8 N.Y.C.R.R. §§ 200.1 (mmm), 200.22(b)(4).)

150. As a result of the failure to provide the necessary behavioral supports, L.M.’s behavior continued to escalate. The school recommended that he be transferred to District 75 in 2009 because his “social and emotional needs” could not be met in a community school. (S.W. Aff. ¶ 9.) The 2009 IEP noted that “[L.M.] is able to work on class assignments if he is engaged immediately on a 1:1 basis, but his impulsivity prevents him from remaining focused and on

task.” The IEP further noted that “[L.M.] frequently leaves the class without permissions...[L.M.] has exhibited disrespectful verbal language toward adults and does not take responsibility for his actions.” The school did not conduct an FBA or create a new BIP, however. (*Id.* ¶ 10, Ex. D; 8 N.Y.C.R.R. §§ 200.4(b)(1)(v), 200.22(b)(1).)

151. In 2010, L.M.’s school created a BIP. The BIP was very similar to the BIP created in 2006; it lacked real strategies and was substantially insufficient. (S.W. Aff. ¶ 11, Ex. E.)

152. Because of the DOE’s failure to provide L.M. with appropriate behavioral supports, he has stagnated academically. At the end of his ninth grade year, L.M. was still reading at a second grade level and doing math at a third grade level. (*Id.* ¶ 12.)

153. In June 2011, AFC requested all of L.M.’s educational records from all the schools L.M. attended and the CSE. The records produced did not include an FBA. To date the DOE still has never conducted an FBA for L.M. despite numerous suspensions and the clear correlation between his behavioral struggles and low academic functioning. (*Id.* ¶ 13; 8 N.Y.C.R.R. §§ 200.4(b)(1)(v), 200.22(b)(1).)

#### **C.P.**

154. C.P. is a fifteen-year-old student classified with an emotional disturbance. (Affidavit of S.P. dated Mar. 13, 2013 (“S.P. Aff.”), ¶ 1.) As described below, although C.P. began exhibiting behavioral issues while in a 12:1:1 special class when he was in the sixth grade in the fall of 2007, C.P.’s school did not conduct an FBA for four years. (*Id.* ¶¶ 2-15; 8 N.Y.C.R.R. §§ 200.4(b)(1)(v).) Even when his school did perform an FBA, the FBA and BIP did not provide any individualized strategies to address C.P.’s behavior, resulting in continued

behavioral and academic challenges and discipline for C.P. (S.P. Aff. ¶¶ 15-17; 8 N.Y.C.R.R. §§ 200.22(a)(3), 200.22(b)(4).)

155. In the fall of 2007, school staff described C.P. as a student who had difficulty with some students and was disrespectful to adults. According to his teachers, he struggled with controlling his feelings and dealing with frustration and conflict. (*Id.* ¶ 2.)

156. C.P.'s November 2007 IEP stated that one of C.P.'s short-term objectives was to learn to function in a controlled manner in situations that result in his loss of control. The IEP also noted that C.P. needed specific academic and behavioral interventions to benefit appropriately from the curriculum. Nevertheless, the school did not conduct an FBA and did not create a BIP. (*Id.* ¶ 3, Ex. A.)

157. Between March 2008 and November 2009, C.P. was suspended seven times for disruptive and aggressive behavior resulting in C.P. being removed from his class for over 20 school days. Even though the school suspended C.P. seven times, the school never conducted an FBA and never created a BIP during that time period. (*Id.* ¶¶ 5, 6.)

158. During the spring of 2009, C.P. failed all subjects in the final marking period of seventh grade. (*Id.* ¶ 7.)

159. In the fall of 2009, the DOE conducted a triennial evaluation of C.P. The DOE evaluator determined that C.P. harbored feelings of anger and that he had difficulty with interpersonal relationships. The evaluation noted that C.P. refused to participate in class, frequently used foul language and demonstrated aggressive behavior towards others. (*Id.* ¶ 8.) At a meeting in November to discuss the results of the evaluation and review the prior year's IEP, school staff stated that C.P. had difficulty with peer relationships and did not treat authority figures with respect, resulting in C.P.'s multiple suspensions. (*Id.* ¶ 9.)



160. A BIP bearing the same date as the IEP was attached to the IEP, but there is no indication that the school conducted an FBA prior to the creation of the BIP. (*Id.* ¶ 9; 8 N.Y.C.R.R. §200.1 (mmm).) Despite the school’s repeated complaints about C.P.’s aggressive behavior, the sole supports listed on the BIP are discussing strategies with the guidance counselor “to address his academic performance” and an instruction that the parent “obtain outside counseling for C.P.” (S.P. Aff. ¶ 10, Ex. C.) C.P.’s BIP did not contain the baseline measure of the problem behavior, including the frequency of the target behavior; nor did it have any information regarding a schedule to measure the effectiveness of intervention strategies used by the school staff. 8 N.Y.C.R.R. §§ 200.22(a)(3), 200.22(b)(4). In other words, the BIP did not explain how the school would properly address the behaviors of concern. (S.P. Aff. ¶ 10, Ex. C.)

161. During the 2010-2011 school year, C.P. attended the ninth grade in an Integrated Co-Teaching (“ICT”) classroom despite his struggles in a more restrictive 12:1 setting during the prior school year. C.P.’s November 2010 IEP indicated that C.P.’s behavior seriously interfered with instruction, but the school did not conduct an FBA or update the November 2009 BIP created while C.P. was attending middle school. (*Id.* ¶ 11, Ex. D.)

162. During the 2010-2011 school year, C.P. failed all his classes. (*Id.* ¶ 12.)

163. At the end of the 2010-2011 school year, C.P.’s school conducted a social history and a psycho-educational evaluation. The psycho-educational evaluation noted that C.P. presented as a young man dealing with issues of frustration and anger who had poor coping skills and appeared defiant and oppositional in order to mask his academic insecurities. The evaluator determined that C.P. did not have the ability to contain his feelings and emotions in a school atmosphere. Despite evaluations and IEPs highlighting C.P.’s behavioral issues and their effect

on his academic performance, the DOE did not conduct an FBA. (*Id.* ¶ 13; 8 N.Y.C.R.R. § 200.4(b)(1)(v).)

164. C.P.'s July 2011 IEP stated that C.P. did not have the ability to contain his feelings, emotions, and reactions when in school and it appeared that his volatility was often tied to his feelings of frustration concerning his learning difficulties. The IEP concluded that C.P. needed a well-structured environment that would address his behavior management needs which interfered with the instructional process. Despite this conclusion, the school's IEP team did not recommend an FBA or BIP for C.P. (S.P. Aff. ¶ 14, Ex. E, 8 N.Y.C.R.R. §200.4(b)(1)(v).)

165. C.P. repeated the ninth grade at the same school in an ICT class. After four years of noted behavioral challenges and multiple removals from instruction because of his behavior, the DOE finally conducted an FBA on December 8, 2011. The school used incident reports and anecdotes from teachers and staff to prepare the FBA. The evaluator did not conduct a classroom observation to collect direct data about C.P.'s behavior. 8 N.Y.C.R.R. § 200.22(a)(2). The school psychologist also failed to include information about the frequency and duration of the behavior to form a baseline of the behavior. 8 N.Y.C.R.R. § 200.22(a)(3). In addition, the school psychologist did not consult C.P. or C.P.'s parent. 8 N.Y.C.R.R. § 200.22(a)(2). With regards to the expected behavior changes, the FBA listed behaviors that were not measurable or objective. For example, as an expected behavior change, the school psychologist listed, "Presenting as amiable and cooperative as opposed to confrontative [*sic*]. Not taking stances that suggest the possibility of imminent aggression" and "Not refusing requests in an odd manner." These goals are neither measurable nor objective. (S.P. Aff. ¶ 15, Ex. E.)

166. The accompanying BIP, also dated December 8, 2011, failed to mention a *single* intervention strategy to be used to prevent the occurrence of C.P.'s concerning behavior. 8

N.Y.C.R.R. §200.22(b)(4). Instead, the BIP listed the expected behavior changes as “Increase attendance, decrease cutting,” “Increase compliance with staff requests,” and “Increase cooperative behavior.” The respective “methods/criteria for outcome measurement” did not provide any strategy or supports for C.P., stating, “Standard attendance measures”, “Decrease in reported incidents and ABC’s,” and “Teacher reports to guidance counselor.” In addition, the document did not propose a hypothesis as to why the problem behavior occurred, nor did it identify a baseline measure of the problem behavior. (S.P. Aff. ¶ 16, Ex. F; 8 N.Y.C.R.R. § 200.22(b)(4).)

167. As a result of the DOE's failure to conduct an FBA for over four years, C.P. did not receive the appropriate behavioral supports in school with grave consequences. He has been suspended and removed from school for his behavior repeatedly, and has been unable to progress academically. (S.P. Aff. ¶ 17.)

**F.M.**

168. F.M. is a 16-year-old student currently attending a transfer high school, who is classified as having an emotional disturbance. (Affidavit of M.M. 1 dated Mar. 13, 2013 (“M.M. 1 Aff.”), ¶ 1.) Although F.M. has struggled with her school behavior since elementary school, the DOE created a BIP for the first time when F.M. was in seventh grade and did not conduct an FBA until the end of her second year of high school. (*Id.* ¶¶ 2, 5, 11.) Even when prepared, the FBA and BIP did not provide individualized information about F.M.’s behavior that would allow her school to provide the necessary behavioral supports.

169. In 2004, when F.M. was in third grade, F.M. was diagnosed with bipolar disorder and ADHD, classified as a student with a disability, and moved from a general education class in a community school to a 12:1:1 class in District 75. The DOE did not conduct an FBA or create

a BIP prior to placing F.M. in this more restrictive setting. (*Id.* ¶ 2; *see* 2011 SED Memo on FBAs; 8 N.Y.C.R.R. § 200.22(b)(1).) F.M. experienced academic challenges in the 12:1:1 District 75 placement as a result of her behavioral issues. For example, a January 2009 IEP indicated that, “When focused, [F.M.] loves to participate, however at times she does get frustrated during math and refuses to do work.” (*Id.* ¶ 3.)

170. Despite the impact F.M.’s behaviors were having on her academic progress, the DOE failed to conduct an FBA or create a BIP while F.M. was in the third through sixth grades. (*Id.* ¶¶ 2, 5, 11.)

171. In January 2009, an Annual Review was held while F.M. was in the seventh grade. The IEP team described F.M. as a student with difficulty regulating her emotions who was extremely rude and defiant toward adults and peers. The IEP team also noted that F.M.’s behavior required highly intensive supervision. (*Id.* ¶ 4.) To address F.M.’s behavioral challenges, the IEP team, for the first time, recommended the development of a BIP. Although a BIP must be “based on the results of a functional behavioral assessment,” 8 N.Y.C.R.R. §200.1(mmm), the IEP team did not recommend that an FBA be conducted prior to the creation of the BIP. (*Id.* ¶ 5.)

172. The BIP that was developed after the 2009 meeting did not provide an individualized plan to address F.M.’s behaviors. (*Id.* ¶ 6, Ex. A.) The BIP failed to include a hypothesis as to why the problem behavior occurs. 8 N.Y.C.R.R. §200.1(mmm). The BIP did not include a baseline measure of F.M.’s problem behavior, including the frequency, duration or intensity of the targeted behavior. 8 N.Y.C.R.R. §200.22(b)(4). It listed the following as “strategies” to manage F.M.’s behavior: (1) special education teacher, (2) paraprofessional, (3) “PAS room”, and (4) counseling. (M.M. 1 Aff. ¶ 6, Ex. A.) The BIP did not discuss what

alternative skills and behaviors would be taught in response to the behaviors. 8 N.Y.C.R.R. §200.22(a)(3). In addition, there was no schedule to measure the effectiveness of the interventions used by the school staff, 8 N.Y.C.R.R. §200.22(b)(4), and the BIP lacked information regarding the implementation of interventions, including regular progress monitoring of the behavioral interventions. 8 N.Y.C.R.R. §200.22(b)(5).

173. Without an appropriate plan to address F.M.'s behavior, F.M.'s behavior continued to interfere with her instruction. (M.M. 1 Aff. ¶ 7.)

174. In October 2009, an IEP team determined that F.M.'s behavior seriously interfered with instruction and required additional adult support. However, despite F.M.'s persistent struggles and the impact F.M.'s behaviors had on her academic progress, the school did not perform an FBA or develop a new BIP. *Id.* ¶ 7; 8 N.Y.C.R.R. §§ 200.4(b)(1)(v), 200.22(b)(1).

175. F.M. attended a new school in 2010 for the ninth grade. On October 5, 2010, the school held an IEP meeting. The IEP team determined that F.M.'s behavior continued to interfere with instruction and impede her learning, and developed a BIP. Although a BIP must be "based on the results of a functional behavioral assessment," 8 N.Y.C.R.R. §200.1(mmm), again there is no record that the school conducted an FBA prior to creating the BIP. (M.M. 1 Aff. ¶ 8, Ex. B.)

176. The 2010 BIP stated that F.M. generally "has difficulty in controlling her impulses." (M.M. 1 Aff. ¶ 9.) Again, the BIP contained no individualized strategies to address F.M.'s behavior. Instead, the BIP listed the strategies without specificity as "individual classroom plans" and "guidance intervention and weekly scheduled and unscheduled sessions." The BIP failed to include a hypothesis as to why the problem behavior occurs. 8 N.Y.C.R.R.

§200.1(mmm). It did not include a baseline measure of F.M.'s problem behavior. 8 N.Y.C.R.R. §§200.22(b)(4). In addition, the BIP had no schedule to measure the effectiveness of the interventions used by the school staff, 8 N.Y.C.R.R. §200.22(b)(4), and the BIP lacked information regarding the implementation of interventions, including regular progress monitoring of the behavioral interventions. (M.M. 1 Aff. ¶ 9; 8 N.Y.C.R.R. §200.22(b)(5).)

177. During the remainder of the 2010-2011 school year, F.M. was repeatedly removed from her classroom or suspended from school due to her behavior, starting in October 2010, the same month the BIP was developed. F.M. repeatedly was removed and sent to the suspension room in the school. Between October 2010 and March 2011, F.M.'s school suspended F.M. eight times. In total, F.M. was either removed or suspended for at least thirty-eight school days. (M.M. 1 Aff. ¶ 10.)

178. In June 2011, the DOE, for the first time, conducted an FBA. The FBA was prepared by the school psychologist using teacher anecdotal and classroom observations. Although required, the psychologist did not speak with the student or parent or review F.M.'s record, including evaluations or the prior BIPs, in preparing the FBA. (*Id.* ¶ 11, Ex. C; *see* 8 N.Y.C.R.R. § 200.22(a)(2).) The FBA did not include relevant information about F.M.'s antecedent behaviors that could be used as a basis of her subsequent BIP. The BIP that the school created did not include a hypothesis as to why the target behavior occurred and listed "Positive Behavior Plan" as a method of collecting data but did not include specific information about the positive behavior plan. (M.M. 1 Aff. ¶ 11, Ex. C; 8 N.Y.C.R.R. § 200.1 (mmm).)

179. In August 2011, another FBA was prepared during an IEP meeting. The FBA stated that data was collected through a classroom observation and teacher anecdotes, and falsely claimed that additional data was collected via conversation with the student, even though F.M.

was not actually asked to provide any information for the creation of the FBA. Without specificity, the FBA listed the frequency of the behavior as “frequent” and the intensity of the behavior as “varies.” (*Id.* ¶ 12, Ex. D.)

180. The BIP created on the same day did not include a hypothesis as to why the target behavior occurred, nor did it specify the criteria for outcome measurement, thereby precluding the school from accurately tracking F.M.’s progress. 8 N.Y.C.R.R. § 200.4(b)(4). Lastly, the school did not reassess the BIP every ten weeks as indicated on the document. (M.M. 1 Aff. ¶ 13, Ex. E.)

181. As a result of the DOE’s failure over at least the past four years to conduct appropriate FBAs and create proper BIPs, F.M. has not received the appropriate behavioral supports, which has negatively impacted her academic progress. (*Id.* ¶ 14.)

#### **D.B.2**

182. D.B.2 is a sixteen-year-old student who attends high school in Queens. (Affidavit of C.B. dated Mar. 20, 2013 (“C.B. Aff.”), ¶ 1.)

183. D.B.2 began attending a DOE school in the first grade in Rockaway Park in September 2002. The first week of that school year, the school informed his mother that D.B.2’s behavior was interfering with his ability to learn. When his mother asked about the possibility of having D.B.2 evaluated, the school said that he could only be eligible if he was held back in his grade twice. D.B.2 continued to attend the school through the end of the third grade. The school never evaluated him for special education services, despite requests. (*Id.* ¶ 2; 8 N.Y.C.R.R. §200.4(b)(1).)

184. D.B.2 started the fourth grade in Ozone Park in September 2005 and attended through the end of his fifth-grade year. During fourth grade, D.B.2 received a suspension that was later overturned but he still missed several days of school. (*Id.* ¶ 3.)

185. Throughout elementary school, D.B.2's behavior impeded his academic progress. Repeatedly, his report cards stated that his behavior was unacceptable and was getting in the way of his learning. Although D.B.2 was never held back, the school often stated that his promotion was in doubt. Neither of his schools conducted any evaluations, performed an FBA, or created a BIP. (*Id.* ¶ 4; 8 N.Y.C.R.R. §§200.4(b)(1)(v), 200.22(b)(1).)

186. After attending middle school in Florida, D.B.2 started ninth grade in a high school in Ozone Park in September 2010. D.B.2 had trouble adapting to high school, and his behavior was an obstacle to his learning from the start of the year. After he failed all of his classes except for physical education during the fall semester of ninth grade, the school evaluated him for special education. D.B.2 was given an IEP, which classified him as emotionally disturbed. Although his behavior had been noted repeatedly as being a significant cause of his academic problems, the school did not conduct an FBA and did not create a BIP. (C.B. Aff. ¶ 5; 8 N.Y.C.R.R. §§200.4(b)(1)(v), 200.22(b)(1).)

187. In March 2011, during the spring semester of D.B.2's ninth grade year, D.B.2 received a sixty-plus day suspension. While at the alternative learning center, D.B.2 was again suspended in May 2011. D.B.2's school did not discuss the possibility of performing an FBA or creating a BIP despite the obvious ongoing obstacle that D.B.2's behavior was presenting to his academic progress. (C.B. Aff. ¶ 6; 8 N.Y.C.R.R. §§200.4(b)(1)(v), 200.22(b)(1).)

188. After serving his suspension, D.B.2 started tenth grade back at the same high school. D.B.2's behavior continued to be an impediment to his learning. He was suspended again



in December 2011 for five days. Although the suspension was later overturned, D.B.2 missed valuable instruction due to his behavior. (C.B. Aff. ¶ 7.)

189. D.B.2 was suspended in March 2012 during the spring semester of his tenth grade year. The suspension he ultimately received was for 75 days. (*Id.* ¶ 8.)

190. D.B.2 started attending a new high school for eleventh grade in January 2013. Despite his long history of behavior problems significantly interfering with his academic progress, the school did not conduct an FBA or create a BIP to help D.B.2 with his latest return to school after his suspension. (*Id.*; 8 N.Y.C.R.R. §§ 200.4(b)(1)(v), 200.22(b)(1).)

191. D.B.2 was involved in an altercation on February 7, 2013 after which the school asked for a one-year suspension, but the incident was ruled a manifestation of his disability on February 25, 2013. (C.B. Aff. ¶ 9.)

192. Also on February 25, 2013, more than half-way through eleventh grade, an FBA and a BIP were finally developed for D.B.2. Both were developed, however, in large part, during the MDR meeting and therefore were inadequate to address D.B.2's behavior. The observational data used to create the FBA did not include a classroom observation; nor did it include input from any of D.B.2's classroom teachers who observed his behavior. 8 N.Y.C.R.R. § 200.22(a)(2). Both documents are vague and do not address D.B.2's behavioral needs. (C.B. Aff. ¶ 10-13, Ex. A and B.)

193. The only two behaviors listed on D.B.2's February 25, 2013 FBA are "insubordination" and "hallway walking." The FBA lists triggers or actions that lead to insubordination simply as D.B.2's difficulties following school rules and interacting with authority figures. For hallway walking, the FBA says the trigger is that he has ADHD. The only

interventions listed for these behavior problems are counseling and outside mental health services. (*Id.* ¶ 11, Ex. A.)

194. The BIP does not contain any specific strategies to address D.B.2's behavioral needs. 8 N.Y.C.R.R. §200.22(b)(4). The only strategy the BIP lists for handling his "insubordination" is to "remind him that he is supported, but must follow rules and regulations like everyone else," and to learn through counseling that the rules were not made to "punish him or harass him." For D.B.2's "hallway walking," the only strategy listed is to "consider walking with him to class, without engaging in any verbal discourse which may be considered argumentative or confrontational." Given D.B.2's long history of behavioral problems, much more specific strategies based on actual observations are needed to allow him to achieve these goals. (C.B. Aff. ¶ 12, Ex. B; 8 N.Y.C.R.R. § 200.22(a)(3).)

195. The BIP failed to include a baseline measure of D.B.2's problem behavior, including the frequency, duration or intensity of the targeted behavior. 8 N.Y.C.R.R. § 200.22(b)(4). The BIP also lacked information regarding the implementation of interventions, including regular progress monitoring of the behavior. (C.B. Aff. ¶ 13, Ex. B.)

196. As a result of the DOE's long history of failing to provide D.B.2 with appropriate behavioral supports, he has missed months of school and lost instruction. (*Id.* ¶ 14.)

### **S.S.**

197. S.S. is a seventeen-year-old student who is currently attending a District 75 school. He is diagnosed with ADHD and is classified as having an emotional disturbance. (Affidavit of M.W. dated Mar. 11, 2013 ("M.W. Aff."), ¶ 1.) Despite the fact that S.S.'s behavior has interfered with his learning since at least third grade, the DOE has never conducted an FBA. 8 N.Y.C.R.R. § 200.4(b)(1)(v). S.S.'s school created a BIP for S.S. for the first time in

2009, when S.S. was fourteen years old, but the BIP does not reflect an understanding of S.S.'s behavioral needs. (M.W. Aff. ¶¶ 3, 4.) Because of the school's failure to conduct an FBA and develop an appropriate BIP, S.S. has not received the appropriate behavioral supports, to the detriment of his academic needs.

198. S.S. was first evaluated for special education while he was in the third grade. Since at least that time, S.S. has had difficulties focusing and sitting still in class. (*Id.* ¶ 2.)

199. S.S.'s school created his first BIP in 2009 without conducting an FBA. 8 N.Y.C.R.R. §200.1(mmm). As a result, the BIP did not address S.S.'s specific behavioral needs, including the triggers for behavior and recommendations as to strategies that would improve S.S.'s behavior. 8 N.Y.C.R.R. §§200.22(a)(3), 200.22(b)(4). The 2009 BIP listed the sole strategies to change behavior as "Positive reinforcement providing more structure and supervision. Providing emotional support." However, the BIP did not explain how these broad statements would be specifically implemented. (M.W. Aff. ¶ 4, Ex. A.)

200. In May 2012, S.S.'s school revised S.S.'s BIP. Again, the school did not conduct an FBA before drafting the BIP. 8 N.Y.C.R.R. §200.1 (mmm). The sole strategies to address S.S.'s behavior were listed without detail as "develop coping mechanisms[,], counseling[, and] power of choice." (M.W. Aff. ¶ 6, Ex. B.) The BIP's sole supports to help S.S. change his behavior were listed without detail as "counseling[,], behavior coach[, and] interventions." (*Id.*) The BIP failed to explain what "interventions" would be used, or who was responsible for conducting the "interventions." 8 N.Y.C.R.R. §200.22(b)(4). The BIP did not specify any target behaviors or what "triggers" exist for these behaviors. 8 N.Y.C.R.R. §§ 200.1 (mmm), 200.22(a)(3), 200.22(b)(4). After the development of the revised BIP in May 2012, the school

failed to regularly share data on S.S.'s behavior and behavioral responses to interventions with S.S.'s parent. (M.W. Aff. ¶¶ 7, 8, Ex. B; *see* 8 N.Y.C.R.R. § 200.22(b)(5).)

201. Since the 2012 BIP, S.S. continues to struggle with behavior, and often leaves the classroom without permission, missing large chunks of instructional time. S.S. has been removed from class multiple times because of his behavior. (M.W. Aff. ¶¶ 9, 11.)

202. The school and S.S.'s classroom teacher recognize that S.S. continues to need behavioral supports, but the school has still not performed an FBA or developed an appropriate BIP. (*Id.* ¶ 15.)

203. In response to an April 2012 request for S.S.'s entire educational record, the DOE did not produce an FBA. (*Id.*) As a result of the DOE's failure to conduct an FBA and create a BIP that discusses and provides for necessary behavioral supports, S.S. continues to miss valuable instructional time which severely limits his academic progress. (*Id.* ¶ 14.)

#### **S.G.**

204. S.G. is a seventeen-year-old student classified with an emotional disturbance. In 2002, a house fire claimed his mother and two younger siblings. Because of the impact this tragedy caused for S.G., he has been diagnosed with Post-Traumatic Stress Disorder ("PTSD"). (Affidavit of L.B. dated April 3, 2013 ("L.B. Aff."), ¶¶ 1, 2.)

205. S.G. began exhibiting behavioral issues in 2004 while in a 12:1 special class in a community school placement. At the time, teachers were concerned about S.G.'s significant behavioral difficulties in the classroom, and his classroom teacher recommended a crisis intervention paraprofessional to work with S.G.. An occupational therapy evaluation from 2004 noted that S.G. "cannot do the work in the classroom and therefore acts out." The DOE did not

conduct an FBA or create a BIP for S.G. at that time. (*Id.* ¶ 3; 8 N.Y.C.R.R. §§ 200.4(b)(1)(v), 200.22(b)(1).)

206. Even with a crisis paraprofessional, a psychoeducational evaluation from May 2005 stated that S.G. was exhibiting increasingly dangerous behaviors in his current 12:1 placement and that his behaviors had not improved. The subsequent IEP noted that S.G.'s behavior seriously interfered with instruction and required additional adult support. Neither a FBA nor a BIP was developed. (L.B. Aff. ¶ 4; 8 N.Y.C.R.R. §§ 200.4(b)(1)(v), 200.22(b)(1).) To address S.G.'s behavior, the IEP just indicated that the school would utilize the classroom teacher and the guidance counselor and did not specify how they would be utilized. (L.G. Aff. ¶ 5, Ex. A.)

207. In 2006, S.G. was hospitalized for his behavior. His 2006 IEP noted that, “[S.G.’s] previous school experience was marred by severe behavioral issues, and his hospital course was reflective of this as he became physically aggressive towards hospital staff.” Though the IEP stated that S.G.’s behavior seriously interfered with instruction and required additional adult support, the school did not conduct an FBA or develop a BIP. 8 N.Y.C.R.R. §§200.4(b)(1)(v), 200.22(b)(1). The *only* intervention recommended by the DOE to deal with S.G.’s behavior was continued counseling as a related service. (L.B. Aff. ¶ 6, Ex. B.)

208. Over the next several school years, S.G.’s behavior continued to deteriorate because of the lack of behavioral supports in school. By 2009, the DOE had placed S.G. in District 75 where his IEP indicated that his behavior required highly intensive supervision. Teachers stated that “[S.G.] seems to have intellectual curiosity and is interested in learning; however, his behavior at times shows the opposite.” They also described S.G. as a youth experiencing difficulty controlling feelings of anger. Despite this explicit acknowledgement

concerning S.G.'s behavior, the DOE failed to conduct an FBA or create a BIP. 8 N.Y.C.R.R. §§ 200.4(b)(1)(v), 200.22(b)(1). Instead, the DOE just recommended continued counseling sessions within the District 75 setting – the very support that had not proven effective for five years. (L.B. Aff. ¶ 7, Ex. C.)

209. It was not until the fall of 2010 that the DOE conducted an FBA and created a BIP for S.G. (*Id.* ¶ 8.) The November 16, 2010 IEP noted that S.G. was the “greatest disturbance to the classroom behaviorally.” Teachers described S.G. as a significant danger to staff and peers in the school setting, and the IEP team determined that his behavior required highly intensive supervision. (*Id.* ¶ 9.)

210. The FBA created by the DOE failed to analyze why S.G. engaged in the behavior and how the behavior related to the environment. 8 N.Y.C.R.R. § 200.1(r). The FBA was the result of a review of S.G.'s record and not direct observation by the evaluator. 8 N.Y.C.R.R. § 200.22(a)(2). There is no information in the FBA to indicate that any classroom observations were done in conducting the evaluation or information to show that S.G. or his guardians were involved in the FBA. *Id.* Rather than include any recommendations for teaching alternative skills, the FBA recommended the severe and extreme step of calling EMS and the New York Police Department to deal with S.G.'s behavior. (L.B. Aff. ¶ 10, Ex. D.)

211. The BIP is similarly deficient. First, it provides no information concerning the baseline measure of S.G.'s behavior. 8 N.Y.C.R.R. § 200.22(b)(4). The BIP simply states that “Through counseling, S.G. will learn self-calming skill and alternative methods to appropriately express his feelings verbally.” Not only did the BIP fail to contain any information relating to the antecedents described in the FBA, 8 N.Y.C.R.R. § 200.22(a)(3), but counseling alone has proven, over the course of several school years, to be an ineffective method of dealing with

S.G.'s behavior. Additionally, the BIP lacked a schedule to measure the effectiveness of the school's intervention strategies. (L.B. Aff. ¶ 11, Ex. E.)

212. As a result of the DOE's failure to provide S.G. with an appropriate FBA and BIP, he has not received the appropriate behavioral support in school. During that time, the DOE has placed S.G. in more restrictive environments and suspended him several times. 8 N.Y.C.R.R. §200.22(b)(1). Taken together, these DOE actions have perpetuated S.G.'s lack of academic progress and failed to improve his behavior. (L.B. Aff. ¶¶ 13-15.)

**A.G.**

213. A.G. is a twelfth grade student who attends high school in Manhattan. (Affidavit of J.V. dated Mar. 28, 2013 ("J.V. Aff."), ¶ 1.)

214. A.G. began displaying behavioral issues when she was in kindergarten. When she was feeling anxious or didn't understand a concept, A.G. would have temper tantrums and knock down objects, such as building blocks. (*Id.* ¶ 2.)

215. Based on these behaviors, and their interference with her learning, A.G.'s mother requested that the DOE evaluate A.G. for special education while A.G. was in the first grade. The DOE conducted some evaluations, but did not conduct an FBA, despite her behavioral issues in the classroom. (*Id.* ¶ 3; 8 N.Y.C.R.R. §200.4(b)(1)(v).)

216. As a result of the evaluations, A.G. was diagnosed with ADHD and an auditory processing disorder. An IEP was developed, and she was classified as Other Health Impaired. The IEP recommended placement in an ICT classroom. The IEP also recommended that she received occupational and speech therapy. A.G. has never received occupational therapy, although it has continued to be mandated by her IEP. Despite A.G.'s history of behavioral

problems in the classroom, the school did not create a BIP. (J.V. Aff. ¶ 4; 8 N.Y.C.R.R. §200.22(b)(1).)

217. A.G. repeated the first grade. She was held back because of her poor attention and focus. Despite the impact her behaviors were having on her learning, the DOE did not conduct an FBA or create a BIP. (J.V. Aff. ¶ 5; 8 N.Y.C.R.R. §§ 200.4(b)(1)(v), 200.22(b)(1).)

218. A.G. began attending a different school for the second grade, and continued having behaviors that affected her learning. During one temper tantrum, the principal attempted to restrain A.G., which led to A.G. becoming even more upset. The principal then called school safety agents to restrain A.G. and called an ambulance to take her to the hospital. A.G. became hysterical, and ended up with scratches over her body from being restrained by the school safety agents. The DOE did not create an FBA or BIP after this incident. (J.V. Aff. ¶ 6; 8 N.Y.C.R.R. §§ 200.4(b)(1)(v), 200.22(b)(1).)

219. As a result of this incident, A.G.'s mother elected to send A.G. to another school for third grade and part of fourth grade. In the middle of fourth grade, A.G. moved to Texas. She attended schools in Texas for fourth, fifth, and sixth grades. (J.V. Aff. ¶ 7.)

220. A.G. moved back to New York and re-entered the New York City public school system in the seventh grade. A.G. continued to have behavioral challenges, and she began acting out both physically, by pushing or hitting objects, or verbally, by yelling. A.G. also reacted by yelling or pushing away if other people tried to touch or restrain her. No updated IEP was created for A.G. in the seventh grade, despite her behavioral challenges and her mother's requests that A.G. be evaluated. The DOE also did not conduct an FBA or create a BIP. (*Id.* ¶ 8; 8 N.Y.C.R.R. §§200.4(b)(1)(v), 200.22(b)(1).)



221. When A.G. was in eighth grade, A.G. became upset, stormed out of a classroom, and punched an exit sign. As a result of this incident, the school suspended A.G. for a week. Because A.G. arrived late to the MDR, the school stated it would not conduct the MDR. (J.V. Aff. ¶ 9; 8 N.Y.C.R.R. § 201.4(a).)

222. Although A.G.'s behaviors were causing her to miss instructional time, A.G.'s school still did not conduct an FBA or create a BIP at this time. (J.V. Aff. ¶ 10; 8 N.Y.C.R.R. §§ 200.4(b)(1)(v), 200.22(b)(1), 201.3(a), 201.3(b), 201.4(d).)

223. An IEP meeting was held later during the eighth grade school year. The IEP stated that A.G. has a "tendency to become frustrated, at times she has difficulty controlling her impulsivity and tendency to act on her feelings," and that "when [A.G.] becomes upset . . . she has difficulty attending to and responding [to] adult directives." Based on A.G.'s behaviors, her mother requested that the DOE create a BIP for A.G. Her mother thought if the DOE examined A.G.'s reactions, they would understand how her ADHD and her challenges with executive functioning tasks exacerbated her behavioral issues. A.G.'s mother also explained that A.G. had test anxiety, and this was a trigger for certain behaviors. The DOE did not conduct an FBA despite her mother's requests or the fact that A.G. was missing instructional time because of her behaviors. 8 N.Y.C.R.R. § 200.4(b)(1)(v). Even though the IEP listed a BIP as a behavior support that would be provided, A.G.'s mother had no knowledge of a BIP being created at that time. (J.V. Aff. ¶ 11, Ex. A; 8 N.Y.C.R.R. §§ 200.1(mmm), 200.22(b)(1), 200.22(b)(5).)

224. A.G. began attending high school in ninth grade, and her concerning behaviors continued. Through conversations that A.G.'s mother had with the school administrators and A.G.'s teachers, A.G.'s mother determined that A.G.'s teachers were not implementing or even

reading A.G.'s IEP. Instead of receiving behavioral supports, A.G. was repeatedly suspended by the school. (J.V. Aff. ¶ 12.)

225. During her ninth and tenth grade years, A.G. was suspended four times for incidents relating to her behaviors. The last suspension was for 90 days. A.G.'s mother continued to request that the DOE create a BIP for A.G. Despite these requests, as well as the fact that A.G.'s behaviors were clearly interfering with her learning, the DOE failed to conduct an FBA or create a BIP. (*Id.* ¶ 13; 8 N.Y.C.R.R. §§ 200.4(b)(1)(v), 200.22(b)(1).)

226. An IEP meeting was held in January 2011. The IEP stated that “when overwhelmed by either workload demand and social stressors, [A.G.] is likely to have difficulty effectively implementing strategies to overcome executive functioning weaknesses. In addition, she has problems modulating her behavior and interpersonal difficulties ensue, leaving her isolated and sabotaging efforts to help her.” Despite A.G.'s clear challenges, and the fact that she was being suspended as a result of her behaviors, the DOE did not conduct an FBA or create a BIP. (J.V. Aff. ¶ 14, Ex. B; 8 N.Y.C.R.R. §§200.4(b)(1)(v), 200.22(b)(1).)

227. While attending a suspension site during her 90 day suspension, A.G. received good grades and had no behavioral issues. Her mother recognized that the smaller setting with 1:1 assistance was beneficial for A.G., so looked for another high school that could meet these needs. (J.V. Aff. ¶ 15.)

228. A.G. began attending a different high school in eleventh grade. Her mother requested that the DOE conduct new evaluations for A.G. (*Id.* ¶ 16.) The DOE did not perform an FBA even though A.G.'s history of behavioral challenges that interfered with her learning. (*Id.* ¶ 17; 8 N.Y.C.R.R. § 200.4(b)(1)(v).)

229. An IEP meeting was held on January 30, 2013. The IEP states that A.G. has “difficulty to sustain focus . . . [which] impede[s] her learning and academic focus.” At that meeting, however, the school did not discuss conducting an FBA or creating a BIP. (J.V. Aff. ¶ 18, Ex. C; 8 N.Y.C.R.R. §§ 200.4(b)(1)(v), 200.22(b)(1).)

230. A.G.’s mother received a copy of the IEP in the mail at the beginning of March 2013. Attached to the IEP were an FBA and a BIP. A.G.’s mother was unaware that the school had conducted an FBA or developed a BIP prior to receiving them in the mail. (J.V. Aff. ¶ 19; 8 N.Y.C.R.R. §§ 200.22(a)(2), 200.22(b)(5).)

231. The FBA fails to appropriately describe the targeted behaviors, 8 N.Y.C.R.R. § 200.1(r), instead stating that A.G. “is easily distracted,” “struggles to start, complete and submit independent work,” and “shows low frustration tolerance.” The FBA does not hypothesize as to conditions that trigger the behavior or consequences that may reinforce it. *Id.* The FBA also fails to specify the frequency, duration, or intensity of behaviors, 8 N.Y.C.R.R. § 200.22(a)(3), and instead describes the frequency as “daily; in the classroom” and the duration as “minutes to entire period.” (J.V. Aff. ¶ 20, Ex. D.)

232. The DOE did not speak with A.G.’s mother or solicit her input at any point in conducting this FBA. 8 N.Y.C.R.R. §200.22(a)(2). Although the FBA is dated prior to the January IEP meeting, A.G.’s mother was not provided a copy of it prior to or at the IEP meeting. (J.V. Aff. ¶ 21.)

233. The BIP, dated December 17, 2012, fails to detail what strategies will be used to address A.G.’s behaviors. 8 N.Y.C.R.R. § 200.22(b)(4). Instead, the BIP contains general statements such as “A.G. will display behaviors consistent with active listening,” “A.G. will refrain from distracting peers by talking during instruction,” and “she will request a pass to meet

with her counselor if overwhelmed by distressing feelings.” The BIP also fails to include any baseline measurements regarding the frequency, duration, or intensity of her behaviors. (J.V. Aff. ¶ 22, Ex. E; 8 N.Y.C.R.R. § 200.22(b)(4).)

234. The DOE did not speak with A.G.’s mother or solicit her input in creating this BIP. 8 N.Y.C.R.R. §200.22(b)(5). Although the BIP is dated prior to the January IEP meeting, A.G.’s mother was not provided a copy of it prior to or at the IEP meeting. (J.V. Aff. ¶ 23.)

235. A.G. continues to have behaviors that impede her learning. For example, her trouble focusing causes her to become distracted during class or leave the room without permission. The DOE has failed to provide proper supports to address these behaviors. As a result, A.G. has suffered academically and failed to progress. (*Id.* ¶ 24.)

### **DOE SCHOOLS ARE NOT COMPLYING WITH THE LEGAL REQUIREMENTS FOR FBAS AND BIPS**

#### **DOE Schools Fail to Conduct FBAs when Behaviors Interfere with Learning**

236. The attached affidavits of parents and guardians provide examples of the numerous students with disabilities who have never had an FBA or have waited years for their school to conduct an FBA even though their behaviors were impeding their abilities to learn. Despite persistent behavioral incidents and challenges that impeded learning, S.S., L.M., D.B. 1, and S.M. have never had an FBA. (M.W. Aff. ¶ 15, S.W. Aff. ¶13, M.M. 2 Aff. ¶ 7, C.E. Aff. ¶ 12.) Similarly, Q.C. did not have an FBA for 8 years, F.M. did not have an FBA for seven years, S.G. did not have an FBA for six years, C.P. did not have an FBA for four years, and R.G. did not have an FBA for three years. (L.C. Aff. ¶ 10, M.M. 1 Aff. ¶ 11, L.B. Aff. ¶¶ 3, 9, S.P. Aff. ¶ 15, L.G. Aff. ¶ 4, 6.) Each year that these students did not have the appropriate behavioral

supports, they lost more irreplaceable academic instruction. (L.C. Aff. ¶ 14, M.M. 1 Aff. ¶ 14, L.B. Aff. ¶¶ 3-7, 15, S.P. Aff. ¶ 17, L.G. Aff. ¶ 15.) Many of these students were removed from the classroom and suspended for behavior that could be prevented through appropriate BIPs and behavioral supports.

237. Even in instances where a DOE school conducts an FBA of a student, schools neglect to update the FBA in subsequent years, resulting in schools relying upon outdated behavioral information about the student. For example, D.S.'s 2009 BIP has not been updated for 4 years. (S.S. Aff. ¶ 4, 8.) S.G.'s BIP has not been updated since 2010. (L.B. Aff. ¶¶ 12, 13.) G.N. and T.H.'s FBAs were not updated since September 2011, despite subsequent behavioral incidents. (T.H. Aff. ¶¶ 6, 9, 10; M.N. Aff. ¶¶ 10, 12.)

238. The failure to conduct an FBA when a student's behavior impedes learning results in the student not receiving appropriate behavioral supports and thus the denial of an appropriate education for the student. *See, e.g.,* Application of the Bd. of Educ. of the Carmel Central Sch. Dist., No. 05-031, at 7-8 (SRO May 6, 2005).

#### DOE Schools Fail to Develop BIPs

239. Schools are not giving the required consideration to developing BIPs either. As a result, DOE schools do not draft BIPs even when students' evaluations, providers, and IEPs recommend that a BIP be created to address their behaviors. For example, after years of behavioral incidents, including suspension and an incident resulting in R.G. going to the hospital, R.G. has still not received a BIP. (L.G. Aff. ¶¶ 11, 14.) Despite behavioral incidents and repeated recommendations for behavioral plans, S.G. did not have a BIP for six years, and F.M. did not have a BIP for five years. (L.B. Aff. ¶¶ 3, 9; M.M. 1 Aff. ¶ 6, 14.)

240. In addition, a student's BIP must be reviewed, at a minimum, every year. 8 N.Y.C.R.R. § 200.22(b)(2). Schools, however, are not reviewing BIPs each year. For example, S.S.'s BIP was not reviewed for more than three years. (M.W. Aff. ¶ 4, 6.)

241. Without a BIP, schools often do not have a plan to prevent a student's problem behavior from occurring altogether or from escalating to a more serious incident. As a result, students lose more instructional time, are removed from the classroom more frequently, and are suspended. (L.G. Aff. ¶¶ 8, 9 13; M.L. Aff. ¶¶ 6, 9, 11; M.N. Aff. ¶¶ 5, 7, 8, 9; T.H. Aff. ¶¶ 2, 4, 5, 6; C.J. Aff. ¶¶ 3-6; L.C. Aff. ¶¶ 4, 6; C.J. Aff. ¶¶ 5, 6; C.B. Aff. ¶¶ 6, 8; J.V. Aff. ¶¶ 6, 9, 13.)

#### DOE Schools Fail to Conduct Appropriate FBAs and Create Appropriate BIPs

242. Even when the DOE does conduct an FBA and develops a BIP, the resulting FBAs often do not analyze "why a student engages in behaviors that impede learning and how the student's behavior relates to the environment." NYSED FBA Memo. Likewise, resulting BIPs do not reflect "a plan that is based on the results of a functional behavioral assessment (FBA) and, at a minimum, includes a description of the problem behavior, global and specific hypotheses as to why the problem behavior occurs and intervention strategies that include positive behavioral supports and services to address the behavior." NYSED BIP Memo.

243. DOE documents produced by the DOE in response to a request pursuant to N.Y.P.O.L. §89 acknowledge that FBAs require observation for more than one day and must detail specific information about the student's behavior. Citing 8 N.Y.C.R.R. § 200.1(r), a DOE document states that FBAs should be based on data collected "over at least a 2-3 week period" and include direct observations of the students, "within multiple settings and situations." (Functional Behavioral Assessment in SESIS ("Compl. Ex. 1") pg. 4.). The document states that

each type of information necessary in an FBA (targeted behavior, frequency, duration, intensity, latency, antecedents to behavior, how behavior relates to environment, why the student engages in behavior, consequences serving to maintain behavior, recommendations for alternative behavior, reinforcement, detail to form the basis of a BIP) should be specifically detailed. (*Id.* pg. 4-9.) For example, in describing the student’s behavior, an FBA should “include who, what where, how much, and how long.” (*Id.* pg. 4.) In describing the antecedents to the behavior, and FBA should “[n]arrow down the data to determine what occurs just prior to the student exhibiting the behavior(s).” (*Id.* pg. 6.)

244. The DOE’s FBAs often consist of *one*, but not all, of the requirements enumerated in 8 N.Y.C.R.R. §200.22. FBAs often do not report on information obtained from direct observation of the student; information obtained from the student, the student’s teacher, and related service provider; information obtained from a review of available data; *and* information obtained from the student’s parent. *Id.* For example, the FBAs of C.P., J.P., A.D., D.B. 2, C.J., T.H, Q.C, and S.G. did not include a classroom observation. (S.P. Aff. ¶ 15, Ex. F; T.D. Aff. ¶ 5, Ex. A; M.M. 3 Aff. ¶ 6, Ex. B; C.J. Aff. ¶ 8, Ex. D; T.H. Aff. ¶ 7, Ex. A; L.C. Aff. ¶ 11, Ex. B; L.B. Aff. ¶ 10, Ex. D.) The FBAs of D.S. and G.N. did not list the source of any data collected to assess the students’ behaviors. (S.S. Aff. ¶. 5, Ex. A; M.N. Aff. Ex. B.)

245. Even though parents can provide highly relevant information about their children’s behavior, schools frequently do not consult parents or students during the FBA process if it occurs at all. (*See, e.g.* J.V. Aff ¶ 21, C.J. Aff. ¶ 7, C.L. Aff. ¶ 12, L.C. Aff. ¶ 10, M.L. Aff. ¶ 13, S.P. Aff ¶ 15, M.M. 1 Aff. ¶ 11, T.D. Aff. ¶ 4, J.R. Aff. ¶ 8, L.B. Aff. ¶ 10) Even worse, some students, like J.P., had an FBA and BIP developed without parental consent in violation of 8 N.Y.C.R.R. §§ 200.5(b) and 200.22(a)(2). *See also* NYSED FBA Memo.

246. Moreover, FBAs often are not conducted over multiple settings and times contrary to 8 N.Y.C.R.R. §200.22(a); NYSED FBA Memo. Instead, FBAs often occur on one day and are based on a short classroom observation, or a review of anecdotal reports without any direct observation. For example, D.S., C.P., F.M., D.B.2, J.L., T.H., Q.C., J.B., and A.D.’s schools conducted their FBAs on one day, and developed their BIPs on that same day. (S.S. Aff. Exs. A and B, S.P. Aff. ¶¶ 15, 16, Exs. F and G; M.M. 1 Aff. ¶¶ 12, 13, Exs. D and E; C.B. Aff. ¶ 10, Exs. A and B; C.L. Aff. ¶ 12, Exs. A and B; T.H. Aff. ¶¶ 7,8, Exs. A and B; L.C. Aff. ¶ 10, Exs. B and C; J.R. Aff. ¶¶ 8,11, Exs. B and C; M.M. 3 Aff. ¶ 6, Exs. B and C.) Similarly, J.P.’s, G.N.’s, and S.G.’s school conducted their FBAs in one day. (T.D. Aff. ¶ 5, Ex. A; M.N. Aff. Ex. B; L.B. Aff. ¶ 10, Ex. D.) With such a limited observation, it is not surprising that the resulting BIPs do not reflect the behavioral needs of the student and do not propose a plan that can appropriately and effectively address and prevent the student’s concerning behavior.

247. Nor do the FBAs contain the required information or data necessary to understand the student’s behavior and develop appropriate BIPs. Most, if not all, of the students’ FBAs described herein do not describe the baseline of the student’s behavior, as 8 N.Y.C.R.R. §200.22(b)(3) requires. Describing the frequency of a student’s behavior as “immediately upon arrival and continues throughout the day” (T.D. Aff. ¶5, Ex. A), “happens frequently throughout the school day” (S.S. Aff. ¶ 5, Ex. A), “frequent” (M.M. I Aff. ¶ 12, Ex. D), “daily” (T.H. Aff. ¶ 7, Ex. A; C.L. Aff. ¶ 13, Ex. A; C.J. Aff. ¶ 8, Ex. D; L.B. Aff. ¶ 10, Ex. D), “various times throughout the day” (M.N. Aff. Ex. B), “all classes” and “ongoing” (L.C. Aff. ¶ 11, Ex. B) and “often” (T.H. Aff. ¶ 7, Ex. A; M.M. 3 Aff. ¶ 6, Ex. B.) does not provide a baseline by which a school can understand, prevent, and address behavior. *See, e.g.*, Application of the Bd. of Educ. of the Wallkill Cent. Sch. Dist., No. 02-039, at 4, 5 (SRO Mar. 28, 2003) (describing frequency



of behavior as “two to three times per week” as not adequate); Application of a Child with a Disability, No. 02-108, at 3 (SRO Oct. 14, 2003) (finding an FBA that failed to identify, define or describe the behavior in specific and concrete terms to be inadequate).

248. The FBAs conducted by DOE schools frequently do not include “information on why the student engages in behaviors that impede learning and how the student’s behavior relates to the environment in sufficient detail to form the basis for a behavioral intervention plan for the student that addresses antecedent behaviors; reinforcing consequences of the behavior; recommendations for teaching alternative skills or behaviors; and assessment of student preferences for reinforcement.” NYSED FBA Memo; 8 N.Y.C.R.R. §§ 200.22(a)(3). Rather, the FBAs attached to this complaint demonstrate that schools provide very vague descriptions of a student’s behavior, or use the FBA to express frustration at the student’s behavior, but do not hypothesize as to *why* the student engages in the behavior. For example, J.P.’s FBA describes the triggers of his behavior as “Begins immediately upon arrival and continues throughout day” and the presumed purpose of his behavior as “[J.P.] wants his own way and to do what he pleases.” (T.D. Aff. ¶ 5, Ex. A.) A.D.’s FBA describes his triggers as “Diagnosed with autism, can be overstimulated auditorily and visually,” without description of what may overstimulate A.D. to cause the behavior. (M.M. 3 Aff. ¶ 6, Ex. B.) D.B.2’s FBA states that triggers for his insubordination are “difficulties abiding by school rules and regulations, also having difficulties with authority figures and properly (socially acceptable manner) interacting with those authority figures,” and that his trigger for his hallway walking is his ADHD. (C.B. Aff. ¶ 11, Ex. A.) Q.C.’s FBA describes the triggers solely as “[Q.C.] shows non-cooperative attitude in all classes, regardless of activities.” (L.C. Aff. ¶ 11, Ex. B.) T.H.’s FBA describes the antecedents as “[T.H.] is very impulsive and gets bored easily. At any given time he may decide to act out” and

identifies his triggers as “[T.H.] does not like school work, school rules, being told what to do, and consequence for his negative behavior.” (T.H. Aff. ¶ 7, Ex. A.) D.S.’s FBA described the behavior of an entirely different student. (S.S. Aff. ¶ 5, Ex. A.) Because the FBAs do not provide sufficient detail about the causes for a student’s behavior, the resulting BIPs do not provide a plan for behavior supports strategies that are individualized to the student’s needs and that recognize what will trigger concerning behavior. *See Application of a Child with a Disability*, No. 02-108, at 3 (SRO Oct. 14, 2003) (finding a BIP to be inadequate because it was based upon a FBA that lacked necessary details about the types of and triggers for behaviors).

249. DOE documents produced in response to a document request emphasize that BIPs must be “specific,” give “clear expectations for student,” and “design the intervention strategies in a more student-centered way.” (Behavioral Intervention Planning in SESIS (“Compl. Ex. 2”) pgs. 3, 7.) DOE schools are not creating these student specific BIPs.

250. To the extent that schools create BIPs, many do not discuss the factors mandated in 8 N.Y.C.R.R. § 200.22 and do not provide any guidance on how the school will work with the student to improve behavior and responses to behavior as mandated by 8 N.Y.C.R.R. §200.22(b)(4(ii)). A number of the BIPs described above do not contain *any* strategies to prevent the occurrence of the behavior (S.P. Aff. ¶ 16, Ex. G; S.S. Aff. ¶ 6, Ex. B; M.W. Aff. ¶ 4, Ex. A; M.M. 1 Aff. ¶ 13, Ex. E; T.D. Aff. ¶ 6, Ex. B; M.N. Aff. Ex. C.) Even those BIPs that purport to give a strategy do not provide any specific plan for addressing a student’s behavior. Instead, the purported strategies describe the behavior the school would like the student to demonstrate. Rather than discuss “the intervention strategies to be used,” BIPs note the general goal that the student will no longer engage in the prohibited behavior, or require that the student improve attendance or follow school rules. (J.V. Aff. ¶ 22, Ex. E; C.J. Aff. ¶ 9, Ex. E; C.L. Aff. ¶ , Ex. B;

L.C. Aff. ¶ 12, Ex. C; J.R. Aff. ¶ , Ex. C; M.M. 3 Aff. ¶ 6, Ex. C.) Other BIPs provide vague encouragement, rather than strategies. For example, the sole strategies on one student’s BIP are, “develop coping mechanisms, counseling, power of choice.” (M.W. Aff. ¶ 6, Ex. B.) Another student’s behavior plan is to “reinforce positive behaviors” and “[t]ry to keep [student] on task. Keep him focused and constantly supervised.” (T.H. Aff. ¶ 8, Ex. B.) D.S.’s BIP states that he will “learn appropriate ways to deal with others.” (S.S. Aff. ¶ 6, Ex. B.) These vague plans do not meet the requirements of 8 N.Y.C.R.R. §§200.22(b). *See, e.g.*, Application of the New York City Dep’t of Educ., No. 07-120, at 9 (SRO Feb. 7, 2008)(finding a BIP inadequate because it fails to describe what strategies and behavioral reinforcements will be used); Bd. of Educ. of the Wallkill Cent. Sch. Dist., No. 02-039, at 4-5 (SRO Mar. 28, 2003)(finding a BIP inadequate because it “does not provide sufficient detail about what will be done to improve the student's behavior that interferes with his academic performance.”)

251. As with FBAs, many BIPs do not list the baseline measure of the problem behavior, including frequency, duration, intensity and latency of the behaviors, taken over various activities, settings, people, and times of day, as required by 8 N.Y.C.R.R. §200.22(b)(4). (S.P. Aff. ¶ 10, 16, Exs. C, G; L.C. Aff. ¶ 12, Ex. C; J.R. Aff. ¶ 5, Ex. A; M.M. 1 Aff. ¶¶ 6, 9, 11, 13, Exs. A, B, C, E; M.M. 3 Aff. ¶ 6, Ex. C; S.S. Aff. ¶ 6, Ex. B; M.N. Aff. Ex. C; M.W. Aff. ¶ 7, Ex. B; C.B. Aff. ¶ 13, Ex. B; T.D. Aff. ¶ 6, Ex. B; L.B. Aff. ¶ 11, Ex. E.)

252. In fact, some BIPs are not even based upon the results of the FBAs as they are required to be. 8 N.Y.C.R.R. 200.1(mmm); NYSED BIP Memo. For example, G.N.’s BIP was created twelve days before the FBA occurred. ( M.N. Aff. ¶ , Ex. .) S.S.’s, L.M.’s, and F.M.’s BIPs were created without an FBA. (M.W. Aff. ¶¶ 3, 4, 7, Exs. A and B; S.W. Aff. ¶¶ 7, 8, 10, Exs. B, C and E; M.M. 1 Aff. ¶¶ 6, 8, Exs. A, B.) Schools are also not reviewing BIPs with

parents regularly, as 8 N.Y.C.R.R. 200.22(b)(5) requires. (J.R. Aff. ¶ 6; C.L. Aff. ¶ 16; S.P. Aff. ¶ 10; M.M. 1 Aff. ¶¶ 6, 13; C.B. Aff. ¶ 13; J.V. Aff. ¶ 23.)

**THE DOE DOES NOT HAVE A SYSTEM OF OVERSIGHT OR ACCOUNTABILITY TO ENSURE SCHOOLS CONDUCT FBAS AND DEVELOP BIPS IN COMPLIANCE WITH STATE LEGAL REQUIREMENTS**

253. The twenty affidavits attached to this complaint illustrate the experiences of students with IEPs and behavioral challenges throughout New York City. The students described in the affidavits have attended more than twenty DOE schools, and each school failed to conduct appropriate FBAs and develop appropriate BIPs. The experiences described in the affidavits are not unique to those schools or those students with disabilities. In connection with the thousands of families of students with disabilities that AFC advises each year, AFC has repeatedly observed that New York City public schools are not conducting FBAs or developing BIPs in a consistent manner to ensure that students receive needed behavioral supports. Many of these students, like the twenty students described in the attached affidavits, are not receiving appropriate behavioral supports because they do not have BIPs, they have never had FBAs, or their BIPs are not appropriate.

254. DOE schools are not following the state mandates for FBAs and BIPs, as the examples of the above twenty students demonstrate. Despite this non-compliance, the DOE is not overseeing its schools to ensure that schools are conducting FBAs and creating BIPs when a student's behavior is interfering with learning and that the resulting FBAs and BIPs specifically address the individual student's behavioral needs.

255. Each school appears to create its own form and have its own approach to the creation and implementation of FBAs and BIPs, many of which do not meet the legal

requirements for FBAs and BIPs. For example, some BIP forms (notably with the DOE logo) ask only for the schools to list the target behavior, expected behavior changes, and methods/criteria for outcome management, but do not request the school to detail the baseline and triggers for the behavior or the strategies and supports that the school will implement to address behavior, all of which 8 N.Y.C.R.R. § 200.22 requires. (J.V. Aff. ¶ 22, Ex. E; C.J. Aff. ¶ 9, Ex. E; C.L. Aff. ¶ 14, Ex. B; S.P. Aff. ¶ 15, Ex. G; M.N. Aff. Ex. C; M.M. 1 Aff. ¶ 11, Ex. C; M.M. 3 Aff. ¶ 6, Ex. C; C.B. Aff. ¶ 12, Ex. B; L.C. Aff. ¶ 12, Ex. C; T.D. Aff. ¶ 6, Ex. B.) Other BIP forms ask for strategies and supports, but do not ask for information on progress monitoring of the behavior as 8 N.Y.C.R.R. § 200.22 requires. (S.W. Aff. ¶¶ 7, 8, 11, Exs. B, C and E; S.P. Aff. ¶ 10, Ex. C; M.M. 1 Aff. ¶ 6, Ex. A; M.W. Aff. ¶¶ 4, 6, Exs. A, B; S.S. Aff. ¶ 6, Ex. B; L.B. Aff. Ex. E.) This lack of uniformity in practice suggests that the DOE has not provided sufficient guidance and oversight to schools to promote consistency regarding when students need FBAs and BIPs and what needs to be included and considered in conducting FBAs and creating BIPs.

256. Presumably in recognition of the state requirements for FBAs and BIPs, Chancellor's Regulation A-443 requires that “an FBA must be conducted within ten (10) business days of ... (a) classroom removal or suspension which results in the student being excluded from his/her current educational program for more than ten (10) school days that school year; or (b) placement of the student in an IAES for up to 45 days by the Regional Superintendent or impartial hearing officer,” and requires that an IEP meeting be convened “as soon as practicable” after the FBA to develop a BIP. DOE schools, however, are not complying with the DOE’s own regulations. Under Chancellor’s Regulation A-443, all students with disabilities on superintendent suspensions of ten days or more should have FBAs and BIPs; yet,

many of these students did not get an FBA and BIP after receiving suspensions (S.P. Aff. ¶¶ 5, 6; J.V. Aff. ¶ 13; C.B. Aff. ¶¶ 6-8; T.H. Aff. ¶¶ 4-6; S.W. Aff. ¶ 6.)


257. AFC has asked repeatedly over the years for the DOE to ensure that its schools comply with requirements for FBAs and BIPs. On February 14, 2013, AFC sent a letter to the DOE demanding that the DOE improve its compliance and gave the DOE to March 8, 2013 to respond. The DOE did not send any response by March 8. Finally, on March 20, 2013, the DOE sent a short letter response. Faced with the prospects of this complaint, the DOE appears to say now that it is working to improve FBAs and BIPs by representing that it is “taking steps to improve schools’ understanding of when an FBA is required and how to perform a quality assessment in these circumstances, and when appropriate, to prepare an effective BIP for students.” The steps that the DOE described, however, are not sufficient to address the systemic failure of DOE schools with regard to FBAs and BIPs. In fact, some of the steps described have already been in place for more than a year, but the problems with FBAs and BIPs continue. After a documented history of extensive and pervasive failure, a finding of violations and an order from NYSED are necessary to guarantee the failures will cease. The DOE has internal guidance on appropriate FBAs and BIPs as well as a Chancellor’s Regulation, but schools are not following either the internal guidance or the regulation and the DOE has not ensured compliance for years. The DOE still has not provided any concrete plan to ensure system-wide compliance with the requirements for FBAs and BIPs, and AFC continues to learn of more students who need FBAs and BIPs or whose FBAs and BIPs do not meet state requirements. These students will continue to be harmed by the loss of instruction that so often results from the lack of appropriate behavior supports.

258. The pervasive failure of DOE schools to conduct FBAs and create BIPs when behavior is impeding learning and to create individualized and appropriate BIPs based upon FBAs that analyze students' behavior observed over multiple settings, people, and times reflects the DOE's systemic violation of 8 N.Y.C.R.R. §§ 200.1, 200.4 and 200.22. The DOE is not monitoring or overseeing its schools to ensure that schools are conducting appropriate FBAs and developing appropriate BIPs when students' behaviors are impeding their ability to learn. The DOE is also not providing sufficient resources and support to the schools so that schools can perform appropriate FBAs and develop and implement appropriate BIPs when required. As a result, each school is left to its own devices with regard to behavioral plans, often with detrimental effects on students. Rather than provide the appropriate supports, schools do not know any better or do not have the resources available, so resort to disciplining and removing these students with disabilities from their classrooms. As one school explained to a parent when faced with an inadequate FBA and BIP, "We are not behavioral specialists." (T.D. Aff. ¶ 9.) The DOE's failure to build the necessary expertise across the system and provide the necessary oversight, support, and resources as to FBAs and BIPs is a systemic violation of New York law and regulations.

#### **RELIEF REQUESTED**

259. We request that NYSED find that the DOE is not complying with state legal requirements on FBAs and BIPs and order the DOE to:
- a. develop an accountability structure to ensure that all DOE schools, Children First Networks and Committees on Special Education ("CSEs") conduct FBAs and develop BIPs to the full extent required by New York law;

- b. identify those schools that are not conducting FBAs and BIPs in full accordance with the state legal requirements and develop a plan to ensure that those schools conduct FBAs and BIPs in appropriate situations;
- c. create a mandatory comprehensive training on FBAs and BIPs (including specific instructions on when to develop FBAs and BIPs, what should be included in FBAs and BIPs, and how to implement BIPs) for all DOE staff responsible for (1) determining whether FBAs and BIPs are necessary, (2) conducting appropriate FBAs and creating and implementing appropriate BIPs, and (3) supervising all DOE staff responsible for conducting FBAs or implementing BIPs;
- d. provide to DOE schools the resources (including professionals experienced in FBAs, BIPs, and positive behavioral supports) necessary to allow schools to conduct appropriate FBAs and develop appropriate BIPs; and
- e. provide mandatory training about positive behavior supports to all DOE staff responsible for ordering, creating, implementing, or supervising FBAs and BIPs.

  
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