



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE
SERVICES

April 2, 2013

Ms. Glenna Gallo
State Director of Special Education
Utah State Office of Education
250 East 500 South
P.O. Box 144200
Salt Lake City, Utah 84114-4200

Dear Ms. Gallo:

This is in response to your letter dated April 23, 2012 to Alexa Posny, former Assistant Secretary, Office of Special Education and Rehabilitative Services (OSERS), U.S. Department of Education, which was forwarded to me for response. I apologize for the delay in responding. In your letter, you request clarification of the consent requirements in Part B of the Individuals with Disabilities Education Act (IDEA) as they relate to functional behavior assessments (FBA). Specifically, you ask us to expand on our guidance issued in our February 9, 2007 letter to Dr. Kris Christiansen (Letter to Christiansen) regarding consent for FBAs and in OSERS's *Questions and Answers on Discipline Procedures*, revised June 2009 (Discipline Q&A). A summary of your questions and the Office of Special Education Programs' (OSEP's) answers follow.

Question 1: Does the definition of an FBA include both informal, i.e., observation, and formal assessments conducted by teachers to determine appropriate instructional interventions?

OSEP's Response: Neither the IDEA nor its implementing regulations at 34 CFR Part 300 define "FBA." As stated in the answer to Question E-2 of the Discipline Q&A,

"[a]n FBA focuses on identifying the function or purpose behind a child's behavior. Typically, the process involves looking closely at a wide range of child-specific factors (e.g., social, affective, environmental)."

An FBA may include both observation and formal assessments.

Question 2: Since an FBA is required under 34 CFR §300.530(f) in situations where an individualized education program (IEP) Team has determined that certain conduct was a manifestation of a child's disability, how can a local educational agency's (LEA) ability to conduct an FBA be dependent on parental consent?

OSEP's Response: In cases where a decision is made to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA), collectively referred to here as the IEP Team, must conduct a manifestation determination consistent with the requirements in 34 CFR §300.530(e). If the IEP Team determines that the conduct was a manifestation of the child's disability, it must take one of two actions: 1) conduct an FBA, unless the LEA has conducted an FBA before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan (BIP) for the child; or 2) if a BIP already has been developed, review

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the BIP, and modify it as necessary, to address the behavior. 34 CFR §300.530(f)(1)(i) and (ii) (emphasis added). Therefore, an LEA is not required to conduct an FBA in every situation where an IEP Team determines that a child's conduct was a manifestation of his or her disability.

In cases where the IEP Team seeks to conduct an FBA to determine if a child's conduct was a manifestation of his or her disability, the LEA must obtain parental consent because -

“[a]n FBA is generally understood to be an individualized evaluation of a child in accordance with 34 CFR §§300.301 through 300.311 to assist in determining whether the child is, or continues to be, a child with a disability. The FBA process is frequently used to determine the nature and extent of the special education and related services that the child needs, including the need for a BIP. As with other individualized evaluation procedures, and consistent with 34 CFR §300.300(a) and (c), parental consent is required for an FBA to be conducted as part of the initial evaluation or a reevaluation.”

Question 3: As used in the Discipline Q&A, clarify the meanings of “school as a whole,” “entire school,” and “overall school behavior” as they relate to an FBA.

OSEP's Response: We believe that you are referring to the usage of those phrases in the Letter to Christiansen, as those phrases are not used in the Discipline Q&A. As stated in your correspondence, and quoted from the Letter to Christiansen, it is the Department's position that -

“if the FBA is intended to assess the effectiveness of behavioral interventions in the school as a whole, the parental consent requirements in 34 CFR §300.300(a) and (c) generally would not be applicable to such an FBA because it would not be focused on the educational and behavioral needs of an individual child. If an FBA is used, for example, in the context of positive behavior supports as a process for understanding problem behaviors within the entire school and to improve overall student behavior in the school, it generally would not be considered an evaluation that would require parental consent, unless such consent is required from the parents of all children in the school prior to conducting such an evaluation. 34 CFR §300.300(d)(1)(ii).”

Letter to Christiansen at 2.

In the above context, the phrases “school as a whole” and “entire school” are assigned their commonly understood meaning, i.e., all or most of the children in a school rather than an individual child. Likewise, the phrase “overall student behavior”¹ is assigned its commonly understood meaning, i.e., behavior of all or most of the children in a school.

Question 4: Would a formative “three term contingency” assessment (e.g., noting a particular stimulus, a student's response to that stimulus, and the consequences of the student's response) used by a teacher with all students on a daily basis be considered an evaluation requiring parental consent?

¹ The phrase “overall school behavior,” as indicated in your question, is not used in the Letter to Christiansen.

OSEP's Response: No, unless such consent is required from the parents of all children in the school prior to conducting such an evaluation. 34 CFR §300.300(d)(1)(ii). You provide an example above of an assessment given to all students as part of a daily classroom management routine. Parental consent is not required for such an FBA in that context because the FBA would not be focused on the educational and behavioral needs of an individual child.

However, if, as part of an FBA for an individual student, a teacher were to conduct a “three term contingency” assessment to determine whether the student has a disability and to determine the nature and extent of the special education and related services that the student needs, the FBA would be considered an initial evaluation or reevaluation, in accordance with 34 CFR §300.15. Parental consent is required for an FBA to be conducted as an initial evaluation or a reevaluation of a child, consistent with 34 CFR §300.300(a) and (c).

Question 5: Must a school team obtain parental consent prior to collecting academic functional assessment data within a response to intervention (RTI) model?

OSEP's Response: There are a number of RTI frameworks, and while the Department does not endorse a particular one, they tend to share several core characteristics. These characteristics are: (1) high-quality, evidence-based instruction in general education settings; (2) screening of all students for academic and behavioral problems; (3) two or more levels (sometimes referred to as “tiers”) of instruction that are progressively more intense and based on the student's response to instruction; and (4) continuous monitoring of student performance. For example, one RTI framework may include a primary, secondary, and tertiary level of instructional support. In this framework, the primary level applies to all students in a general education setting, and the activities at this level are designed to provide high-quality instruction to the entire class or school and not principally intended to address the needs of students who are struggling. Secondary level activities provide specialized small-group instruction for students determined to be at risk for academic and behavioral problems. Tertiary level activities include specialized, individualized instructional or behavioral support for students with intensive needs.

Consistent with the answer to Question 4, parental consent is not required to collect data from all students in a general education setting at the primary level of an RTI framework, because the data collection would not be focused on the educational and behavioral needs of an individual child. Parental consent also would not be required to review such data when conducting an evaluation of a child under 34 CFR §300.305, because the data would be considered “existing evaluation data.” 34 CFR §300.300(d)(1)(i). (See Answer to Question 6 for further discussion on existing evaluation data.)

However, parental consent would be required if, during the secondary or tertiary level of an RTI framework for an individual student, a teacher were to collect academic functional assessment data to determine whether the child has, or continues to have, a disability and to determine the nature and extent of the special education and related services that the child needs. As with other individualized evaluation procedures, and consistent with 34 CFR §300.300(a) and (c), parental consent is required for an FBA to be conducted as part of an initial evaluation or reevaluation of a child when determining if a child qualifies as a child with a disability.

Question 6: Why must the LEA obtain parental consent before conducting a behavior observation as a part of an FBA, but not before reviewing a student’s record, including current classroom-based observations, as part of a reevaluation under 34 CFR §300.305?

OSEP’s Response: As explained in the answer to Question 2 above and in the Discipline Q&A, an FBA is generally understood to be an individualized evaluation of a child in accordance with 34 CFR §§300.301 through 300.311 to assist in determining whether the child is, or continues to be, a child with a disability. Parental consent is required prior to conducting such an FBA. In contrast, reviews of a student’s record conducted in accordance with 34 CFR §300.305 are reviews of *existing* evaluation data. OSEP previously explained that -

“[t]he public agency is not required to obtain parental consent before reviewing existing data as part of an evaluation or a reevaluation. 34 CFR §300.300(d)(1)(i). The review of existing data is part of the evaluation process. Section 300.305(a), consistent with section 614(c)(1) of IDEA, states that, as part of any reevaluation, the individualized education program (IEP) Team and other qualified professionals, as appropriate, must review existing evaluation data on the child, and on the basis of that review, and input from the child’s parents, identify what additional data, if any, are needed to determine whether the child continues to have a disability, and the educational needs of the child.”

Response to Question 1 in Letter to Anonymous, dated February 6, 2007 (Letter to Anonymous).

However, after reviewing existing evaluation data, the public agency must obtain parental consent before conducting any additional assessments needed for a reevaluation. 34 CFR §300.300(c)(1); see also Response to Questions 6 and 7 in Letter to Anonymous. Additional assessments may be necessary if the IEP Team and other qualified professionals determine that additional data are needed or the parent requests an assessment to determine whether the child continues to be a child with a disability and to determine the nature and extent of the special education and related services that the child needs.

Based on section 607(e) of the IDEA, we are informing you that our responses are provided as informal guidance and are not legally binding, but represent an interpretation by the U. S. Department of Education of the IDEA in the context of the specific facts presented.

We hope this explanation is helpful. If you have further questions, please do not hesitate to contact Rebecca Walawender at 202-245-7399 or by email at Rebecca.Walawender@ed.gov.

Sincerely,



Melody Musgrove, Ed.D
Director
Office of Special Education Programs