

PUBLIC SCHOOLS OF NORTH CAROLINA

DEPARTMENT OF PUBLIC INSTRUCTION June St. Clair Atkinson, Ed.D., *State Superintendent*

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TO: Directors, Exceptional Children Programs
Directors, Charter Schools
Directors, State-Operated Programs

FROM: Mary N. Watson, Director *MNW*
Exceptional Children Division

Ira B. Wolfe, Section Chief *IBW*
Policy, Monitoring and Audit Section

DATE: August 22, 2011

FUNCTIONAL BEHAVIORAL ASSESSMENTS

The Exceptional Children (EC) Division has received numerous inquiries from LEAs related to whether an Individualized Education Program (IEP) Team must conduct a reevaluation and obtain parental consent before conducting a Functional Behavioral Assessment (FBA), and whether a parent is entitled to an independent educational evaluation (IEE) following a disputed FBA. Dr. Alexa Posney, Director of the Office of Special Education Programs, provided some clarification for LEAs in the attached letter to Dr. Kris Christiansen. Please review the letter and its implications for your LEA as you consider conducting an FBA for a student with a disability.

Based upon Dr. Posney's guidance, the EC Division recommends that the IEP Team conduct a reevaluation and obtain the parent's written informed consent before conducting an FBA for purposes of developing or amending an individual behavioral intervention plan or behavioral goals for a student's IEP. Questions related to this interpretation should be directed to Ira Wolfe, Policy, Monitoring, and Audit Section Chief, at (919) 807-3976 or Ira.Wolfe@dpi.nc.gov or Joe Simmons, Behavior Support and Special Programs Section Chief, at (919) 807-3298 or Joe.Simmons@dpi.nc.gov.

MNW/IBW/JS:ls

Attachment

EXCEPTIONAL CHILDREN DIVISION

Mary N. Watson, *Director* | mary.watson@dpi.nc.gov

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

FEB - 9 2007

Dr. Kris Christiansen
Assistant Superintendent of Special Education and Related Services
Washoe County School District, Student Support Services
P.O. Box 30425
Reno, Nevada 89520-3425

Dear Dr. Christiansen:

Thank you for your recent letter to the Office of Special Education Programs (OSEP) in which you forwarded to my attention a letter submitted initially to this office dated May 10, 2005. I apologize for the delay in responding. You are asking for clarification under Part B of the Individuals with Disabilities Education Act (Part B) regarding whether a Functional Behavior Assessment (FBA) always triggers the procedural safeguards applicable to an evaluation or an independent educational evaluation (IEE) and whether parent consent is required prior to conducting an FBA.

In your May 10, 2005 letter, you reference an OSEP letter to Montana attorney Jennifer L. Scheinz dated June 7, 2000, in which OSEP responded, based on the situation posed by Ms. Scheinz's query, that an FBA conducted subsequent to the initial evaluation was a reevaluation, and that a parent was entitled to an IEE under applicable regulations if the parent disagreed with the child's FBA. On the other hand, you point out that the clarification provided in OSEP's 22nd Annual Report to Congress on the Implementation of the IDEA and in Technical Assistance Guide (TAG) #1, suggests that an FBA is a teaching methodology, which requires ongoing data collection to determine the effectiveness and efficiency of the behavior support plan." See OSEP Center on Positive Behavioral Interventions and Supports, Applying Positive Behavioral Supports and Functional Behavioral Assessments in Schools, 9, 17 (1999).

Your May 10, 2005 letter also makes reference to the U.S. Supreme Court's decision in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984), and you ask to which OSEP interpretation your School District should give deference. As explained below, we do not believe that the Scheinz letter and the TAG are in conflict.¹

If an FBA is used to evaluate an individual child in accordance with 34 CFR §§300.304 through 300.311 to assist in determining whether the child is a child with a disability and the nature and extent of special education and related services that the child needs, it is considered an evaluation

¹ Since the issuance of the OSEP response to Ms. Scheinz and the OSEP publication of the Technical Assistance Guide referenced in this letter, the Department has published a new set of final regulations implementing Part B of the Individuals with Disabilities Education Act (Part B) in 34 CFR Part 300--Assistance to States for the Education of Children with Disabilities program. The regulatory citations provided in this letter are to the final Part B regulations published in the Federal Register on August 14, 2006 at 71 Fed. Reg. 46540, which became effective on October 13, 2006. The policy clarification contained in the Scheinz letter and the TAG continues to apply even though some regulatory citations have changed in the final Part B regulations.

under Part B and the regulation at 34 CFR §300.15. Parental consent, consistent with 34 CFR §300.300(a) and (b), is required for an FBA conducted as an individual evaluation or reevaluation. If the FBA is conducted for individual evaluative purposes to develop or modify a behavioral intervention plan for a particular child, under 34 CFR §300.502, a parent who disagrees with the child's FBA would have the right to request an IEE at public expense. These regulatory provisions are consistent with the policy clarification provided in the Scheinz letter.

In contrast, the excerpt from the TAG reproduced in the 22nd Annual Report to Congress on the Implementation of the IDEA provides technical assistance for public agency personnel who wish to utilize positive behavioral supports and FBAs as methodologies within the agency's schools to improve the behavior of all students in the schools. The TAG is a compilation of research that reflects the opinions of the authors and does not necessarily reflect the views of the U.S. Department of Education. The purpose of the FBA is summarized in the TAG as "a process of understanding behavior in the context in which it is observed and of guiding the development of positive behavioral interventions that are relevant, effective, and efficient. FBA is a best and preferred practice for all challenging behavior, not just for behavioral events that result in suspensions or other disciplinary actions" TAG #1, at 9.

The TAG does not state that parental consent would not be required for an FBA conducted as "a best and preferred practice for all challenging behavior," as your letter suggests. However, we believe 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).

Your letter also asks: "If the IEP [individualized education program] team has developed appropriate goals and objectives, and specially designed instruction and wish to complete an FBA to determine the effectiveness of the teaching methods and positive behavioral supports used for the student to make progress towards IEP goals/objectives, is this considered an assessment, therefore requiring parental consent?"

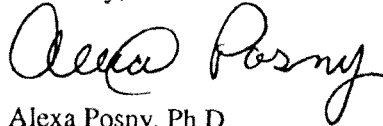
Consistent with the explanation provided in the Scheinz letter, we believe that parental consent would be required in this situation. Under 34 CFR §300.324(a)(2)(i), if a child's behavior impedes his or her learning or that of others, the IEP Team must "consider the use of positive behavioral interventions and supports, and other strategies to address that behavior." If an FBA is being conducted for the purpose of determining whether the positive behavioral interventions and supports set out in the current IEP for a particular child with a disability would be effective in enabling the child to make progress toward the child's IEP goals/objectives, or to determine whether the behavioral component of the child's IEP would need to be revised, we believe that the FBA would be considered a reevaluation under Part B for which parental consent would be required under 34 CFR §300.300(c).

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

I hope the information contained in this letter is helpful. If you have any other questions, please feel free to contact my office.

Sincerely,

A handwritten signature in cursive script that reads "Alexa Posny". The signature is written in black ink and is positioned above the printed name.

Alexa Posny, Ph.D.

Director

Office of Special Education Programs