



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

SEP - 5 2007

Edward J. Sarzynski, Esq.
Hogan, Sarzynski, Lynch, Surowka and DeWind, LLP
P.O. Box 660
Binghamton, NY 13902-0660

Dear Mr. Sarzynski:

This letter is in response to your letter dated May 15, 2007 to Dr. Michael Slade of my office, requesting additional response to your letter dated April 18, 2006. In your April 18, 2006 letter you request the opinion of the Office of Special Education Programs (OSEP) regarding whether, under Part B of the Individuals with Disabilities Education Act (IDEA), a parent's written consent is required for all evaluations that are not standardized tests administered to all students. You also state that the New York State Education Department has taken the position that a parent's written consent is necessary if a functional behavioral assessment is an evaluation.

IDEA and 34 CFR §300.300 of the final Part B regulations implementing the 2004 reauthorization of IDEA require a public agency to obtain parental consent prior to conducting an initial evaluation or reevaluation.

Under 34 CFR §300.300(a)(1), a public agency proposing to conduct an initial evaluation to determine if a child qualifies as a child with a disability under 34 CFR §300.8 must, after providing notice consistent with 34 CFR §§300.503 and 300.504, obtain informed consent, consistent with 34 CFR §300.9, from the parent of the child before conducting the evaluation. If the parent of a child enrolled in public school, or seeking to be enrolled in public school, does not provide consent for the initial evaluation, or the parent fails to respond to a request to provide consent, the public agency may, but is not required to, pursue the initial evaluation of the child by utilizing the procedural safeguards in subpart E of Part 300 (including the mediation procedures under 34 CFR §300.506 or the due process procedures under 34 CFR §§300.507 through 300.516). See 34 CFR §300.300(a)(3)(i).

A public agency must also obtain informed parental consent, in accordance with 34 CFR §300.300(a)(1), prior to conducting any reevaluation of a child with a disability. If the parent refuses to consent to the reevaluation, the public agency may, but is not required to, pursue the reevaluation by using the consent override procedures described in 34 CFR §300.300(a)(3). Also, the informed parental consent to conduct a reevaluation need not be obtained if the public agency can demonstrate that it made reasonable efforts to obtain such consent; and the child's parent has failed to respond. See 34 CFR §300.300(c)(1)-(2).

Written parental consent, consistent with 34 CFR §300.300(a) and (b), is required for any evaluation that is conducted in accordance with 34 CFR §§300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs. See 34 CFR §300.15. An initial evaluation of a child is the first completed assessment of a child to determine if he or she has a disability under IDEA, and the nature and extent of special education and related services required. Once a child has been fully evaluated the first time in a State, a decision has been rendered that a child is eligible under IDEA, and the required services have been determined, any subsequent evaluation of a child to determine whether the child is a child with a disability and the nature and extent of special education and related services that the child needs would constitute a reevaluation.

A public agency is not required to obtain parental consent before reviewing existing data as part of an evaluation or a reevaluation, or administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of parents of all children. See 34 CFR §300.300(d)(1). In addition, the screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services, and therefore could occur without obtaining informed parental consent for the screening. See 34 CFR §300.300(d)(1).

Evaluations of student progress occur as a regular part of instruction for all students in all schools. If such evaluations are designed to assess whether the child has mastered the information in, for example, chapter 10 of the social studies text, and are the same or similar to such evaluations for all children studying chapter 10 of the social studies text, parental consent would not be required for such an evaluation. If, however, the evaluation is specific to an individual child and is, as you indicated in your letter, "...crucial to determining a child's continuing eligibility for services or changes in those services," OSEP believes such evaluations fall under the provisions of 34 CFR §300.15 and require parental consent under the provisions of 34 CFR §300.300(a) and (c).

OSEP's letter to Dr. Kris Christiansen, dated February 9, 2007, and attached to this letter, specifically addressed the issue of parental consent for functional behavioral assessments (FBAs). As stated in that letter, if an FBA is being conducted for the purpose of determining whether the positive behavioral interventions and supports set out in the current individualized education program (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, OSEP believes that the FBA would be considered a reevaluation under Part B for which parental consent would be required under 34 CFR §300.300(c). However, 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.

Based on section 607(e) of 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 IDEA in the context of the specific facts presented.

We hope this provides the clarification you requested. If you have further questions on this matter, please contact Deborah Morrow, of my staff, at 202-245-7456.

Sincerely,

A handwritten signature in cursive script that reads "Patricia J. Guard".

Patricia J. Guard
Acting Director
Office of Special Education
Programs

Enclosure

cc: Dr. Rebecca Cort

Dated February 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 #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).¹

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).

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,

/s/

Alexa Posny
Director
Office of Special Education Programs