

CLARIFICATION OF THE PARENTAL CONSENT REQUIREMENTS RELATED TO FUNCTIONAL BEHAVIOR ASSESSMENTS

The Annual

UTAH INSTITUTE ON
SPECIAL EDUCATION LAW



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of Education

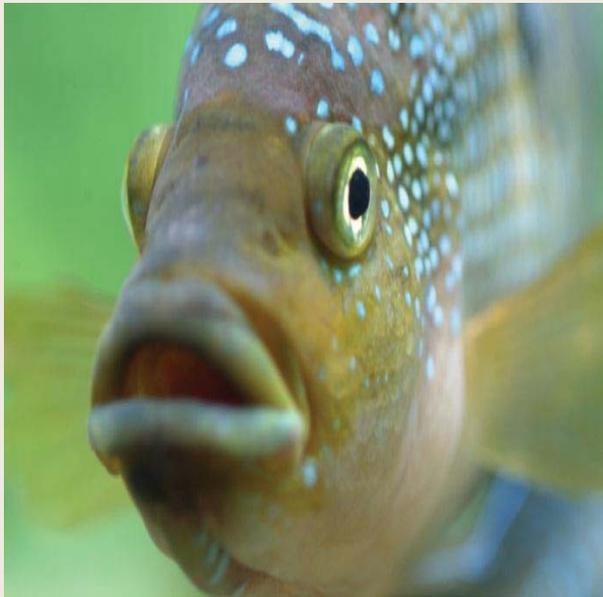
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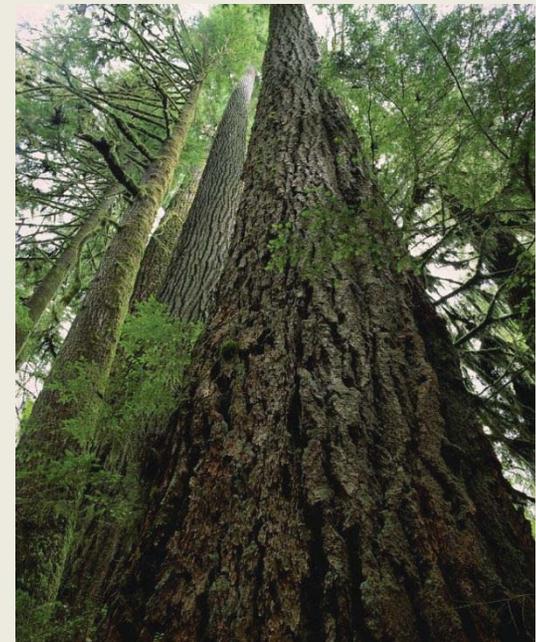
SECTION TOPICS

- OSEP Letter to Gallo (2013) clarification of the parental consent requirements in Part B of the IDEA as they relate to functional behavior assessments (FBA)
- Six questions related to parental consent requirements
- OSEP responses to questions
- Clarification where does required consent overlap with best practice

“Everybody is a genius. But if you judge a fish by its ability to climb a tree, it will live its whole life believing that it is stupid.”



Albert Einstein



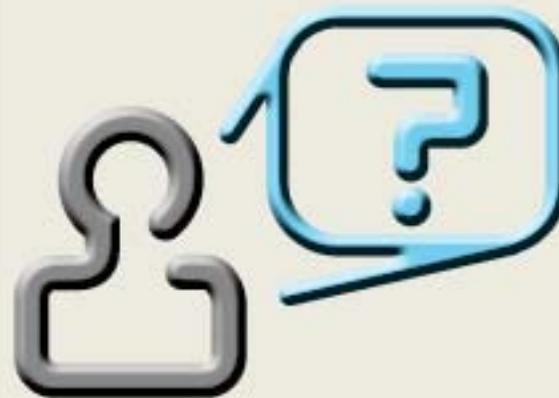
**Every piece of data represents
the life of a child.**

Vivian Lee

- **Using the functional behavior assessments (FBA) data to better serve our students is the best practice.**

QUESTION ONE

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 ONE

1. Neither the IDEA nor its implementing regulations at 34CFR 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 TWO

2. Since an FBA is required under 34CFR §300.530(f) in situations where an individualized education plan (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 NUMBER 2

2. 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 part and the LEA), collectively referred to here as the IEP Team, must conduct a manifestation determination consistent with the requirements in §34CFR §300.530(e). If the IEP Team determines that the conduct was a manifestation of the child's disability it must take one to two actions:

OSEP'S RESPONSE NUMBER 2

- 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 the BIP, and modify it as necessary, to ***address the behavior.*** 34 CFR §300.530(f)(1)(i) and (ii)(emphasis added).

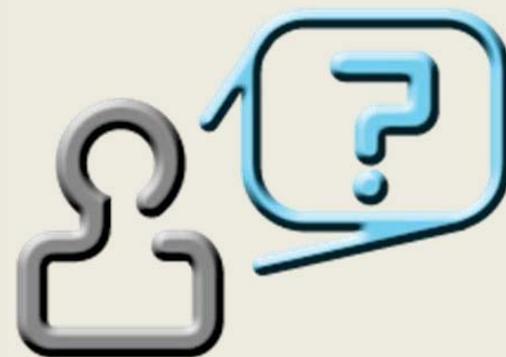
OSEP'S RESPONSE NUMBER 2

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 §300.530(a) and (c), parental consent is required for an FBA to be conducted as part of the initial evaluation or a reevaluation.”

QUESTION THREE

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



OSEP'S RESPONSE THREE

- 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 and evaluation.

34 CFR §300.300(d)(1)(ii).”

LETTER TO CHRISTIANSEN

“School as a whole” and “entire school”

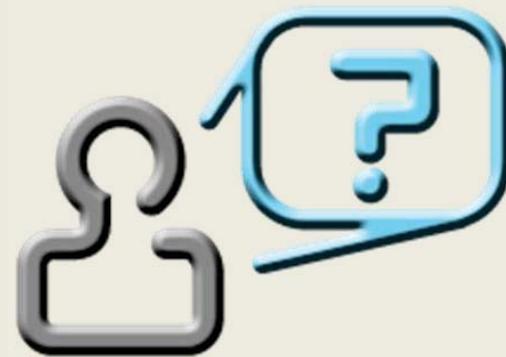
All or most of the children in a school rather than an individual child.

“Overall student behavior”

Commonly understood meaning, behavior of all or most of the children in a school.

QUESTION FOUR

4. Would a formative “three term contingency” assessment (e.g., noting a particular stimulus, a student’s response to the 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?



OSEP'S RESPONSE FOUR

- No, unless such consent is required for the parent for 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 a FBA in that context because the FBA would not be focused on educational and behavioral needs of an individual child.

HOWEVER



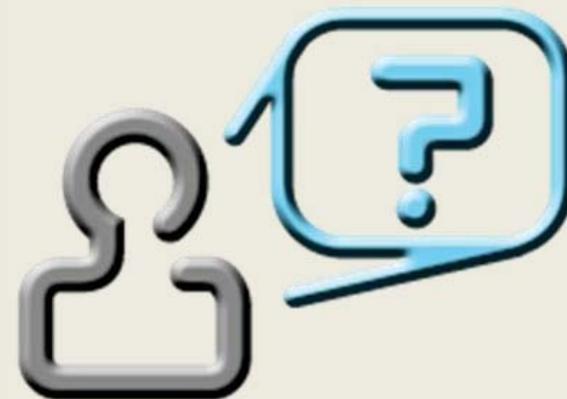
OSEP'S RESPONSE FOUR

- **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 the 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

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 FIVE

- There are a number of RtI frameworks, and while the Department does not endorse a particular one, they tend to share several core characteristics.
 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
 4. Continuous monitoring of student performance

OSEP Example



OSEP'S 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 included specialized, ***individualized instructional*** or behavioral support for students with intensive needs.

OSEP'S RESPONSE FIVE

- 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 education 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).

However



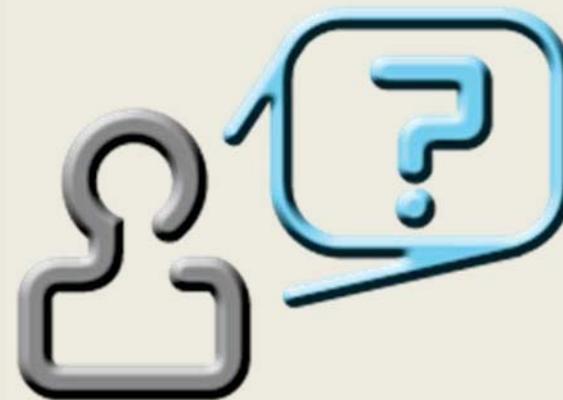
OSEP'S RESPONSE FIVE

- 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 SIX

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



OSEP'S RESPONSE SIX

- 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

- The public agency is not required to obtain parental consent 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 the review, and input from the child's parents, identify what additional data, if any, are needed to determine whether the child continues to have disability, and the education needs of the child”

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

HOWEVER--OSEP'S RESPONSE SIX

- However, after reviewing existing 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 Question 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.

OSEP RESPONSES

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

GUIDANCE AT A GLANCE

Parental Consent

- Safe School/Code of Conduct
- Manifestation
- Change of Placement
- Evaluation/Reevaluation

No Consent Needed

- Effectiveness of behavior intervention as a whole
- Context PBIS process entire school or most
- All students on a daily basis/classroom management
- Rtl Framework primary & secondary levels



**School reform must be matched by
a will to assess and cooperatively
deliver an environment in which
every student, regardless of
race/ethnicity, gender, special need,
or income has tools necessary to
succeed...**