



ALERT!

SPECIAL EDUCATION



July 3, 2014

INFORMAL FUNCTIONAL BEHAVIORAL ASSESSMENT – IS IT VALID?

For a student whose behavior impedes his learning or that of others, a functional behavioral assessment (*fba*) is required. Once an *fba* is done, a behavioral intervention plan (*bip*) is then developed to address the student's behavior. Commissioner's Regulations § 200.22 sets forth specific requirements for a *formal* functional behavioral assessment:

(1) A FBA shall be conducted as required in section 200.4 of this Part and section 201.3 of this Title.

(2) The FBA shall, as appropriate, be based on multiple sources of data including, but 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), 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 shall not be based solely on the student's history of presenting problem behaviors.

(3) The FBA shall provide a baseline of the student's problem behaviors with regard to frequency, duration, intensity and/or latency across activities, settings, people and times of the day and include the information required in section 200.1(r) of this Part 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 an assessment of student preferences for reinforcement. 8 NYCRR 200.22, emphasis added.

Special Education Alert dated September 16, 2008 discussed the legal consequences of failing to do an appropriate *fba*, including a potential denial of *fape* claim. Section 200.22 specifies the components of a *fba*, including *direct* observation of the student. What if the student is not able to be observed, for example, the student is not in attendance because of medical reasons, yet a *bip*

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should be in place to address the student's behaviors when the student is able to return to school?
Can an *informal fba* be conducted?

In *E.H. individually and on behalf of M.K. v. New York City Department of Education*, 2014 U.S. Dist. LEXIS 40086, 62 IDELR 47 (March 21, 2014), the federal court affirmed a decision of the State Review Officer (SRO) which upheld the validity of an informal fba. The parent was seeking reimbursement for the child's private school costs arguing, among other claims, that the district had failed to conduct a *formal fba*.

In reviewing the SRO decision which had been appealed by the parent, the federal court gave deference to the SRO's decision which had held that the district had formulated an appropriate IEP and that it was reasonably calculated to enable the student to receive educational benefits and therefore provided the student with *fape*. Addressing the SRO's finding that an informal fba had been done prior to the formulation of a bip for the student, the court stated:

. . . The SRO further found that the ' . . . CSE had sufficient information relevant to the student's present levels of academic achievement and functional performance. . . to develop an IEP that accurately reflected the student's special education needs. . . the SRO found that an informal FBA of the Student was done prior to the formulation of the BIP. . . .

. . . the informal FBA did not violate the procedural requirements of the Act. The CSE's reliance on classroom observation of the Student by a DOE psychologist, the input of his classroom teacher about the nature and cause of his disruptive behaviors and information from Plaintiff is consistent with the requirements of New York regulations governing FBAs.
...

Although in the *E.H.* case an observation of the student had been conducted, an observation of the student had not been done in another case before the SRO. The SRO upheld the validity of an *informal fba* that had been completed without a classroom observation:

. . . [A]lthough the . . . CSE did not complete a formal FBA of the student prior to developing the . . . BIP and IEP, the . . . CSE did conduct an "informal" FBA of the student. . . [T]he district special education teacher who participated at the . . . CSE meeting testified that a "formal observation" of the student . . . was not necessary because the student's "behavior" was "clearly identified already" In addition, she testified that both the student's then-current special education teacher from the Rebecca School . . . who participated at the . . . CSE meeting, as well as the student's parents, provided "a lot of input" about the student's behaviors, which resulted in a modification and revision of the BIP from the student's previous IEP. . . . The district special education teacher further testified that the parents actively participated in the development of the BIP and did not object to the BIP developed. . . . Notably, the BIP describes the behaviors that interfere with the student's learning, the behavior changes expected through the implementation of the BIP, the strategies to be used to change the student's behaviors, and the supports to be used to help the student change the behaviors. . . . Thus, the evidence in the hearing record supports a conclusion that although

the . . . CSE did not conduct a formal FBA prior to developing the student's . . . IEP or the accompanying BIP consistent with regulations, the . . . CSE had sufficient information to accurately identify the student's behaviors that seriously interfered with his ability to engage in instruction and as detailed below, recommended sufficient supports and services to address these needs. . . . Based upon the foregoing, the hearing record does not support the IHO's finding that the failure to conduct an FBA contributed to a failure to offer the student a FAPE, especially where as here the . . . CSE accurately identified the student's behavior needs in the . . . IEP and attached BIP, the . . . CSE addressed the student's behavioral needs and formulated a BIP based on information and documentation provided by the student's providers, and the . . . CSE developed management needs designed to target the student's interfering behaviors without the need for conducting a formal FBA of the student under the facts and circumstances of this case. . . . SRO Decision 12-061.

COMMENT

Complying with the specific requirements of § 200.22 of the Commissioner's Regulations, and therefore conducting a formal fba, should not result in any denial of fape claim on the basis that an inadequate fba was done. Nevertheless, on those (infrequent) occasions when a formal fba cannot be done, an informal fba which provides all of the information a CSE or bip team needs to address a student's behavior is valid, and should be upheld if a legal challenge ensues.

NOTE: If an informal fba is done with a resulting bip, the bip team should inform the parent that the bip and the fba will be reviewed and revised if necessary if the student's behaviors are not being addressed by the current bip.

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