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IDEA 2004: Final Regulations and the Reauthorized Functional Behavioral Assessment

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Abstract

This article discusses school administrators' continued legal support for their use of functional behavioral assessment and positive behavioral interventions and strategies for supporting children with disabilities who exhibit problem behaviors under the Individuals with Disabilities Education Improvement Act of 2004 and its implementing regulations. This article will help school and legal administrators unacquainted with concepts versant to behaviorists, close the knowledge gap and learn the functional behavioral assessment's purpose, application and implementation to more effectively train and manage personnel through the process. The outcome for school administrators in obtaining the legal and practical knowledge presented here will be to improve school climate.

Keywords: educational leaders, legal requirements, problem behaviors, students with disabilities, functional behavioral assessment, IDEA 2004.

Introduction

School administrators and special education directors continue to have legal support for their use of functional behavioral assessment (FBA) and positive behavioral interventions and strategies for supporting children with disabilities who engage in problem behavior at school under the Individuals with Disabilities Education Improvement Act of 2004 (IDEA 2004) which took effect July 1, 2005 and its implementing regulations. There is an increasing number of principals who are erudite in positive behavior supports who call upon their personal knowledge or that of experts to effectively train and guide school personnel through the process of conducting a functional behavioral assessment (Carr et al., 2002; Dietrich & Villani, 2002; Drasgow & Yell, 2001; Drasgow, Yell, Bradley, & Shriner, 1999; Yell & Katsiyannis, 2000).

Understandably, the fairly recent appearance of functional behavioral assessment in the Individuals with Disabilities Education Act Amendments of 1997 (IDEA 1997) combined with a general unfamiliarity with the concept has created a knowledge gap. As a result, school as well as legal administrators less familiar with concepts which are known to behaviorists have been left playing catch-up to ascertain the functional behavioral assessment's purpose and determine its appropriate components, application and implementation. For example, in Fitzpatrick (2005), the functional behavioral assessment was confused with a direct threat evaluation. In Upper Cape Cod Regional Technical School and Sandwich Public Schools (2005), the FBA was treated incorrectly as a manifestation determination review, when it concluded that the student's disability and lack of social skills caused the offending behavior, rather than correctly using the assessment to identify the reason why the behavior is occurring (the function) and then to use this information as the basis for the behavior intervention plan.

With the final regulations to IDEA 2004 going into effect October 13, 2006, some additional guidance in the proper use and application of the functional behavioral assessment has been provided by the U.S. Department of Education (DOE) in the Analysis of Comments and Changes section. Made clear is that functional behavioral assessment is (1) considered a type of social work service that may be provided, (2) to be transmitted as part of the student's records, and (3) to be part of the child's evaluation when suspected needs of the child include behavior, even when that child engages in behavior determined not to be a manifestation of the child's disability. As with most substantive decisions concerning the functional behavioral assessment, the determination of its currentness is left to local relevant decision makers.

More than ever, it behooves School administrators to forge ahead on the learning curve as there has been legislative movement to extend the use of functional behavioral assessment and positive behavioral interventions and support procedures to all students who may benefit, and not just those with identified disabilities. On June 6, 2006, in response to President George W. Bush's New Freedom Commission on Mental Health, Senate Bill 3449 the Child and Adolescent Mental Health Resiliency Act of 2006 was introduced to improve the quality and availability of mental health services for children and adolescents. Had this proposed bill passed, elementary and secondary schools and educational institutions would have been encouraged to use positive behavioral support procedures and functional behavioral assessments on a school-wide basis as an alternative to suspending or expelling children and adolescents with or who are at risk for mental health needs.

Even though S.B.3449 was not enacted into law, there is evidence to support movement away from school-wide behavior management policies that favor zero tolerance and toward policies that promote positive behavioral supports and strategies. Although policy makers were

under intense public pressure in the 1990s to take all necessary measures to ensure the safety of children in schools, there has been minimal evidence to support the use of zero tolerance (Skiba, 2000). In fact, high rates of antisocial behavior in school are associated with “punitive disciplinary strategies; lack of clarity about rules, expectations and consequences; lack of staff support; and failure to accommodate and consider individual differences” (Lewis & Sugai, 1999, p. 2).

Meanwhile, there is evidence spanning back nearly a decade supporting the use of school-wide positive behavior support including its use in ethnically and racially diverse inner-city schools (McCurdy, Mannella & Eldridge, 2003). Functional behavioral assessment is a positive strategy and considers individual differences. Administrators who utilize functional behavioral assessment can provide evidence in a due process hearing of compliance with the IDEA 2004 procedural protections.

This article will briefly review the procedural requirements for functional behavioral assessment under IDEA 2004, compare these with the old requirements under IDEA 1997 where those changes are significant and outline substantive guidance that administrators can apply found through a review of federal and state legislative and administrative actions, legal opinions and recent literature on functional behavioral assessment.

Procedural Requirements Provide Contextual Guidance

An examination and comparison of IDEA 2004, IDEA 1997 and final implementing regulations reveal that administrators continue to have great flexibility with respect to the substance of the functional behavioral assessment, being that they are provided with only contextual guidance respecting their duty to provide the assessment. In sum, the functional

behavioral assessment is a service administrators must ensure a child with a disability receives when that child is removed long-term from his or her current placement for disciplinary reasons

Framed by IDEA are several contextual factors which taken together alert school administrators that the need to conduct a functional behavioral assessment has been triggered: (1) there is a child with a disability, (2) who is removed for more than ten school days, (3) for misconduct that either (a) is a manifestation of the child's disability, (b) is not a manifestation of the child's disability, or (c) involves weapons, drugs, or serious bodily injury, regardless of the outcome of the manifestation determination review, or (4) for behavior that interferes with the learning environment

Child with a Disability

Administrators must be cognizant that a student's procedural right to a functional behavioral assessment also extends to a "child who has not [yet] been determined to be eligible for special education and related services under IDEA and who has engaged in behavior that violates a code of student conduct . . . if the local educational agency had knowledge . . . that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred" (20 U.S.C. § 1415(k)(5)(A) (2004)).

As for a child currently identified as disabled, administrators must consider the length of time that child is removed from his/her regular educational placement, as specified in the Individualized Education program (IEP), when determining if the need for a functional behavioral assessment has been triggered.

Removal is for More Than Ten School Days

To redress a long history of exclusion, IDEA establishes for children with disabilities the right to the educational placement decided on by the IEP team. Administrators are increasingly

aware that disciplinary removal for more than 10 school days is legally regarded as a unilateral change in the child's placement triggering the child's procedural protections, including a functional behavioral assessment. A removal is for more than 10 school days when a child with a disability is removed from her regular educational placement as specified in the IEP for more than ten consecutive school days. In addition, a removal for more than 10 school days occurs when "the child is subjected to a series of removals that constitute a pattern . . . because the series of removals total more than 10 school days in a school year" (Final Regulations, 34 C.F.R. § 300.536 (2006)).

Determining a pattern depends on such factors as "the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; . . . the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another" (34 C.F.R. § 300.536 (2006)). Thus, short removals for separate unrelated incidents of behavior over the course of the academic year would not constitute a pattern. The local education agency, subject to administrative and judicial review, makes the determination, on a case-by-case basis, whether a pattern of removals constitutes a change of placement (34 C.F.R. § 300.536 (2006)).

For these reasons, administrators are advised to keep careful records on the number and length of removals, descriptions of the misconduct that leads to the removals and the proximity to one another.

Once an administrator decides to remove a child with a disability for more than 10 school days, he must then direct the IEP team to conduct a manifestation determination review, the outcome of which determines which type of functional behavioral assessment to conduct.

Manifestation Determination Review

When the administrator orders the long-term removal of a child with a disability for misconduct, he/she must see that that a manifestation determination review be conducted and that the local educational agency (LEA), the parent and relevant members of the IEP team (as determined by the parent and the LEA) determine if the misconduct was caused by or had a direct and substantial relationship to the child's disability or if the misconduct was the direct result of the school's failure to implement the IEP (20 U.S.C. § 1415(k)(1)(E)(2004)). The logic underlying this determination is that school officials will avoid the inequitable response of applying the same disciplinary procedures that are used for the misconduct of nondisabled children to a behavior that is the manifestation of a child's disability. For example, a student with Tourette's Syndrome is unable to control his utterance of prohibited words. The principal may, however, discipline the student with Tourette's Syndrome the same as she would nondisabled students for misconduct not related to his disability.

Under IDEA 1997, administrators were to see that both the manifestation determination review and functional behavioral assessment were conducted no later than 10 school days after taking disciplinary action involving removals for more than 10 days. Now, under IDEA 2004, the manifestation determination review must still be done within 10 school days; however, Congress specifically removed from the Act the requirement to conduct a functional behavioral assessment or review and modify an existing behavioral intervention plan within 10 days of such a disciplinary removal. Instead, IDEA 2004 has created a relationship between the manifestation determination review and the functional behavioral assessment which did not previously exist under IDEA 1997. As a result, there are now two types of FBA under IDEA 2004 with the outcome of the manifestation determination review driving whether administrators are to conduct

a Section (k)(1)(D) type FBA which must be conducted “as appropriate” or a Section (k)(1)(F) type FBA which must be conducted if not done so previously.

Misconduct Is Manifestation of Child’s Disability: FBA Must Be Conducted If Not Done so Previously

In the specific instance where the misbehavior is a manifestation of the child’s disability, it is clear that administrators are required to direct the IEP team to conduct the functional behavioral assessment as the basis for developing and implementing a behavior intervention plan. Specifically, administrators are charged with seeing that the IEP team shall:

- (i) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, *provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement [for more than 10 school days];* (ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior. (20 U.S.C. § 1415(k)(1)(F) (2004), emphasis added.)

In circumstances where the misconduct is not a manifestation of the child’s behavior, IDEA 2004 gives the administrator greater flexibility in deciding whether to direct a functional behavioral assessment.

Misconduct Not A Manifestation of Child’s Disability: FBA Must Be Conducted “As Appropriate”

In instances where the misconduct is determined not to be a manifestation of the child’s disability, administrators should direct that a functional behavioral assessment be conducted “as

appropriate.” Specifically, administrators are charged with seeing that A child with a disability who is removed from her current placement for more than 10 school days for violations of the school code (where the behavior was determined not to be a manifestation of the child’s disability) shall:

receive, *as appropriate*, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur. (20 U.S.C. § 1415(k)(1)(D) (2004), emphasis added.)

Nothing in IDEA 2004, its legislative history or the final regulations helps explain what is meant by “as appropriate.” One possible interpretation is that this new language reflects the fact that the 10 day deadline has been eliminated. A second possible interpretation is that as “*appropriate* implies professional choice” (Prasse, 2006) which would take into account standard practice for conducting functional behavioral assessments. Professional judgment is essential in determining which elements to include in a particular individual case. For example, while the student is suspended from school, as would typically be the case during the 10 days of the disciplinary removal, direct observations of the behavior and circumstances surrounding it would not be possible. The “as appropriate” language in IDEA 2004, along with the removal of the 10 day deadline, make it possible for higher quality FBAs to be conducted, making use of direct observations in the appropriate setting, which would be determined according to individual circumstances.

In Indep. Sch. Dist. #831 (1999), the hearing officer reasoned: “It is preferable to complete a functional behavioral assessment in the environment in which a student will normally be learning . . . while it is possible to perform an assessment in a more restrictive alternative

setting, it will not provide a setting consistent with [student's] current IEP to determine how the student will function in [student's current placement].”

With regard to the importance of professional judgment, IDEA 2004 provisions call for schools to have properly trained professionals available to conduct functional behavioral assessments and develop appropriate behavioral intervention plans. It is the district's responsibility, working with the state department of education, to provide professional development, in-service training, and technical assistance, as needed, for school staff members to be able to conduct FBAs well.

The “as appropriate” language for functional behavioral assessment also applies to circumstances involving drugs, weapons and serious bodily injury.

Misconduct Involves Weapons, Drugs or Serious Bodily Injury: FBA Must Be Conducted “As Appropriate”

Administrators have the authority to remove a child with a disability for up to 45 days to an interim alternative educational setting for (1) carrying or possessing a weapon; (2) knowingly possessing or using illegal drugs, or selling or soliciting the sale of a controlled substance; or (3) inflicting serious bodily injury upon another person, whether or not the misconduct is a manifestation of the child's disability (20 U.S.C. §1415(k)(1)(G) (2004)). In such circumstances, administrators will need to direct staff to conduct, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur (20 U.S.C. § 1415(k)(1)(D)(ii) (2004)).

Administrators will note that changes made during the reauthorization of IDEA 2004 concerning weapons, drugs and serious bodily injury favor school personnel. IDEA 1997 was silent in circumstances where a child possesses a weapon at school. IDEA 2004 closed this gap

giving administrators authority to address circumstances where a child “carries or possesses a weapon to or at school”(20 U.S.C. §1415(k)(1)(G) (2004)). Similarly, IDEA 1997 was silent in circumstances where the weapons, drugs and bodily injury behaviors occurred on school premises. Now under IDEA 2004, administrators have the authority to address circumstances involving these behaviors on school premises.

IDEA 2004 contains another notable change which favors school administrators. Administrators now possess unilateral authority to remove a child for up to 45 days to an interim alternative educational setting in cases where the child “has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency” (20 U.S.C. § 1415(k)(1)(G) (2004)). Previously, under IDEA 1997 only administrative hearing officers held such authority.

Given these behavioral contextual guidelines, it should be noted that functional behavioral assessment of low frequency but high intensity behaviors (i.e., dangerous behaviors that do not happen very often and may be unexpected) typically involves understanding how these serious behaviors tend to be associated with lower intensity behavior that occurs more frequently. However, IDEA requires administrators to provide a functional behavioral assessment in circumstances where behaviors may have been unforeseen and occurred only once if the behavior leads to a long term suspension or change of placement. A full reading of IDEA indicates that preventive interventions are preferred, such as early intervention and IEPs that include positive behavior support when needed. A case example of a functional assessment of a dangerous, low-rate, high-intensity behavior (severe physical aggression) was described by Radford and Ervin (2002). In this case, a review of records and direct observations indicated that

the physical aggression was related to verbal aggression (e.g., swearing, name-calling). A successful intervention prevented physical aggression by reducing verbal aggression.

Administrators can take proactive measures to intervene in behavior that interferes with the learning environment by including a functional behavioral assessment in the child's evaluation and basing a behavior intervention plan on the results of the assessment.

Behavior Interferes with the Educational Environment

Administrators searching IDEA 2004 will notice that functional behavioral assessment appears only in the discipline sections and not in sections on evaluation or IEP development. This might lead administrators to incorrectly conclude that the functional behavioral assessment is used appropriately only in the context of discipline. In fact, functional behavioral assessment is appropriate when evaluating the child in all suspected areas of disability, including behavior, when that behavior interferes with the learning environment.

The U.S. Department of Education (DOE) declined to change the regulation pertaining to the evaluation of a child to require an FBA whenever any member of the IEP Team requests one or raises concerns about the child's behavior. In declining, the DOE reasoned that the public agency is already required to ensure that the child is assessed in all areas related to the suspected disability and decisions regarding the areas to be assessed are determined by the suspected needs of the child, including behavior.

The DOE also declined to change the discipline regulations to require that even if a child's conduct is determined not to be a manifestation of the child's disability, the IEP Team, in determining how the child will be provided services, must, at a minimum, consider whether to conduct a functional behavioral assessment and implement a behavior plan. The rationale was that IDEA 2004 and final regulations emphasize a proactive approach to behaviors that interfere

with learning by requiring that, for children with disabilities whose behavior impedes their learning or that of others, the IEP Team consider, as appropriate, and address in the child's IEP, “the use of positive behavioral interventions and strategies to address the behavior.”

Given the procedural contextual guidance on when administrators should order a functional behavioral assessment, they will nevertheless search IDEA 2004 and the final regulations in vain for any substantive guidance. The following section draws out guidance on the purpose, components, application and implementation of functional behavioral assessment from other sources.

Substantive Guidance

The contextual guidance aside, no definition of functional behavioral assessment exists in past or present versions of IDEA or its implementing regulations. Similarly lacking are essential components of a functional behavioral assessment and procedures for its implementation, application, interpretation or evaluation. In the absence of clear guidance, administrators nevertheless remain bound to conduct functional behavioral assessments when the contextual circumstances call for one.

Fortunately for the administrators of certain school systems, the laws of their state or federal administrative agency give additional guidance. Functional behavioral assessment remains an emerging concept in the law and has progressed further at the state level than the federal. Several states lead the way in providing detailed definitions and guidance to administrators on its purpose and application. This section sets forth those state definitions as nonbinding guidance for administrators in other jurisdictions looking for guidance of any sort. Included here also is substantive guidance provided administrators subject to the U.S. Department of Defense Education agency regulations. School administrators should note that

because the regulations to IDEA 2004 became final in 2006, some state departments of education may still be in the process of updating their own regulations to be in compliance with the federal regulations.

Definitions

As of the time of the writing of this article, at least six educational administrative agencies were identified as directing school administrators to use a specific operational definition of functional behavioral assessment. Although an in depth discussion of the differences is beyond the scope of this article, overlap exists in the use of the terms “functional behavioral assessment,” “functional behavioral analysis,” and “functional analysis assessment.” California passed the Hughes Bill Cal. Code of Regs. tit. 5, § 3052, codifying the functional analysis assessment (FAA) which is a highly complex and lengthy assessment procedure and may only be conducted by a person with documented training in behavior analysis. Functional behavioral assessment is less formal than the functional analysis assessment, and has been defined as follows:

U.S. Department of Defense: functional behavioral assessment is a “process for identifying the events that predict and maintain patterns of problem behavior” (Provision of Early Intervention and Special Education Services to Eligible DOD Dependents, 32 C.F.R. § 57.3(dd) (2006)).

Illinois: functional behavioral assessment is an “assessment process for gathering information regarding the target behavior, its antecedents and consequences, controlling variables, the student's strengths, and the communicative and functional intent of the behavior, for use in developing behavioral interventions” (Ill. Admin. Code tit. 23, § 226.75 (2006)).

Indiana: functional behavioral assessment “means a systematic collection and analysis of data that will vary in length and scope depending on the severity of a student's behavior. Results and analysis of the data collection are used in developing the student's behavioral intervention plan. A functional behavioral assessment shall identify patterns in the student's behavior and the purpose or function of the behavior for the student” (Ind. Admin. Code 7-17-38 (2006)).

Maine: “The term ‘functional behavior assessment’ means a school-based process used by the Pupil Evaluation Team, which includes the parent and, as appropriate, the student, to determine why a student engages in challenging behaviors and how the behavior relates to the student's environment. The term includes direct assessments, indirect assessments, and data analysis designed to assist the P.E.T. to identify and define the problem behavior in concrete terms; identify the contextual factors (including affective and cognitive factors) that contribute to the behavior; and formulate a hypothesis regarding the general conditions under which a behavior usually occurs and the probable consequences that maintain the behavior” (05-071-101 Me. Code R. § 2.10 (2003)).

New York: functional behavioral assessment “means the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment. The functional behavioral assessment includes, but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it” (N.Y. Comp. Codes R. & Regs. tit. 8 § 200.1(r) (2005)).

Oregon: functional behavioral assessment “means an individualized assessment of the student that results in a hypothesis about the function of a student's behavior and, as appropriate, recommendations for a behavior intervention plan”(Or. Admin. R. 581-015-0550(4) (2006)).

Components, Procedures, and Function

Weber, Killu, Derby, and Barretto (2005) reviewed materials provided by state departments of education on functional behavioral assessment according to criteria for standard practice as defined by documents provided by Office of Special Education (OSEP) Center on Positive Behavior Interventions and Supports (Sugai et al., 2000) and the National Association of State Directors of Special Education (Levay, 1998) with the basic conceptualization of FBA as a process of determining the function of a behavior. According to Weber et al., the FBA process will vary according to individual need and circumstances but typically includes several (not all) of the following 14 possible components:

1. Description of target behavior
2. Review of records
3. Checklists related to circumstances surrounding the behavior
4. Student interviews
5. Interviews with others (e.g. teachers and parents; see Crone & Horner, 2003)
6. Team meetings
7. Direct observations in natural settings without manipulations
8. Scatterplots (Touchette, MacDonald & Langer (1985))
9. Antecedent-behavior-consequence (ABC) analysis (Bijou, Peterson, & Ault, 1968)
10. Functional Analysis Observation Form (O'Neill et al., 1997)
11. Reinforcer identification

12. Ecological context

13. Development of hypothesis

14. Analogue experimentation (Iwata, Dorsey, Slifer, Bauman, & Richman, 1982)

This list of components is similar to a more detailed list, intended for use by schools in tracking the entire process of function-based support in a systematic way, and including both elements related to functional behavioral assessment and the resulting positive behavior intervention plans and services, provided by Tobin (2006). Professional judgment would determine which components should be used in a particular case. With regard to the importance of professional judgment, IDEA 2004 provisions call for schools to have properly trained professionals available to conduct functional behavioral assessments. It is the district's responsibility, working with the state department of education, to provide professional development, in-service training, and technical assistance, as needed, for school staff members to be able to conduct FBAs well.

In Franklin Township (2005), staff errors led to an inappropriate functional behavioral assessment and inappropriate Behavior Intervention Plans (BIPs) which were based on the functional behavioral assessment. Staff observed the student but collection of data on his behavior and the staff's reaction thereto was sporadic rather than systematic. Staff's proposed BIPs failed to address the function of the student's behaviors--how to intervene in different situations based upon the reasons for the student's behavior (i.e., escape tasks, get attention, etc.). School staff were reinforcing student's maladaptive behaviors through inappropriate and inconsistent responses to the behaviors (e.g., teacher would place student in time-out without knowing if it was reinforcing student's attempts to escape the situation he was then experiencing).

In addition, schools are expected to use functional behavioral assessment proactively and to intervene early to prevent serious problem behaviors: The IDEA states that a behavior intervention plan based on a functional behavioral assessment should be considered when developing the IEP if a student's behavior interferes with his or her learning or the learning of classmates (20 U.S.C. § 1414(d)(3)(B)(i) (2004)). To be meaningful, plans need to be reviewed at least annually and revised as often as needed. However, the plan may be reviewed and reevaluated whenever any member of the child's IEP team feels it is necessary (Fitzsimmons, 1998). According to Wilcox, Turnbull, & Turnbull (1999-2000), in practice, functional behavioral assessment is inseparable from positive behavior support. Other authors agree (Sugai et al., 2000; Turnbull & Turnbull, 2001).

Conclusion

Schools have a legal responsibility to students with disabilities to provide behavioral support needed for a free, public, appropriate education. Under some circumstances, this includes a functional behavioral assessment and a related positive behavior intervention plan and services. Although IDEA 2004 provides some changes in wording and in requirements related to functional behavioral assessments from IDEA '97, professional judgment remains essential for deciding how to conduct functional behavioral assessments on an individual basis. This is consistent with the basis for special education, which is an individualized education plan. In order to comply with the federal regulations, school leaders should take advantage of the multitude of resources available, many online (e.g. Positive Behavioral Interventions & Supports Home Page, <http://pbis.org/main.htm>; Positive Behavior Support at School, <http://uoregon.edu/~ttobin/>) for professional development and technical assistance to ensure that

school staff members who are conducting functional behavioral assessments are well trained and following state-of-the-art practices.

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