

LEGAL MAILBAG – March 28, 2024



By Attorney Erin R. Shaffer, Counsel, Shipman & Goodwin – GUEST COLUMNIST

The “Legal Mailbag Question of the Week” is a regular feature of the CAS Weekly NewsBlast. We invite readers to submit short, law-related questions of practical concern to school administrators. Each week, we will select a question and publish an answer. While these answers cannot be considered formal legal advice, they may be of help to you and your colleagues. We may edit your questions, and we will not identify the authors. Please submit your questions to: legalmailbag@casciac.org.

Dear Legal Mailbag,

In our behavioral child study team meetings, we are often confused about when an FBA and BIP should be created and put into place. Ideally, we would do this after tier 2 supports have been unsuccessful and before going to PPT. If the FBA and BIP are successful, we can avoid the PPT process and avoid unnecessary evaluations.

Our director of special education is a maven on procedures, who is telling our team that you need consent to do an FBA and the PPT is the place to get that consent. Can't we get consent another way and use the FBA and BIP as a tiered intervention?

Signed,
To Bip or not to Bip

Dear BIP:

Legal Mailbag commends your team's efforts to address student behavior through a multi-tiered system of support (MTSS) and understands your confusion regarding the appropriate process to use when recommending an FBA.

Before we get into the specific details of your questions, let us first define the terms FBA and BIP for those less familiar with the alphabet soup of assessments and interventions. An FBA, or Functional Behavioral Assessment, is an individualized assessment used to identify the reasons behind, or the factors contributing to, a student's behavior. The information gained from the FBA helps to inform the development of appropriate, effective and non-punitive interventions to address the behaviors of concern. The BIP, or Behavior Intervention Plan, is the individualized plan that describes how to address antecedents to behavior and how to teach and reinforce new skills or replacement behaviors to mitigate or eliminate the behaviors of concern.

As Legal Mailbag understands the scenario you described, universal and targeted interventions of Tier I and Tier II supports have been unsuccessful in addressing student behavior, and the team proposes conducting an FBA as part of an individualized, intensive Tier III intervention. Legal Mailbag is happy to let you know that there is no legal mandate preventing your team from recommending an FBA to inform individualized behavior interventions outside the planning and placement team ("PPT") process. There may be specific circumstances when conducting an FBA is an appropriate tiered intervention. However, Legal Mailbag cautions you to be mindful of your obligation for "prompt referral to a planning and placement team of all children who have been suspended repeatedly, or whose behavior, attendance, including truant behavior, or progress in school is considered unsatisfactory or at a marginal level of acceptance." Conn. Agencies Regs. 10-76d-7(d).

Legal Mailbag understands your hesitation to refer a student to PPT before exhausting Tier III interventions. However, a child study team considering whether to conduct an FBA for a student as a tiered intervention should also seriously consider whether the student's behavior is such that a referral to PPT is triggered. Further, a referral to PPT does not prevent your team from providing more intensive and individualized Tier III interventions, including conducting an FBA and implementing a BIP, as both tiered interventions and the PPT process can occur contemporaneously.

Now that we have determined when an FBA may be conducted, we turn to the thornier question of whether and when written consent to conduct an FBA is necessary. The answer to this question is not as clear cut as it once was due to a recent Second Circuit decision, *D.S. v. Trumbull Board of Education*, 975 F.3d 152 (2d Cir. 2020). Prior to the *D.S. v. Trumbull* decision, guidance issued by the U.S. Department of Education ("USDOE") specified that an FBA was generally understood to be an individualized evaluation requiring written parental consent before conducting the evaluation. In *D.S. v. Trumbull*, however, the Court held that an FBA was not an "evaluation" as that term is understood under the IDEA. Therefore, since the IDEA's consent requirements govern only IDEA "evaluations" or "reevaluations," in the Second Circuit at least, which covers Connecticut, consent to conduct an FBA may no longer be legally mandated under the IDEA. Further, given the decision in *D.S. v. Trumbull*, the USDOE has indicated that it is reviewing its prior position on whether or when a district must seek written consent to conduct an FBA.

Another consideration for a school team in determining whether parental consent is required to conduct an FBA depends on who conducts the FBA. Board Certified Behavior Analysts

(BCBAs) who conduct FBAs, must comply with the professional and ethical code of their certifying agency, the Behavior-Analyst Certification Board. The BACB code requires that BCBAs obtain written consent prior to conducting assessments of behavior. The Connecticut State Department of Education plans to issue guidelines for BCBAs operating in schools that may provide further clarity on this issue.

Moreover, while written consent to conduct an FBA may not be legally mandated under the IDEA, school teams nevertheless may opt to obtain written consent to conduct an FBA as a matter of practice and procedure. Teams should be transparent and open with parents when discussing or considering more intensive and individualized interventions and supports. Obtaining written consent to conduct an FBA, whether through the child study or PPT processes, ensures that parents understand the FBA process.

Bottom line, Legal Mailbag concludes that conducting an FBA without written parent consent is not a violation of the IDEA, but obtaining such consent has its advantages and likely is required for BCBAs to conduct such an assessment. Legal Mailbag thanks you for your good questions and is confident that you will continue to provide interventions and supports to address challenging student behavior.