EVERYTHING YOU NEED TO KNOW ABOUT INDEPENDENT EDUCATIONAL EVALUATIONS

Julie J. Weatherly, Esq.
Resolutions in Special Education, Inc.
6420 Tokeneak Trail
Mobile, Alabama
(251) 607-7377
JJWEsq@aol.com
Web site: www.specialresolutions.com

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I. INTRODUCTION

Many school agencies are inundated with parental requests to fund Independent Education Evaluations ("IEEs"), yet there is still confusion about how to respond to them. This session will provide practical answers to common questions regarding IEEs, such as questions concerning what constitutes a proper request for an IEE, what IEE procedures and/or criteria school agencies should have in place, when a request for an IEE can be denied, etc. In addition, sample procedures will be provided for consideration for use in your district.

II. COMMON IEE QUESTIONS AND ANSWERS

A. General IEE Provisions of the Individuals with Disabilities Education Act (IDEA) and its Regulations

1. Question #1: Where is an IEE referenced in the law?

Answer: Parental entitlement to an IEE is contained in the procedural safeguards section of the IDEA, where it is only vaguely referenced. 20 U.S.C. § 1415(b)(1) and (d)(2)(A). The details regarding this procedural safeguard are found in the IDEA regulations at 34 C.F.R. § 300.502, where it is provided that parents of a child with a disability have the right to an IEE under certain conditions.

2. Question #2: What is a parent's right with respect to an IEE?

<u>Answer:</u> The IDEA regulations provide that a parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the public agency and subject to certain conditions. 34 C.F.R. § 300.502(b)(1).

3. Question #3: How is an IEE defined?

Answer: The regulations define an "independent educational evaluation" as "an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." 34 C.F.R. § 300.502(a)(3)(i). In addition, "public expense" means that the public agency either pays for the full cost of the evaluation or ensures that evaluation is otherwise provided at no cost to the parent." 34 C.F.R. § 300.502(a)(3)(ii).

B. Specific Questions Regarding IEEs

4. Question #4: What if the school district has not conducted or completed its own evaluation and the parent requests an IEE?

Answer: If the district has not done its own evaluation, a parental request for an IEE would be premature. Similarly, if the district has requested to do its own evaluation or reevaluation but has not been allowed to do so, there is clear authority that would support denying a parents' requested IEE. Clearly, a district must have first completed an evaluation with which the parent disagrees to trigger the IEE provisions.

- a. G.J. v. Muscogee Co. Sch. Dist., 58 IDELR 61, __ F.3d __ (11th Cir. 2012). Where the district sought to conduct a reevaluation, the conditions the parents placed upon it amounted to a denial of consent to do the reevaluation. Rather than signing the consent form the district provided, the parents wrote a seven-point addendum, which stated that the district would use the parents' chosen evaluator, that the parents would have the right to discuss the assessment with the evaluator prior to its consideration by the IEP team, and that the evaluation results would be confidential and not used at any proceeding involving the student. With these conditions, the parents effectively withheld their consent for the reevaluation and "vitiated any rights the school district had under the IDEA for the reevaluation process, such as who is to conduct the interview, the presence of the parents during the evaluation, not permitting the evaluation to be used in litigation against [the parents] and whether the parents received the information prior to the school district." The district court's determination that the lack of an underlying evaluation prevented the parents from obtaining an IEE at public expense is upheld.
- b. *P.L. v. Charlotte-Mecklenburg Bd. of Educ.*, 55 IDELR 46, 2010 WL 2926129 (W.D. N.C. 2010). Where parents obtained an IEE without waiting for the school district to respond and provide a list of approved evaluators, parents are not entitled to reimbursement for their IEE because they failed to follow IDEA's requirement for obtaining a publicly-funded IEE. In addition, the parents were not able to show that the district's response came too late and they jumped the gun by obtaining and paying for an IEE eight days after mailing their request for an IEE. Although there was disagreement as to when the parents received the district's response that it would pay \$800 for an IEE from its approved list of examiners, all of the asserted dates of receipt fall within the 60 days the district had to respond or request due process under North Carolina's statute of limitations.
- c. D.Z. v. Bethlehem Area Sch. Dist., 54 IDELR 323 (Pa. Comm. Ct. 2010). Parent's request for an IEE was premature where the parent's disagreement with the school district's findings pertained to a district evaluation that was not complete. The parent first agreed to the district's reevaluation, but later revoked her consent to it because she did not agree with the scope of the testing proposed. She subsequently e-mailed the district, asking for an IEE. The district refused and sought a due process hearing seeking permission to proceed with the reevaluation. The hearing officer was correct in refusing to consider the parent's request for an IEE as part of the hearing, as the parent's right to request an IEE does not vest until there is an evaluation completed by the district with which the parent disagrees.

d. *C.S. v. Governing Bd. of Riverside Unif. Sch. Dist.*, 52 IDELR 122, 321 F. App'x 630 (9th Cir. 2009) (unpublished). District court did not abuse its discretion when it denied the parents reimbursement for an IEE. The parents obtained it before the district's evaluation was complete.

5. Question #5: What if a parent disagrees with the RtI process and asks for an IEE?

<u>Answer:</u> It depends upon whether the school district has actually "completed" its evaluation. In 2006, the U.S. Department of Education noted in its regulatory commentary that:

If a parent disagrees with the results of a completed evaluation that includes a review of the results of the child's response to intervention process, the parent has a right to an IEE at public expense, subject to the conditions in [34 CFR 300.502(b)(2) through (b)(4)]. The parent, however, would not have the right to obtain an IEE at public expense before the public agency completes its evaluation simply because the parent disagrees with the public agency's decision to use data from a child's response to intervention as part of its evaluation to determine if the child is a child with a disability.

71 Fed. Reg. 46,689 (2006).

a. Letter to Zirkel, 52 IDELR 77 (OSEP 2008). A district has no obligation to provide an IEE at public expense just because a parent objects to its use of a response-to-intervention process. Instead, the parent must wait until the district has completed an evaluation of the student to request an IEE.

6. Question #6: Are school districts required to provide information to parents regarding IEEs?

<u>Answer:</u> The IDEA regulations provide that each school district must provide two things to parents, upon request for an IEE: 1) information about where an IEE may be obtained, and 2) the school district's criteria applicable to IEEs. 34 C.F.R. § 300.502(a)(2).

7. Question #7: What kind of IEE criteria do school districts need to have in place?

Answer: According to the IDEA regulations, if an IEE is at public expense, the criteria under which the IEE is obtained, including the location of it and the qualifications of the examiner, must be the same as the criteria that the school district uses when it initiates an evaluation, "to the extent those criteria are consistent with the parent's right to an independent educational evaluation." 34 C.F.R. § 300.502(e)(1). Except for these criteria, a school district may not impose conditions or timelines related to obtaining an IEE as public expense. 34 C.F.R. § 300.502(e)(2).

8. Question #8: As part of its criteria, can a district have a cap on the cost of an IEE?

Answer: Conceivably so, if the cap is "reasonable." However, a district must also maintain an avenue for a parent to show that there are extenuating circumstances concerning the student's needs which would warrant reimbursement or funding in excess of a set cap.

- a. Fleetwood Area Sch. Dist., 111 LRP 51069 (SEA Pa. 2011). Where the parents proposed an evaluator whose fee was several times more than the \$1,500 limit, parents have the burden of showing that the district failed to perform its IDEA obligation to provide an IEE at public expense. The district's restriction on the cost of the IEE was based upon the reasonable estimations and findings of the IU based on the child's circumstances and differences in fees of assorted evaluators specializing in various methods of evaluations of children with disabilities like this student's.
- b. Letter to Petska, 35 IDELR 191 (OSEP 2001). Where the reviewed districts' policies establish that it is in the school district's solo judgment to determine whether the cost of an IEE is justifiable if it exceeds the maximum allowable cost of an IEE, this is inconsistent with the regulations. If the total cost of the IEE exceeds the maximum allowable costs and the school district believes that there is no justification for the excess cost, the school district cannot in its sole judgment determine that it will pay only the maximum allowable cost and no further. The district must, without unnecessary delay, initiate a hearing to demonstrate that the evaluation obtained by the parent did not meet the agency's cost criteria.
- c. Letter to Thorne, 16 IDELR 606 (OSEP 1990). If a district establishes a maximum cost allowable for specific tests, the maximum cannot simply be an average of the fees customarily charged in the area by professionals who are qualified to conduct the specific test. Rather, the maximum must be established so that it allows parents to choose from among the qualified professionals in the area and only eliminates unreasonably excessive fees. When enforcing reasonable cost containment criteria, the district must allow parents the opportunity to demonstrate that unique circumstances justify an IEE that does not fall within the district's criteria. In addition, if the total cost for an IEE exceeds the district's cost criteria and there is no justification for the excess cost, the cost of the IEE must be publicly-funded to the extent of the district's maximum allowable charge. When an agency does not adopt cost criteria, parents are free to obtain the services of any qualified evaluator.

9. Question #9: What about funding for the costs the parents may incur in having an IEE conducted, such as travel costs?

Answer: According to the U.S. DOE's OSEP, the parents' related travel expenses, including meals and lodging, must be funded as part of the cost of the IEE, even if the parents are able to afford those costs. *Letter to Heldman*, 20 IDELR 621 (OSEP 1993). However, the district maintains the right to a due process hearing to challenge the parents' overall entitlement to funding for the IEE based upon location, qualifications of the evaluator or reasonable cost criteria.

10. Question #10: Do the parents ultimately get to choose the evaluator for an IEE? As part of its criteria, can a district have a list of "preferred evaluators" from which the parents must choose?

Answer: Applicable authority seems to indicate that districts can maintain a list of "preferred evaluators" and applicable criteria. However, it seems clear that if a school district does not maintain such a list or specific criteria applicable to such evaluations that are the same as those imposed upon its own evaluations, the chances are more likely that the district will be ordered to fund an IEE by the evaluator chosen by the parents, no matter how far away or how costly the

IEE may be. If the district does maintain a list and criteria (which is certainly advisable), OSEP has indicated that if the parent believes that there is no appropriate evaluator for the child's unique needs within the criteria stated by the district, the district must always give the parents an opportunity to demonstrate that unique circumstances would justify the selection of an evaluator who does not meet the agency's criteria.

- a. South Coast Educ. Service Dist. and Central Curry Sch. Dist., 57 IDELR 300 (SEA Ore. 2011). Oregon ED found two districts in violation of the IDEA when they, among other various violations, conditioned parents' rights to an IEE on selection of an independent evaluator who operated within a specific geographic region and from an approved list. Apparently, the districts did not allow parents to prove extraordinary circumstances warranting an IEE at public expense which does not meet district criteria and did not provide parents with information about the specific criteria on which the district relied to approve independent evaluators.
- Letter to Anonymous, 56 IDELR 175 (OSEP 2010). Nothing in the IDEA prevents a b. district from maintaining a list of "preferred evaluators." If the people on the list are capable of appropriately evaluating the child and the list exhausts the availability of qualified people in the geographic area specified, then the district can restrict parents to that list, pursuant to its right under 34 C.F.R. 300.502(e)(1) to require an evaluation that matches its own criteria. However, if such a list is maintained and parents are required to use it, the district must include in its policy that parents have the opportunity to demonstrate that unique circumstances justify selection of an IEE examiner who does not meet the agency's qualification criteria and does not appear on the agency's list of examiners. "Allowing parents this opportunity recognizes that, in some instances, the only person qualified to conduct the type of evaluation needed by the child may be an evaluator who does not meet agency criteria." If the parents can demonstrate that no district examiner fits the bill, the district must ensure that the parents still have the chance to obtain an appropriate IEE and must inform them as to where the evaluation may be obtained.
- c. Dunmore Sch. Dist., 53 IDELR 107 (SEA Pa. 2009). Parent's request for an IEE by a school psychologist whose practice was 100 miles away and a cost of \$4,200 is upheld. This is so, because the district failed to maintain specific criteria for choosing an evaluator and its list of approved evaluators was not complete and many on the list had a conflict of interest, no longer conducted evaluations or could not be reached with the contract information provided. While a district may require parents to choose from a list of IEE evaluators that meet its criteria, it can do so only where the listed evaluators are qualified and the list exhausts the available evaluators within the geographic area specified. Here, the district neither established specific criteria nor supplied a complete list. Rather, the district's "criteria" were, in fact, merely categories. For example, while "reasonable cost" was listed, the district did not specify a dollar amount or dollar range. Furthermore, the district failed to refute the numerous deficiencies the parents had identified in its list, which undermined the district's assertion that the list was exhaustive.
- d. Letter to Parker, 41 IDELR 155 (OSEP 2004). In order to ensure the parent's right to an IEE, it is the parent, not the district, who has the right to choose which evaluator on the list will conduct the IEE. "We recognize that it is difficult, particularly in a big district, to establish a list that includes every qualified evaluator who meets the agency's criteria. Therefore, when enforcing IEE criteria, the district must allow parents the opportunity to

select an evaluator who is not on the list but who meets the criteria set by the public agency." If a parent elects to obtain an IEE by an evaluator not on the district's list, the district may initiate a hearing to demonstrate that the evaluation obtained by the parent did not meet the district's IEE criteria or there is no justification for selecting an evaluator that does not meet agency criteria. If the agency chooses not to initiate a hearing, it must ensure that the parent is reimbursed for the evaluation.

- Letter to Young, 39 IDELR 98 (OSEP 2003). The district should have criteria for the e. minimum qualifications of the persons who conduct evaluations, and listing the names and addresses of evaluators who meet the minimum qualifications can be an effective way for agencies to inform parents of where and how they might obtain an IEE. Thus, there is nothing in IDEA that would prohibit a district from publishing a list of qualified examiners that might meet agency criteria. Further, it is not inconsistent with IDEA for the district to maintain, and require parents to use, a list of qualified examiners that meet the same criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an IEE. Specifically, if the child's needs can be appropriately evaluated by the persons on the list and the list exhausts the availability of qualified people within the geographic area specified, then a district can restrict parents to selecting from among those on the list. However, the district must include in its policy that parents have the opportunity to show that unique circumstances justify selection of an examiner who does not meet the district's qualification criteria and who does not appear on the agency's list of examiners.
- f. Letter to Anonymous, 20 IDELR 1219 (OSEP 1993). While it is permissible for a school district to restrict independent evaluations to evaluators located within the same state as the district, (provided there are enough evaluators qualified to conduct required evaluations within the state), a school district must always give parents an opportunity to demonstrate that unique circumstances exists that would justify the selection of an evaluator who does not meet the agency's location criteria. If unique circumstances exist, the IEE must be publicly-funded. If a school district believes that the IEE obtained by the parent did not meet its criteria, the district must initiate a due process hearing to show that its evaluation is appropriate or pay for the IEE.

11. Question #11: What if the parents' chosen evaluator is someone who testifies against school districts frequently?

Answer: That probably does not matter in terms of whether the evaluator is qualified and meets criteria. Although not addressing the IEE requirement directly or making any ruling on it, the U.S. Supreme Court indicated in *Shafer v. Weast*, 44 IDELR 150, 126 S. Ct. 528 (2005) that the IDEA's IEE requirement ensures parents access to an expert who can evaluate all the materials that the school must make available and who can give an independent opinion. "They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition."

a. Letter to Petska, 35 IDELR 191 (OSEP 2001). A district's rule that prohibits IEE examiners from associating with private schools or advocacy groups is unrelated to the examiners' ability to conduct an IEE. A requirement that the examiner must have "recent and extensive experience in the public schools" was too narrow and was also unrelated to the examiner's ability to conduct an educational evaluation.

12. Question #12: Other than providing information to the parent on the district's criteria and information about where an IEE can be obtained, how is a school district to respond to a request for an IEE?

Answer: The IDEA regulations give a school district two choices for responding to a request for an IEE—either (1) file a due process complaint to request a hearing to show that its evaluation is appropriate; or (2) ensure that an IEE is provided at public expense, unless the agency demonstrates in a due process hearing that the evaluation obtained by the parent did not meet agency criteria. 34 C.F.R. § 300.502(b)(2)(i) and (ii).

13. Question #13: When a parent asks for an IEE, can the school district ask the parents to explain why they disagree with the school district's evaluation?

Answer: Yes, sort of. The regulations provide that a school district may ask for the parent's reason(s) why he or she objects to the public evaluation. However, the school district may not require the parent to provide an explanation and may not unreasonably delay either providing the IEE at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation. 34 C.F.R. § 300.502(b)(4).

14. Question #14: So, what is a "reasonable period of time" within which to decide whether to fund an IEE or to initiate a due process hearing? In other words, what constitutes "unreasonable delay"?

<u>Answer:</u> Some states actually define what period of time is a "reasonable period of time" within which a district must make a decision on the IEE—either to fund it or request a hearing to defend its own evaluation. In the absence of a timeline, there is some decisional authority that is relevant. Apparently, whether a delay is "unreasonable" will depend upon the facts of the case.

- a. *Taylor v. District of Columbia*, 56 IDELR 128, 770 F.Supp.2d 105 (D. D.C. 2011). Case is remanded to hearing officer to consider new evidence that the district and independent evaluator found the student eligible as ED after the hearing officer issued a decision. The hearing officer needs to determine whether the district's four-month delay in authorizing the IEE was a denial of FAPE. It is appropriate here to remand the case so that the hearing officer can consider whether the delay caused substantive harm, given that a timely response by the district to the IEE request would have permitted the student to begin receiving services he needed four months earlier than he did.
- b. *Keene Sch. Dist.*, 111 LRP 63293 (SEA N.H. 2011). The school district reasonably believed that its own evaluations were independent and, therefore, did not unnecessarily delay when it waited 130 days after the parent's IEE request to file for a due process hearing to defend its evaluations. Clearly, the district had a good faith belief that an IEE request was inapplicable, since its original evaluations were already independent and hearing officers issued conflicting rulings. Thus, the district is permitted to present its evidence proving the appropriateness of its evaluations.
- c. Dover City Schs., 57 IDELR 208 (SEA 2011). The Ohio ED found that the school district's delay in supplying parent with IEE guidelines was not an IDEA violation in itself, but the geographical and cost restrictions it imposed were not reasonable and required the ED to take remedial action, giving the district 11 days to arrange for the IEE or request a due process hearing to demonstrate that its own evaluation was appropriate. In addition to taking one month to respond to the parent's request for a list of providers

and IEE criteria (which did not exist before the parent's request for an IEE), the district informed the parent that the chosen evaluator had to work within a 30-mile radius of the district and that the district would pay a maximum of \$1,000 toward the evaluation. The ED, however, pointed out that three of the five providers on the list worked outside of the 30-mile radius and that some providers charged more than the \$1,000. The district is ordered to take prompt action on the request and to submit a revised version of its IEE policies and procedures for review.

- d. Los Angeles Unif. Sch. Dist., 111 LRP 48178 (SEA Cal. 2011). District's failure to initiate a due process hearing when denying the parent's IEE request constituted "unreasonable delay" in violation of the IDEA. Where the district conducted an APE assessment of a 12-year-old student with autism, the parent disagreed with it and requested an IEE. The district did not file for due process to uphold the validity of its evaluation until 90 days after the IEE request was made. Here, "unreasonable delay" occurred because the district neglected to communicate with the parent during the 90-day period between the request and the denial; nor did the district explain the reason for its delay. Thus, a district-sponsored APE IEE will be done, along with coordination of an IEP meeting to discuss the results. In addition, there was a denial of FAPE here, as the district's refusal to subsidize an IEE made the parent unable to understand the student's educational needs and, therefore, the parent could not adequately participate in the development and implementation of the IEP.
- e. Los Angeles Unif. Sch. Dist., 57 IDELR 55 (SEA Cal. 2011). The district's assessments were appropriate and its 7-week delay in responding to the parent's request for an IEE was reasonable. The parent requested the IEEs just one week before the 24-day winter break and very few district employees were allowed to work over the break. Clearly, the district was entitled to take time after the break to review its assessments and determine whether to grant the parent's IEE request. Thus, the district is not required to pay for independent hearing and vision assessments.
- f. Capistrano Unif. Sch. Dist., 56 IDELR 279 (SEA Cal. 2011). The district did not act unreasonably in taking 40 days to review a parent's request for an IEE, because the parent never stated why she was dissatisfied with the district's evaluation. "Because of the lack of information as to the basis of [the parent's] IEE request other than she 'disagrees' with [the OT] assessment, the district had a right to review the appropriateness of the assessment before determining whether to grant [the parent's] IEE request."
- g. *J.P. v. Ripon Unif. Sch. Dist.*, 52 IDELR 125 (E.D. Cal. 2009). Parent's argument that school district was tardy in its request for a due process hearing to show that its evaluations were appropriate is rejected. Though the parent requested the IEEs on December 21, 2006, the parties discussed the provision of the IEEs through a series of letters and did not reach a final impasse until February 7, 2007, less than three weeks before the district's request for a hearing. In addition, the district's winter break began immediately after the parent's IEE request, which is a factor that must also be considered in determining the timeliness of the district's due process request. Given the circumstances here, no "unnecessary delay" was present that would invalidate the underlying request made by the district.

- h. Los Angeles Unif. Sch. Dist., 48 IDELR 293 (SEA Cal. 2007). District's 74-day delay in requesting a due process hearing was unnecessary and unreasonable. The district could not wait for the parents to request a hearing.
- i. Pajaro Valley Unif. Sch. Dist. v. J.S., 47 IDELR 12 (N.D. Cal. 2006). The school district's unexplained and unnecessary delay in filing for a due process hearing waived its right to contest the parent's request for an independent educational evaluation at public expense. Waiting three months to request a hearing was enough by itself to enter judgment in favor of the student and his parents.
- j. *Baldwin County Bd. of Educ.*, 21 IDELR 311 (SEA Ala. 1994). The school district cannot outright ignore a parents' request for an IEE in the face of a disagreement over an area of suspected disability.

15. Question #15: Who makes the decision within the school district as to whether an IEE will be funded by the school district?

Answer: Neither the IDEA nor its regulations answer this question. However, it is advisable that the decision be an administrative one, rather than one for an IEP team or individual service provider. IEP teams and school personnel should be trained to immediately refer the parents to the district's special education director/designee for information as to the district's IEE procedures or to otherwise ensure that the parents' request is brought to the attention of the special education director. IEP teams should not be charged with approving or denying requests for IEEs, but remain aware that the right to an IEE is set forth in the parents' procedural safeguards.

16. Question #16: How long does a parent have to "disagree with the district's evaluation" and request an IEE at public expense?

Answer: Neither the IDEA nor its regulations address this question. However, there is some decisional and OSEP authority that addresses the question.

- a. Atlanta Pub. Schs., 51 IDELR 29 (SEA Ga. 2008). Where the student's last evaluation occurred more than three years before the request for an IEE, the IDEA's 2-year statute of limitations barred her claim seeking an IEE at public expense. To the extent the student disagrees with an evaluation conducted in 2005 and seeks an IEE in 2008 based on that disagreement, the request is untimely, as it was not made within a reasonable period of time after the district conducted its evaluation and is beyond the 2-year statute of limitations.
- b. Letter to Thorne, 16 IDELR 606 (OSEP 1990). The regulations do not establish timelines regarding how long after receiving the results of the district's evaluation a parent can wait to request reimbursement for an IEE. It would not seem unreasonable for the district to deny a parent reimbursement for an IEE that was conducted more than two years after the district's evaluation. Thus, it would not be necessary for the district to initiate a hearing in this situation.

17. Question #17: Once an IEE is completed, what does the school district do with it?

Answer: If the parent either obtains an IEE at public expense or shares one with the school district obtained at private expense, the results of the evaluation must be considered by the school

district if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child. 34 C.F.R. § 300.502(c)(1).

- a. *K.E. v. Independent Sch. Dist. No. 15*, 57 IDELR 61, 647 F.3d 795 (8th Cir. 2011). Where progress reports showed that an 11 year-old student with bipolar disorder made significant gains in her areas of need of reading, spelling and math, she was not denied FAPE. In addition, the parent's claim that the district failed to consider the reports of independent evaluators is rejected. The IEPs incorporated many of the recommendations of the neurologist and the neuropsychologist and meeting notes reflected that the team discussed the recommendations of the student's psychiatrist.
- b. Marc M. v. Department of Educ., 56 IDELR 9, 762 F. Supp.2d 1235 (D. Haw. 2011). Although parents of a teenager with ADHD waited until the very last moment of an IEP meeting to provide the team with a private school progress report, that was no basis for the team to disregard it. The Education Department procedurally violated the IDEA and denied FAPE when it declined to review the private report because it contained vital information about the student's present levels of academic achievement and functional performance. The document, which showed that the student had progressed in his current private school, contradicted the information placed in the IEP, but the care coordinator who received the document did not share it with the rest of the team, because the team had just completed the new IEP. Where the new IEP proposed that the student attend public school for the upcoming school year, the parents reenrolled the student in private school and sought reimbursement. Since the IDEA requires districts to consider private evaluations presented by parents in any decision with respect to the provision of FAPE, the coordinator's contention that because the document was provided at the end of the meeting, the team could not have considered and incorporated it into the new IEP, is rejected. As a result of failing to consider the private report, the IEP contained inaccurate information about the student's current levels of performance, such that these procedural errors "were sufficiently grave" to support a finding that the student was denied FAPE.
- c. Lakeville Indep. Sch. Dist. #194, 53 IDELR 206 (SEA Minn. 2009). District's mistaken belief that a test used by the independent evaluator was not valid did not justify the district's failure to consider it IEE when determining eligibility. Because the district failed to review existing evaluation data and draw upon a variety of sources, the Minnesota ED ordered it to make another eligibility determination.
- d. Watson v. Kingston City Sch. Dist., 43 IDELR 244, 2005 WL 1791553 (2d Cir. 2005). Lower court's ruling that district was not required to incorporate recommendations of private evaluator is upheld. In addition, district's failure to update goals and objectives from student's prior year IEP was insufficient to find a violation of IDEA, as this was a minor procedural error.
- e. *DiBuo v. Board of Educ. of Worcester Co.*, 309 F.3d 184 (4th Cir. 2002). Even though school district procedurally erred when it failed to consider the evaluations by the child's physician relating to the need for ESY services, this failure did not necessarily deny FAPE to the child. A violation of a procedural requirement of IDEA must actually interfere with the provision of FAPE before the child and/or his parents are entitled to reimbursement for private services. Thus, the district court must determine whether it accepts or rejects the ALJ's finding that the student did not need ESY in order to receive FAPE.

f. T.S. v. Ridgefield Bd. of Educ., 808 F. Supp. 926 (D. Conn. 1992). The requirement for IEP team to take into consideration an IEE presented by the parent was satisfied when a district psychologist read portions of the independent psychological report and summarized it at the IEP meeting.

18. Question #18: What if the parents don't like the first IEE? Do they get a second? A third?

<u>Answer:</u> The regulations provide that a parent is entitled to only one IEE at public expense each time the school district conducts an evaluation with which the parent disagrees. 34 C.F.R. § 300.502(b)(5).

a. *In re: Student with a Disability*, 54 IDELR 110 (SEA N.Y. 2010). Parents' request for reimbursement for an IEE is denied where they had already received a publicly-funded IEE after they disagreed with the district's most recent evaluation. They were not entitled to receive a second.

19. Question #19: Can a district set a timeline for parents to submit an independent evaluation report prior to scheduling an IEP meeting, so that it may be properly considered?

Answer: Yes, according to recent OSEP guidance.

a. Letter to Anonymous, 58 IDELR 19 (OSEP 2011). While a district may set timelines for parents to submit an independent evaluation report prior to scheduling an IEP meeting, such a timeline must be made known to the parents and be aligned with any state-imposed criteria. Because the IDEA regulations do require a district to consider the results of independent evaluations, "[w]e believe it would be reasonable for a public agency to establish criteria, including a requirement that it receive the entire evaluation report and not just the scaled scores within a certain time, to give the public agency the opportunity to review the report prior to scheduling an IEP Team meeting to discuss the evaluation."

20. Question #20: Can the results of an IEE be used as evidence at a due process hearing?

Answer: Yes. Any party can present the results of an IEE (either publicly or privately funded) at a hearing on a due process complaint regarding the child. 34 C.F.R. § 300.502(c)(2).

21. Question #21: Can a hearing officer in a due process hearing ask for an IEE?

Answer: Yes, and if they do that as part of a hearing, the cost of the evaluation must be at public expense. 34 C.F.R. § 300.502(d).

22. Question #22: Can the district insist on reimbursing parents for an IEE rather than advancing the funding for one?

Answer: Not necessarily, because the denial of advance funding could deny a particular parent the right to an IEE. It is advisable that, in most situations, the district would arrange for and pay the evaluator directly for conducting the IEE, if the parents have not already gone out and paid for it.

a. *Edna Indep. Sch. Dist.*, 21 IDELR 419 (SEA Tex. 1994). If the denial of advance funding for an IEE effectively denies a parent the right to an IEE, a parent is entitled to relief.

23. Question #23: Can the parents go out and obtain an IEE, without first giving notice to the school district, and then ask the school district to fund it?

Answer: Yes, according to OSEP.

- a. Letter to Anonymous, 55 IDELR 106 (OSEP 2010). The following procedural statement contained in the agency's IEE policy is not consistent with the regulations: "The district does not have an obligation to reimburse parent for private evaluations obtained prior to the date that the district's evaluation is completed and discussed in an IEP meeting or prior to the parent's written disagreement with the district's evaluation or notice of their request for an IEE in the IEP meeting which must be considered by the IEP team." There is no requirement that a parent notify the public agency in writing or in an EIP meeting that the parent will be requesting an IEE at public expense. See also, Letter to Thorne, 16 IDELR 606 (OSEP 1990).
- b. *P.R. v. Woodmore Local Sch. Dist.*, 49 IDELR 31 (6th Cir. 2007). District court properly rejected school district's argument that parents were required to notify district in advance that they wanted and obtained an IEE in order to be reimbursed. However, parents did not show that district's evaluation was inappropriate and, therefore, are not entitled to reimbursement for the IEE they obtained when they disagreed with the district's evaluation.

24. Question #24: What if the independent examiner will not provide the results of the IEE to the district without parental consent?

Answer: OSEP took a "stab" at this one.

a. Letter to Anonymous, 55 IDELR 106 (OSEP 2010). This office is not in a position to express an opinion on whether it would violate HIPAA, or any State laws, for an independent examiner to disclose the results of an IEE to the district without parental consent. If written consent is required for the independent examiner to provide the results of the IEE to the district and the parent refuses to provide consent, it is not inconsistent with IDEA for the district to deny reimbursement for the IEE since it will be unable to consider the results of the IEE.

25. Question #25: What if the school district can show that its evaluation is appropriate?

<u>Answer:</u> If the school district files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense. 34 C.F.R. § 300.502(b)(3).

26. Question #26: Is it worth it for a district to request a hearing to defend its own evaluation(s) as appropriate?

Answer: Maybe so. It has been done!

- a. <u>Blake B. v. Council Rock Sch. Dist.</u>, 51 IDELR 100 (E.D. Pa. 2008). Appellate panel's determination that the district's evaluation was appropriate is upheld. The parents' assertion that the district used inadequate instruments when assessing the student and failed to administer them in accordance with their instructions is rejected. Although the observation checklist that the district's psychologist distributed to teachers was not normed or validated for any purpose, the psychologist did not use the checklist as a diagnostic tool. Rather, it was used only to elicit from the teachers observations of behavior that might be relevant to a diagnosis of autism. Clearly, the psychologist used a variety of assessment tools in evaluating the student and administered all screening instruments in accordance with their directions. Further, the psychologist had the credentials and training required to evaluate the student. While the parents may have disagreed with the results of the evaluations, the evaluations themselves were appropriate. Thus, the parents' request for an IEE at public expense is denied.
- b. *In re: Student with a Disability*, 50 IDELR 206 (SEA NY 2008). The district is not required to reimburse the parents for an IEE they obtained after the IEP team refused to change their child's classification to autism. This is so because the district's neuropsychological evaluation was appropriate.

27. Question #27: Can parents ask for an IEE if they disagree with an FBA conducted by the school district?

<u>Answer:</u> Apparently so, because an FBA is considered, by some, to be an "evaluation" that would trigger the right to an IEE.

- a. *Harris v. District of Columbia*, 50 IDELR 194, 561 F.Supp.2d 63 (D. D.C. 2008). The IEE regulatory requirements apply to a parental request for an independent FBA. This is so, because the IDEA regulations broadly define "evaluation" to include the procedures used to identify the specialized instruction and related services required by a child with a disability. Clearly, the IDEA recognizes that education is "inextricably linked" to a child's behavior by requiring IEP teams to consider the use of positive behavioral interventions and supports for children whose behavior interferes with learning.
- b. Letter to Sarzynski, 49 IDELR 228 (OSEP 2007). As to whether evaluations of student progress are "evaluations" requiring consent, OSEP responds that 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, parental consent would not be required for such an evaluation. If, however, the evaluation specific to an individual child is "crucial to determining a child's continuing eligibility for services or changes in those services," such evaluations would require parental consent.
- c. Letter to Christiansen, 48 IDELR 161 (OSEP 2007). 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, OSEP believes that the FBA would be a reevaluation. However, if the FBA is intended to assess the effectiveness of behavioral interventions in the school as a whole, parental

consent would generally not be applicable to such an FBA because it would not be focused on the educational and behavioral needs of an individual child.

28. Question #28: Can a school district restrict use of certain scoring in IEE reports?

Answer: Not if the district does not impose similar restrictions upon its own evaluators.

a. Letter to LoDolce, 50 IDELR 106 (OSEP 2007). A school district does not have the right to dictate policies to independent educational evaluators that restrict the use of age and grade level scores in their reports because, in some cases and depending on a child's individual needs, it may be necessary for an evaluator to conduct an assessment that includes age and grade level scores in order to gather relevant information about the child that may assist in determining the content of the child's IEP, including information related to enabling the child to participate in the general education curriculum. Because a public agency cannot prohibit its own evaluators from including age and grade level scores in evaluation reports, it cannot prohibit independent evaluators from doing so. Similarly, if a public agency prohibits its own evaluators from making recommendations pertaining to specific methodologies and/or use of materials, it could preclude independent evaluators from doing so.

29. Question #29: Is a district required to allow an independent evaluator to observe a student in the classroom setting?

<u>Answer:</u> Applicable decisional authority seems to provide that where a district allows its own evaluators to observe students in the classroom, it must give independent evaluators the same opportunity to do so.

- a. Letter to Mamas, 42 IDELR 10 (OSEP 2004). A classroom observation by an independent evaluator may be necessary where parents invoke their right to an IEE and the evaluation requires observing the student in the educational environment.
- b. *L.M. v. Capistrano Unif. Sch. Dist.*, 50 IDELR 181, 538 F.3d 1261 (9th Cir. 2008). Where California law requires that districts give independent evaluators an "equivalent opportunity" to observe, the district committed a procedural violation when it allowed the independent evaluator only 20 minutes to observe. However, the procedural violation did not constitute a denial of FAPE because the evaluator was able to provide expert testimony and to formulate an opinion.
- c. *Manatee Co. Sch. Dist.*, 53 IDELR 149, 666 F.Supp.2d 1285 (M.D. Fla. 2009). While the district could maintain reasonable guidelines for a private psychologist's on-campus activities, it could not prevent the independent evaluator from conducting an in-school observation of a disabled student. Thus, the ALJ's decision ordering the district to allow for at least a two-hour observation is upheld, where OSEP has ruled that a classroom observation may be necessary if the parents invoke their right to an IEE and the evaluation requires observing the student in her educational placement. The district's position that OSEP's guidance does not apply to IEEs funded by the parents is rejected, as there is no reason to differentiate between private and publicly funded IEEs when determining whether an evaluator should have access to the classroom.

SAMPLE IEE GUIDELINES

(NOTE: The following guidelines were developed by Julie J. Weatherly for the Alabama Council of Administrators in Special Education (AL-CASE) in October 2011 and are submitted and reprinted with the express permission of and thanks to AL-CASE

(To be adapted as needed/as appropriate for each School System with approval by local counsel)



PROCEDURES AND GUIDELINES FOR THE PROVISION OF INDEPENDENT EDUCATIONAL EVALUATIONS (IEEs) AT SCHOOL SYSTEM EXPENSE

PURPOSE

The purpose of these procedures is to provide for a process for responding to a parental request for the School System to fund an independent educational evaluation (IEE). In addition, provision of copies of these guidelines to parents will meet the IDEA's requirement to provide necessary information to parents when they request an IEE, including information about where an IEE may be obtained and the School System's criteria applicable to IEEs.

THE PARENTAL RIGHT TO AN IEE

Under the IDEA, a parent has the right to an IEE at public expense *only* when the parent disagrees with an individual evaluation completed or obtained by the School System (e.g., OT, PT, achievement). If the School System has not conducted or obtained an evaluation of the student, the parental right to an IEE does not arise until the School System has completed its evaluation. If the request for an IEE is made one calendar year or more from the date of completion of the School System's evaluation, the School System may seek to complete a reevaluation prior to agreeing to fund an IEE.

A parent is entitled to only one IEE at public expense each time the School System conducts an individual evaluation(s) with which the parent disagrees.

DEFINITION OF AN IEE

An IEE is an evaluation conducted by a qualified evaluator who is not an employee of the School System. The IEE is funded by the School System or otherwise provided at no cost to the parent of a student with a disability. The purpose of an IEE is for determining a student's eligibility for special education or related services and for meeting a student's educational needs.

SCHOOL SYSTEM'S GENERAL RESPONSE TO A REQUEST FOR AN IEE

If a parent requests an IEE at public expense, the School System must, without unnecessary delay, either 1) file a due process hearing request to show that its evaluation is appropriate or 2) agree to fund the IEE and ensure that the IEE is provided, unless the School System demonstrates in a due process hearing that the evaluation obtained by the parent did not meet agency criteria. If the final decision in a due process hearing is that the School System's evaluation is appropriate, the parent continues to have the right to an IEE, but not at public expense.

Specific procedures for responding to a request for an IEE are set forth below and are to be followed when a parent makes a request for an IEE.

CONSIDERATION OF IEE RESULTS

If a parent obtains an IEE at public expense or shares with the School System an evaluation obtained by the parent at private expense, the results of the evaluation will be considered by the School System in any decision made with respect to the provision of FAPE to the student, if it meets agency criteria applicable to evaluations. However, the School System is not required to adopt the findings or recommendations contained in an IEE.

SPECIFIC PROCEDURES FOR RESPONDING TO A REQUEST FOR AN IEE

- 1. Parents are encouraged to notify the School System and ask for funding prior to obtaining an IEE. However, the School System will not necessarily deny funding or reimbursement for an IEE already obtained, as long as the IEE meets School System evaluation criteria, including cost and location of the evaluation and the qualifications of the evaluator that the School System uses when it initiates an evaluation.
- 2. All parental requests for an IEE must be made in writing and forwarded to the School System's Special Education Coordinator or designee for decision. When a parent makes a request for an IEE, a copy of these Guidelines, the Request form for an IEE, School System evaluation criteria and the School System's list of qualified evaluators must be provided to the parent. The Request for IEE should be completed by the parent making the IEE request and returned to the Special Education Coordinator or designee. The refusal of a parent to complete the Request for IEE form cannot ultimately serve as a basis for unnecessarily delaying the funding decision if an otherwise proper request for an IEE has been made.
- 3. Upon receipt of the Request for an IEE, the Special Education Coordinator or designee will decide whether the requested IEE will be publicly-funded or, in the alternative, whether the School System will seek a due process hearing to obtain a ruling that its evaluation is appropriate or that the parents' privately-funded IEE (if they have already obtained one) does not meet School System criteria. Once it is clear to the School System that the parent disagrees with an evaluation conducted by the School System and has properly and clearly requested an IEE, a decision will be made, without unnecessary delay, as to whether it will be funded. Generally, the time period for responding to the request will be 10 school days, unless more flexibility is needed to accommodate good faith discussions and negotiations regarding the need and arrangements for an IEE.
- 4. In selecting an evaluator to conduct the IEE, a parent may choose from the School System's list of qualified evaluators. Parents may select an evaluator that does not appear on the list, but must ensure that the IEE performed otherwise meets the School System's criteria, including those related to the qualifications of the evaluator, the cost and location of the evaluation and the criteria for performing evaluations. Should the parent's requested IEE not meet criteria, the parent will be given the opportunity to provide an explanation of any unique circumstances that exist that would justify any deviation from the criteria.
- 5. Once the parent has selected an independent evaluator from the School System's approved list or has identified another evaluator that meets School System criteria or is otherwise approved pursuant to the guidelines, the Special Education Coordinator or designee will contact the

evaluator in order to make appropriate contractual arrangements for the evaluation to be performed and funded. An independent evaluator will not be paid for the independent evaluation until the School System receives a written evaluation report from the evaluator and is given the opportunity to discuss the evaluation results with the evaluator, if needed, and at the same time that the results are discussed with the parent.

6. If the School System decides to refuse funding for the IEE, prior written notice of the refusal must be provided to the parent and a request for due process hearing will be initiated by the School System to prove its evaluation is appropriate or that the IEE requested or obtained by the parent does not meet agency criteria.

PARENTAL REQUEST FORM FOR AN INDEPENDENT EDUCATIONAL EVALUATION (IEE)

(to be completed by or on behalf of a parent requesting an IEE)

Student's Name: School:
Parent(s) name, address and phone:
Do you disagree with an evaluation conducted by the School System?YesNo If so, with which evaluation(s) do you disagree?
Why do you disagree with the School System's evaluation(s)?
What kind of independent evaluation do you wish to be done or in what area(s) do you wish for your child to be evaluated?
A copy of the School System's approved list of qualified evaluators has been provided to you, along with applicable criteria related thereto.
Please identify the evaluator you have chosen to conduct the independent evaluation. If you do not select someone from the School System's approved list, please identify your chosen examiner and describe the qualifications of the selected examiner, the location of the evaluation, the estimated cost of the evaluation and the contact information for the evaluator so that the School System can make a proper decision and, is appropriate, proper arrangements for obtaining/funding the evaluation. In addition, please set forth the unique circumstances that justify any deviation from the School System's IEE criteria (additional pages if needed).
Submit this Request to The School System will respond to your reques
without unnecessary delay and will either agree to fund it or will initiate a due process hearing to show the appropriateness of its own evaluation or to prove that the IEE requested does not meet applicable criteria.
Parental Signature: Date:
Date Received by Special Education Coordinator/designee:

SCHOOL SYSTEM

LIST OF APPROVED QUALIFIED EVALUATORS AND APPLICABLE CRITERIA FOR CONDUCTING INDEPENDENT EDUCATIONAL EVALUATIONS

You have indicated that you disagree with an evaluation conducted by the School System and have requested that the School System fund an Independent Educational Evaluation (IEE). The criteria under which an IEE is conducted or obtained, including the location and cost of the evaluation and the qualification of the evaluator, must be the same as the criteria the School System uses when it conducts the same kind of evaluation.

Below is a list of approved qualified evaluators from which you may choose to conduct such an evaluation, along with School System criteria for conducting an IEE. Should you choose an evaluator that is not on the list, you must ensure that the qualifications of the evaluator and the School System's criteria are met or provide the School System with an explanation as to any unique circumstances that would justify deviation from the list or the criteria.

The following is a list of approved qualified independent examiners within the geographic region and where they can be reached:

LIST OF APPROVED EVALUATORS

(**INSERT List** of approved evaluators here with contact information—it is suggested that evaluators be listed by type of evaluation: Psychological, Educational, Medical, Psychiatric, Neuropsychological, etc.)

SCHOOL SYSTEM'S EVALUATION CRITERIA

Where an IEE is at the expense of the School System, the criteria under which the evaluation is conducted or obtained, including the location of the evaluation and the qualifications of the evaluator, must be the same as the criteria the School System uses when it initiates an evaluation, to the extent the criteria are consistent with the parent's rights to an IEE. The following are the School System's criteria applicable to the performance of evaluations. An IEE must be conducted based upon these criteria, unless the parent can demonstrate that unique circumstances justify deviation from them.

1. Applicable Overall Criteria for Conducting an Evaluation

An independent evaluation must include an observation of the student in an educational setting (if the student is in an educational setting) and review and consideration of current education records;

The evaluator must obtain direct information concerning the performance of the student from not less than one current teacher or other service provider of the child, unless the child does not have a current teacher/service provider;

All assessment instruments must be administered by a qualified evaluator, be age appropriate to the child, and be administered and scored in conformance with the test publisher's instructions. The evaluation instruments are to be chosen on the basis of their relevancy to the educational questions to be addressed by the evaluation. This means that the instruments should be those which are commonly known to and used by public school professionals. All instruments used must be current editions and reported in standard scores:

The evaluator must prepare and sign a full evaluation report containing:

- A list of all information/data reviewed;
- A clear explanation of the testing and assessment results;
- A complete summary of all test scores, including, for all standardized testing administered, all applicable full scale or battery scores, domain or composite scores, and sub-test scores reported in standard, scaled or T-score format;
- A complete summary of all information obtained or reviewed from sources other than testing conducted by the evaluator;
- Recommendations for IEP team consideration for educational programming and, if appropriate, placement that are educationally relevant and realistic within a public educational setting.

2. Location of Evaluators Conducting IEEs

An independent evaluator must be located within the same geographic area that the School System uses for its own evaluations, which is ______ (NOTE: Describe specific region, e.g., ____ mile radius; to include ______ area). These location requirements may be waived or modified in special circumstances when unique diagnostic expertise is warranted, provided the parents can demonstrate the necessity of using an evaluator outside the specified geographic area.

3. Qualifications of Evaluators Conducting IEEs

Independent evaluators must meet the minimum qualifications/criteria set forth in Appendix A.

4. Cost for IEEs

The cost of an IEE shall reflect reasonable and customary rates for such services in ______County (State?, Region?). Unreasonable costs for travel will not be reimbursed as part of the funding for an IEE. Costs above customary amounts will be approved only if the parent can demonstrate that the cost reflects a reasonable and customary rate for such evaluative services or if the parents can demonstrate that there are other factors that make the extraordinary costs necessary in order to exercise their right to an IEE.

5. Timeline for Completing the IEE

If the IEE has not already been conducted, it must be completed within a reasonable period of time from the date that the School System finalizes its agreement with the evaluator to fund the IEE. Generally, the IEE should be completed within sixty (60) calendar days from the date that the School System finalizes the agreement with the evaluator.

6. <u>Provision of Evaluation Report to School System</u>

The evaluator must have parental permission to communicate and share information with the School System and, as part of the contracted evaluation, must agree to prepare an evaluation report and release their assessment information and results directly to the School System prior to the receipt of payment for services. Results must be sent to the School System prior to or on the same day that results are provided to the parents.

7. Conflict of Interest Requirements

The independent evaluator must be free of any conflict of interest and the independent evaluation must not be of benefit to any particular public, non-public or private school, agency or institution.

Independent Educational Evaluations (IEE) Minimum Qualifications/Criteria for Evaluators

Type of Assessment	Qualifications	Cost
Academic Achievement	Certificated Special Education Teacher or Licensed Educational Psychologist/Psychometrist	
Adaptive Behavior	Licensed Educational Psychologist/Psychometrist or Certificated Special Education Teacher	
Auditory Processing/Perception	Certificated or Licensed Speech/Language Pathologist	
Behavioral	Certificated Special Education Teacher or Licensed Educational Psychologist/Psychiatrist Behavior Specialist	
Cognitive/Intellectual	Licensed Educational, Clinical or School Psychologist Psychometrist Clinical Psychiatrist	
Health or Medical Disability	Licensed Physician	
Hearing Acuity	Audiologist or Certificated or Licensed Speech/Language Pathologist	
Motor Adaptive	Physical Education Specialist or Registered Occupational Therapist or Licensed Physical Therapist	
Neurological	Licensed Psychiatrist/Neurologist	
Neuropsychological	Licensed Clinical Psychologist with American Board of Clinical Neuropsychology or comparable Board Certification	
Social/Emotional	Licensed Educational Psychologist/ Psychometrist or Clinical Psychologist or Psychiatrist	
Speech and Language	Certificated or Licensed Speech/ Language Pathologist	

Visual Processing/Perception Certificated Special Education

Certificated Special Education Teacher or Licensed Educational Psychologist/ Psychometrist

Visual Acuity Ophthalmologist or Optometrist