INDEPENDENT EDUCATIONAL EVALUATION ISSUES UNDER THE IDEA

NYS IDEA IMPARTIAL HEARING OFFICER TRAINING – WEBINAR 2
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PROF. MARK C. WEBER
DEPAUL UNIVERSITY COLLEGE OF LAW
SPECIAL EDUCATION SOLUTIONS, LLC

Parents of children with disabilities frequently obtain independent educational evaluations (IEEs). They also frequently ask for public funding for IEEs. Disputes over IEEs are a challenging component of many due process hearings, so the law on the topic is of importance to impartial hearing officers (IHOs). This outline discusses:

- Relevant Provisions of the Individuals with Disabilities Education Act, the Federal Regulations, and New York Statutes and Regulations
- The essentials of the right to an IEE
- Bases for obtaining publicly funded IEEs
- Procedures for obtaining publicly funded IEEs
- Uses of IEEs
- Remedies in IEE cases

The IDEA, the Federal Regulations, and New York Law and Regulations

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1482, a state educational agency, state agency, or local educational agency (typically a school district) that receives federal special education funding must provide, "An opportunity for the parents of a child with a disability . . . to obtain an independent educational evaluation of the child." 20 U.S.C. § 1415(b)(1). The procedural safeguards notice furnished to parents must explain the statutory and regulatory provisions relating to independent educational evaluations. *Id.* § 1415(d)(2)(A); *see also* 34 C.F.R. § 300.504(c)(1).

Under the federal regulation, an IEE is "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). School districts and other public agencies have to afford parents of children with disabilities the right to obtain an IEE. *Id.* § 300.502(a)(1). The agency has to provide the parents who make a request for independent evaluation the information they need about where to obtain the evaluation and the agency's criteria that apply to IEEs. *Id.* § 300.502(a)(2).

Parents may have the right to an educational evaluation at public expense. "Public expense means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with [34 C.F.R.] § 300.103," one of the regulations interpreting the

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requirement to provide free, appropriate public education (FAPE). *Id.* § 300.502(a)(3)(ii). The federal regulation on educational evaluation at public expense provides:

> Parent right to evaluation at public expense.
>
> (1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.
>
> (2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—
>
> (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or
>
> (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.
>
> (3) If the public agency 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.
>
> (4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.
>
> (5) A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees.

Id. § 300.502(b).

The section of the federal regulation covering "agency criteria" that apply to IEEs at public expense states:

> Agency criteria.
>
> (1) If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of

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> the evaluation and the qualifications of the examiner, must be the same as the 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 independent educational evaluation.
>
> (2) Except for the criteria described in paragraph (e)(1) of this section, a public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

Id. § 300.502(e).

Independent educational evaluations requested by hearing officers as part of a hearing on a due process complaint must also be at public expense. *Id.* § 300.502(d).

Publicly funded or not, the IEE has to be considered by the school district and may be used in a due process hearing and state level appeal:

> Parent-initiated evaluations.
>
> If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation—
>
> (1) Must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and
>
> (2) May be presented by any party as evidence at a hearing on a due process complaint under subpart E of this part regarding that child.

Id. § 300.502(c).

State law has a number of provisions that bear on independent educational evaluation. N.Y. Education Law § 4402(d)(3) requires that "Each school district shall make available a register of public or private agencies and other professional resources within the county from which a parent or person in parental relationship may obtain an independent evaluation of the child."

A New York regulation on special education, 8 NYCRR § 200.5(g), focuses on independent evaluations at public expense:

> (1) Requests by parents. If the parent disagrees with an evaluation obtained by the school district, the parent has a right to obtain an independent educational evaluation at public expense. A parent is entitled to only one independent educational evaluation at public expense each time the school district conducts an evaluation with which the parent disagrees.
>
> (i) If requested by the parent, the school district shall provide to parents, information about where an independent educational evaluation may be

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obtained, and the school district's criteria applicable for independent educational evaluations, as described in subparagraph (ii) of this paragraph.

(ii) The criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, shall be the same as the criteria which 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. A school district may not impose additional conditions or timelines related to obtaining an independent educational evaluation at public expense.

(iii) If a parent requests an independent educational evaluation at public expense, the school district may ask for the parent's reason why he or she objects to the public evaluation.

(*a*) The explanation by the parent in subparagraph (iii) of this paragraph may not be required and the school district may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint notice to request a hearing to defend the public evaluation.

(iv) If a parent requests an independent educational evaluation at public expense, the school district must, without unnecessary delay, either ensure an independent educational evaluation is provided at public expense or file a due process complaint notice to request a hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria.

(v) If the school district files a due process complaint notice to request an impartial hearing and the final decision is that the school district's evaluation is appropriate, or that the evaluation obtained by the parent did not meet school district criteria, the parent has the right to an independent educational evaluation, but not at public expense.

. . .

(2) Requests for evaluations by hearing officers. If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

The regulation thus harmonizes with the federal requirements regarding independent evaluations at public expense. In keeping with the federal regulation, under the New York regulation, if the parent obtains the evaluation at public expense or if the parent shares a privately funded evaluation with the district, evaluation results "may be presented by any party as evidence at an impartial hearing for that student, *id*. § 200.5 (g)(1)(vi)(b), and have to be considered by the school district "in any decisions made

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with respect to the provision of a free appropriate public education for the student," as long as the evaluation meets the school district's criteria, *id*. § 200.5(g)(1)(vi)(a).

The Essentials of the Right to an IEE

The right to an IEE exists against a background of duties on the part of public school authorities to evaluate all children suspected of having disabilities. A public agency has to conduct a comprehensive evaluation, using a variety of assessment tools and strategies to obtain relevant functional, developmental, and academic information about the child. Information obtained through the evaluation is to assist in determining whether the child is a child with a disability as well as determining the content of an eligible child's IEP to enable the child to be involved in, and make progress in, the general education curriculum. 34 CFR § 300.304(b)(1). The public agency must ensure that each child is assessed in all areas related to the suspected disability, including as appropriate, academic performance. 34 CFR § 300.304(c)(4). Nevertheless, "There is no provision in the IDEA that gives a parent the right to dictate the specific areas that the public agency must assess as part of the comprehensive evaluation; the public agency is only required to assess the child in particular areas related to the child's suspected disability, as it determines appropriate." *Letter to Unnerstall*, 68 IDELR 22 (OSEP Apr. 25, 2016). "However, if a determination is made through the evaluation process that a particular assessment for dyslexia is needed to ascertain whether the child has a disability and the child's educational needs, including those related to the child's reading difficulties, then the public agency must conduct the necessary assessments." *Id*.

A court has emphasized that access to school district evaluations are critical to the ability of parents to exercise their IDEA right to an independent evaluation, and that the information has to be made available to the parents early enough for them to obtain an IEE:

> The right to examine a district's evaluations undergirds the parents' right to request an independent evaluation if they disagree. In order for these rights to be effectuated, they need to be available far enough in advance of the school year for the independent evaluation to be conducted and reviewed by the CSE team. By failing to provide a copy of R.Y.'s evaluation until the May 2012 CSE meeting was already underway, the DOE violated the Parents' right to be involved in the IEP decisionmaking.

S.Y. v. New York City Dep't of Educ., 210 F. Supp. 3d 556, 569, 68 IDELR 230 (S.D.N.Y. 2016) (citation omitted) (finding violation not sufficient to invalidate IEP in light of other steps taken to inform parents).

The IDEA regulations contain extensive provisions on evaluations and reevaluations at 34 C.F.R. § 300.301-.311. Beyond the authorities requiring or withholding public funding for independent evaluations considered below, there is an abundance of case law concerning what constitutes an adequate evaluation. For a discussion of the topic, see Mark C. Weber, *"All Areas of Suspected Disability,"* 59 Loy. L. Rev. 289 (2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2235090

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Parents are, of course, free to have evaluations done on their children independently of the public school's IDEA evaluation process. When parents undertake such an evaluation, the school authorities must consider the evaluation in making special education eligibility, program, and placement decisions, even if the district has done its own evaluation, as long as the independent evaluation meets the criteria set by the district. *See* 34 C.F.R. § 300.502(c)(1). *See generally* M.Z. v. New York City Dep't of Educ., No. 12 CIV. 4111, 2013 WL 1314992, at *5 (S.D. N.Y. Mar. 21, 2013) ("State and federal regulations also require the that the results of the initial or most recent evaluation of the student and any independent evaluations obtained at public expense be considered in connection with the development of the IEP. 34 C.F.R. § 300.324; N.Y. Comp. Codes R. & Regs. tit. 8, §§ 200.4(f)(1), 200.5(g)(1)(vi)."), *appeal dismissed*, No. 13-1508 (2d Cir. June 17, 2013). As indicated above, the evaluation may also be used as evidence in a due process or review proceeding. *Id.* § 300.502(c)(2). The criteria for the IEE have to 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 IEE. *Id.* § 300.502(e)(1). An evaluation is deemed independent if conducted by an examiner who is qualified and not employed by the public agency responsible for the education of the child. *Id.* § 300.502(a)(3)(i).

As noted above, parents may demand an IEE at public expense if they disagree with the public school's evaluation of their child. *Id.* § 300.502(b)(1). The school district may avoid paying for the IEE only if it requests a due process hearing and establishes at the hearing that its evaluation was appropriate. *Id.* § 300.502(b)(3). A federal court of appeals has upheld the regulation requiring school districts and other public agencies to fund IEEs when the parents disagree with the public school's evaluation and the public agency fails to request a due process hearing and show that its evaluation is appropriate. In *Philip C. v. Jefferson County Board of Education*, 701 F.3d 691, 60 IDELR 30 (11th Cir. 2012), the court held that the regulation requiring that an IEE be at public expense if the specified conditions are met was a valid exercise of the Department of Education's rulemaking power, even though the right to funding was not specifically listed in the IDEA's text.

The regulation on IEEs at public expense does not clarify which parent prevails when one demands the IEE and the other objects. The Second Circuit ruled that a parent's whose parental rights to participate in her daughter's education had been revoked by a Vermont family court lacked standing to invoke due process on a demand she made for an IEE when the parent with the right to educational decision making disagreed. *Taylor v. Vermont Dep't of Educ.*, 313 F.3d 768 (2d Cir. 2002) (Sotomayor, J.).

The regulation does not require notice to the district before the parent who disagrees with the district evaluation obtains the IEE and seeks reimbursement, and courts have required reimbursement when the parents did not give notice before hiring the evaluator and incurring the cost. *E.g., Warren G. v. Cumberland Cnty. Sch. Dist.*, 190 F.3d 80, 31 IDELR 27 (3d Cir. 1999) (not requiring parents to express disagreement with district's evaluation before getting IEE for child); *Hiller v. Board of Educ.*, 687 F. Supp. 735, 441 IDELR 194 (N.D.N.Y. 1988). The school district or other public agency

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may ask the parent about the reason for disagreement with the school's evaluation, but the parent does not have to answer, and the district must not delay in providing the IEE or filing the due process hearing request. 34 CFR § 300.502(b)(4). A written statement of the nature of the disagreement cannot be required, nor is the request for the publicly funded IEE subject to consideration by the IEP team. *Letter to Anonymous*, 55 IDELR 106 (OSEP Jan. 4, 2010) ("While it is reasonable for a public agency to require that it be notified prior to the parent obtaining an IEE at public expense, it is inconsistent with 34 CFR § 300.502 to deny reimbursement prior to discussion of the district's evaluation at an IEP meeting, or to require the parent to provide a written statement of its disagreement with the district's evaluation, or to provide notice of their request for an IEE in an IEP team meeting for consideration by the IEP team.").

As stated above, school district or the other relevant public agency criteria for evaluations must be followed with regard to publicly funded IEEs. *Letter to Savit*, 67 IDELR 216 (OSEP Jan. 19, 2016) ("[U]nder 34 CFR § 300.502(e), if an IEE is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the 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."). But a school district must not restrict the providers of IEEs to a set list, and must give parents the chance to show that circumstances require choosing an evaluator who does not meet school district criteria. *Letter to Parker*, https://www2.ed.gov/policy/speced/guid/idea/letters/2004-1/parker022004iee1q2004.pdf (OSEP Feb. 20, 2004) ("[W]hen 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. In addition, when enforcing IEE criteria, the district must allow parents the opportunity to demonstrate that unique circumstances justify the selection of an evaluator that does not meet agency criteria.").

School districts or other public agencies may set cost caps for IEEs at public expense. *See M.V. v. Shenendehowa Cent. Sch. Dist.*, No. 1:11-CV-0070, 2013 WL 936438, 60 IDELR 213 (N.D.N.Y. Mar. 8, 2013) (noting that parents failed to contact several experts in area who would perform requested evaluation for less than cap set by district). The Office of Special Education Programs has cautioned, however:

> The denial of an IEE based solely on financial cost would be inconsistent with 34 CFR § 300.502. To avoid unreasonable charges for IEEs, the school district may establish maximum allowable charges for specific tests. 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. If an IEE that falls outside the district's criteria is justified by the child's unique circumstances, that IEE must be publicly-funded. 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 public agency must, without unnecessary delay, initiate a hearing to demonstrate that the evaluation obtained by the

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parent did not meet the agency's cost criteria and that unique circumstances of the child do not justify an IEE at a rate that is higher than normally allowed.

Letter to Anonymous, https://www2.ed.gov/policy/speced/guid/idea/letters/2002-4/redact100902iee4q2002.pdf (OSEP Oct. 9, 2002).

A parent is entitled to only one IEE at public expense each time the school district or other public agency conducts an evaluation with which the parent disagrees. 34 C.F.R. § 300.502(b)(5). The limit of one school district evaluation per year at the request of the parent, *see id.* § 300.303(b)(1), does not apply to independent evaluations at public expense. *Meridian Joint Sch. Dist. No. 2 v. D.A.*, No. 1:11-cv-00320-CWD, 60 IDELR 282 (D. Idaho Mar. 20, 2013), *aff'd*, 792 F. 3d 1054, 65 IDELR 253 (9th Cir. 2015).

School districts may not limit the amount of time that independent evaluators spend with the child in completing the evaluation. *See Letter to Anonymous*, 72 IDELR 251 (OSEP Aug. 23, 2018) ("[I]t would be inconsistent with the right of a parent to have an IEE considered by the public agency for a public agency to limit an independent evaluator's access in a way that would deny the independent evaluator the ability to conduct an evaluation in a way that meets agency criteria. Such criteria would include the amount of time that the independent evaluator spends with the child."). Other restrictions on independent evaluators may also run afoul of the federal law. *See School Bd. of Manatee Cnty. v. L.H.*, No. 8:08–cv–1435–T–33MAP, 2009 WL 3231914, 53 IDELR 149 (M.D. Fla. Sept. 30, 2009) (ruling that not permitting private psychologist conducting IEE to make observations in classroom violated IDEA; affirming order that observation at least two hours long be allowed).

Requesting an IEE at public expense does not by itself trigger the right to maintenance of placement (i.e., stay-put) under 20 U.S.C. § 1415(j). *See Letter to Anonymous*, 72 IDELR 163 (OSERS June 28, 2018) ("It is important to note that the parent's request for an IEE alone would not require the school district to continue the child's current educational placement unless a due process complaint was filed in the matter. If the public agency agrees to a parent's request for an IEE it may either delay the issuance of the prior written notice until the IEE has been completed and reviewed by the IEP Team or it may issue the prior written notice within a reasonable time and discontinue special education services, pending the completion and review of the IEE.").

Bases for Obtaining Publicly Funded IEEs

The ordinary basis for obtaining a publicly funded IEE is that the school district's evaluation is not appropriate. For example, in *Rose Tree Media Sch. Dist. v. M.J.*, No. 18-CV-1063, 2019 WL 1062487, 74 IDELR 15 (E.D. Pa. Mar. 6, 2019), the court considered the case of a high school student with various disorders but with top grades, whose grades deteriorated as she became frequently absent from school. She received an evaluation by a school psychologist that covered a cognitive assessment, academic achievement testing, social, emotional and behavior scales, teacher input, observations, and a records review, which resulted in a finding that she was not eligible for IDEA

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services on the ground that she did not need specialized instruction despite her mental health needs. The court affirmed a hearing officer ruling that the district failed to evaluate her in all areas of suspected disabilities in a manner that properly considered all of her special education needs, and thus an independent evaluation at public expense should be provided. The court noted that the district did not evaluate the student or consider her eligibility under the other health impairment (OHI) category when there appeared to be no dispute that OHI was an area of suspected disability, and the district did not sufficiently explain why the student did not meet the emotional disturbance classification despite many indicators. *See also Letter to Baus*, 65 IDELR 81 (OSEP Feb. 23, 2015) ("When an evaluation is conducted in accordance with 34 CFR §§ 300.304 through 300.311 and a parent disagrees with the evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs.").

A court has ruled that specific deficiencies as to individual assessments by the district result in an entitlement to a publicly funded IEE in all relevant areas, even those in which the assessments were sufficient. In *Jones-Herrion v. District of Columbia*, No. CV 18-2828, 2019 WL 5086693, 75 IDELR 92 (D.D.C. Oct. 10, 2019), the school system performed only four of the five assessments it agreed to do when evaluating a seventh grader for eligibility for special education. Of the four, the district could defend only three before the special education hearing officer. The five areas were assistive technology; occupational therapy; speech/language; functional behavior; and comprehensive psychological. The parents asked for funding for an IEE that would cover all five assessments, and in litigation the school system agreed to fund an IEE for the one assessment that it did not perform (the assistive technology assessment) and the one it could not defend (the occupational therapy assessment, which was conducted by a therapist who could not attend the hearing). The court granted the parents' motion for summary judgment, awarding payment for all five assessments. The court ruled that when an IEE is requested the district must defend the appropriateness of the evaluation as a whole, and that the hearing officer erred in finding that the partial evaluation by the school system was appropriate. The court stated: "Congress recognized that assessments cannot be separated from the evaluation which they inform. Here, DCPS determined which assessments were needed to evaluate K.H. but failed to perform them all or even to defend successfully all of those it did perform. Without necessary assessments, its evaluation was clearly deficient. IDEA entitles K.H. to a publicly funded independent educational evaluation, and therefore entitles her to all of the independent assessments necessary to formulate that evaluation." *Id.* at *4.

On the other hand, a court has ruled that disagreement with a specific assessment does not entitle the parent to funding for additional testing or assessments in areas other than the one the parent challenges. In *D.S. v. Trumbull Board of Education*, 357 F. Supp. 3d 166, 73 IDELR 228 (D. Conn. 2019), *appeal filed*, No. 19-644 (2d Cir. Mar. 15, 2019), the court held that a hearing officer did not err when she denied an IEE for additional assessments that the parents requested that were beyond the scope of the functional behavioral analysis with which they disagreed. The court stated:

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> [B]ecause the right to a publicly funded IEE depends on the parents' disagreement with an existing IEE [sic], there must necessarily be a connection between the evaluation with which the parents disagree and the independent evaluation which they demand be funded at taxpayer expense. After all, the right to a publicly funded IEE turns on the parents' disagreement with an evaluation that was actually done, not a parent's disagreement with an evaluation that was *not* done. The IEE regulation's requirement that there be a disagreement with an existing evaluation would be meaningless if a parent could lodge a "disagreement" with any particular evaluation as no more than a device to demand a publicly funded IEE for testing beyond the intended or proper scope of the evaluation with which the parents purportedly disagree.

Id. at 176. The court cautioned that, "Of course, if a school district refuses to conduct an evaluation that the parent requests, then a parent is free to file for a due process hearing to insist that the school district's failure to conduct a reevaluation as requested by the parent is inconsistent with the student's IEP or the school district's overall duty to provide a free and appropriate education." *Id*. at 177 (citation omitted).

In any instance, when the parents' IEE request challenges the entirety of a school district's evaluation or reevaluation, it is error for the hearing officer to focus only on the specific assessments that were performed and not consider whether further assessments were needed. *L.D. v. Anne Arundel Pub. Schs*., No. CV CCB-18-1637, 2019 WL 6173818, 119 LRP 44337 (D. Md. Nov. 20, 2019) (stating that evidence should have been allowed regarding the failure to assess student for learning disability when parents' IEE request stated disagreement with triennial evaluation as a whole, but ALJ decided that hearing would focus only on reading, writing, math, pragmatic language, and social emotional development assessments; remanding case to hearing officer).

Parents' rights to a publicly funded IEE do not hinge on the school district's failure to cure defects in the school's evaluation. In other words, there is no safe harbor in which a district may try to fix inadequacies of the evaluation; the district must demand the hearing or pay for the IEE. *See Letter to Carroll*, 68 IDELR 279 (OSEP Oct. 22, 2016) ("The IDEA affords a parent the right to an IEE at public expense and does not condition that right on a public agency's ability to cure the defects of the evaluation it conducted prior to granting the parent's request for an IEE. Therefore, it would be inconsistent with the provisions of 34 CFR § 300.502 to allow the public agency to conduct an assessment in an area that was not part of the initial evaluation or reevaluation before either granting the parents' request for an IEE at public expense or filing a due process complaint to show that its evaluation was appropriate.").

Similarly, the right to the publicly funded evaluation does not depend on the district's evaluation having resulted in a finding of IDEA eligibility for the child. See *Letter to Zirkel*, 74 IDELR 142 (OSEP May 2, 2019) ("Question 1: Does the parent have the right to obtain an IEE at public expense if the child is evaluated under IDEA and found not to be a child with a disability in need of special education and related services? Answer: Yes. Under 34 C.F.R. § 300.502(a), the parents of a child with a disability have the right under Part B of IDEA to obtain an IEE, subject to 34 C.F.R. §

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300.502(b) through (e). Under 34 C.F.R. § 300.15, the term 'evaluation' means the procedures used in accordance with 34 C.F.R. §§ 300.304 through 300.311 to determine whether a child has a disability (emphasis added), and the nature and extent of the special education and related services that the child needs. Because the definition of evaluation includes eligibility determinations under IDEA, we believe an IEE can be obtained after an initial evaluation regardless of whether the child was found eligible as a child with a disability, if the parent disagrees with the initial evaluation obtained by the public agency, subject to certain conditions. 34 C.F.R. § 300.502(b)(1). The right to an IEE at public expense, therefore, would extend to parents who suspect their child might be a child with a disability and who disagree with the initial evaluation obtained by the public agency.").

When the district demonstrates at hearing that its evaluation is appropriate, payment for a parent's IEE is denied; a parent is not entitled to an IEE when the district has properly assessed a child in all areas related to the child's suspected disability. *R.Z.C. v. North Shore Sch. Dist.*, 755 F. App'x 658, 118 LRP 50704 (9th Cir. 2018) (finding evaluation appropriate when it did not omit needed information, but instead included results of student's cognitive, attention, social, emotional, medical, and physical assessments, as well as general education teacher reports, parent input, past and current grades, progress measurements, teacher observations, psychologist's report, specific assessment results, and transition assessment, minor omission was harmless, and classroom observation was adequate); *Avila v. Spokane Sch. Dist. 81*, 686 F. App'x 384, 69 IDELR 204 (9th Cir. 2017) (affirming district court decision that denied independent evaluation at public expense, stating that district assessed child in all areas related to his suspected disability when it gave him battery of tests for reading and writing deficiencies, including many of same tests parent's private evaluator used).

Minor deficiencies in the district's evaluation do not justify public funding for the parent's IEE. In *B.G. v. City of Chicago Sch. Dist. 299*, 901 F.3d 903, 72 IDELR 231 (7th Cir. 2018), the court affirmed the district court's denial of a motion to overturn a hearing officer decision rejecting a request for independent educational evaluations at public expense for a teenager with medical conditions and emotional and learning disabilities. The court reasoned that substantial evidence supported the hearing officer's decision that the school district's evaluations were appropriate. Regarding the district's psychological evaluation, the court held that the district's evaluators were qualified, that errors in test administration were harmless, that testing in English was appropriate for the student, that support for the recommended emotional disability classification was adequate, and that the evaluators considered the possibility of ADHD. The court further said that the belief of the evaluator that the student did not have a learning disability did not cause harm when the student was classified as having a learning disability and provided access to audiobooks and a multisensory approach to decoding. The court also found the occupational therapy evaluation sufficient. It ruled that the social work evaluation was adequate though it did not include a home visit, and that the functional behavioral assessment was sufficient. With regard to the physical therapy evaluation, the court found that the hearing officer's error about the evaluator's finding of pain was harmless. As to the speech and language evaluation, the court affirmed that the

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evaluator's loss of test protocols was harmless when the evaluator had them at the meeting on eligibility and the findings had additional corroboration.

Courts have ruled that for the parent to have a right to a publicly funded IEE, there has to be a district evaluation for the parent to disagree with. *G.J. v. Muscogee Cnty. Sch. Dist.*, 668 F.3d 1258, 1266, 58 IDELR 61 (11th Cir. 2012) ("The district court correctly determined that the statutory provisions for a publicly funded independent educational evaluation never kicked in because no reevaluation ever occurred. The right to a publicly funded independent educational evaluation does not obtain until there is a reevaluation with which the parents disagree."). This principle applies when the parent withholds consent to the public school evaluation, which prevents the district's evaluation from taking place. *Id.*; *see also M.S. v. Hillsborough Twp. Pub. Sch. Dist.*, No. 19-1510, 2019 WL 6817169, 75 IDELR 212 (3d Cir. Dec. 13, 2019) (unpublished).

In one case, however, a court held that parents might be able to obtain district funding for an IEE by contesting an earlier evaluation that was still within the limitations period, while refusing consent to a later evaluation; but in that instance, said the court, the hearing on the district's earlier evaluation and the IEE, if ordered, would have to relate to the time period of the earlier evaluation. *N.D.S. v. Academy for Sci. & Agric. Charter Sch.*, No. 18-CV-0711, 2018 WL 6201725, 73 IDELR 114 (D. Minn. Nov. 28, 2018). Nevertheless, a court has ruled that when the evaluation with which the parent disagrees is obsolete because it took place too long ago, requiring a district to provide an IEE at public expense is futile because it will not aid in the parents' assertion of the child's right to FAPE. *See T.P. v. Bryan Cnty. Sch. Dist.*, 792 F.3d 1284, 1293, 65 IDELR 254 (11th Cir. 2015) ("The parental right to an IEE is not an end in itself; rather, it serves the purpose of furnishing parents with the independent expertise and information they need to confirm or disagree with an extant, school-district-conducted evaluation. The evaluation in connection with which Parents sought an IEE at public expense—the 2010 initial evaluation of T.P.—is no longer current because more than three years have passed since September 2010. Regardless of the merits of Parents' case, ordering an IEE at public expense in these circumstances would be futile because the District cannot be forced to rely solely on an independent evaluation conducted at the parents' behest.") (citations and internal quotation marks omitted).

A court has also ruled that there is no entitlement to a publicly funded IEE if the parent has no actual disagreement with the district's evaluation. *M.C. v. Katonah/Lewisboro Union Free Sch. Dist.*, No. 10 CV 6268(VB), 2012 WL 834350, at *11 (S.D.N.Y. Mar. 5, 2012) ("[P]arent's claim depends on whether the Flaum evaluation was obtained because she disagreed with a district evaluation within the meaning of that statute."); *see also R.L. v. Plainville Bd. of Educ.*, 363 F. Supp. 2d 222, 43 IDELR 57 (D. Conn. 2005) (stating that parents seeking IEE did not disagree with the district's evaluation, but merely desired additional evaluation).

Nevertheless, in various cases, courts have required IEE reimbursement for parents when school districts have improperly failed to evaluate children for suspected disabilities, and so no district evaluation exists. *See, e.g., A.S. v. Norwalk Bd. of Educ.*, 183 F. Supp. 2d 534, 36 IDELR 92 (D. Conn. 2002) (requiring reimbursement for evaluation when district did not conduct educational assessment before proposing

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movement of child to non-mainstreamed setting); *J.P. v. Anchorage Sch. Dist.*, 260 P.3d 285, 57 IDELR 169 (Alaska 2011) (affirming order that parents be reimbursed for independent evaluation when parents requested evaluation of child and district did not act within 45 school days, and even though ultimately child was not found eligible for special education,; noting that right to publicly funded IEE does not depend on eligibility, and that district made use of private evaluation); *see also J.G. v. Douglas Cnty. Sch. Dist.*, 552 F.3d 786, 51 IDELR 119 (9th Cir. 2008) (reversing decision to refuse full reimbursement of private evaluations of twins with autism when district did not promptly evaluate twins after special education referral, even though parents refused to share private evaluations with school district).

Of course, there may be disputes over just what constitutes an evaluation with which the parents can disagree, for purposes of the parents' entitlement to a publicly funded IEE. In *Haddon Township School District v. New Jersey Department of Education*, No. A-1626-14T4, 2016 WL 416531 (N.J. App. Div. Feb. 4, 2016), the New Jersey Appellate Division ruled that under the federal regulations, a review of existing data constitutes an evaluation with which parents may disagree so as to entitle them to an IEE at public expense. *See id.* at *3 ("[T]he School District also seeks to define an evaluation as 'something more than a review of data.' The federal regulation does not support this interpretation. Evaluations are defined as procedures used 'to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.' 34 C.F.R. § 300.15 (2016)."). *F.C. v. Montgomery County Public Schools*, No. TDC-14-2562, 2016 WL 3570604, 68 IDELR 6 (D. Md. June 27, 2016), took a contrary view. It stated, "[I]t is evident that the May 2012 meeting was not an evaluation under 34 C.F.R. § 300.502(b). The meeting consisted of reviewing 2009 assessment data, report card data, and teacher observations." *Id.* at *3. The Office of Special Education programs has issued a letter stating that a request for an IEE at public expense made "early during" the Response to Intervention process is not subject to reimbursement "because the district has not completed an evaluation." *Letter to Zirkel*, 52 IDELR 77 (OSEP Dec. 11, 2008).

The federal regulation provides that when the IHO orders an independent evaluation, it must be at public expense. 34 C.F.R. § 300.502(d). Circumstances in which an IHO may order the evaluation will vary, but one court has ruled that a hearing officer may need to order an independent educational evaluation to determine specific deficits due to the denial of appropriate education and what compensatory services will remedy them. *Butler v. District of Columbia*, 275 F. Supp. 3d 1, 5, 70 IDELR 149 (D.D.C. 2017) ("A hearing officer who finds that he needs more information to make such an individualized assessment [of needs for compensatory education due to denial of FAPE] has at least two options. He can allow the parties to submit additional evidence to enable him to craft an appropriate compensatory education award . . . , or he can order the assessments needed to make the compensatory education determination, . . . In the end, he must solicit the evidence necessary to determine the student's 'specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits.' What he cannot do is what the hearing officer did here, that is, outright reject an award for compensatory services and terminate the proceedings.") (citations omitted).

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Procedures for Obtaining Publicly Funded IEEs

If a parent requests an IEE at public expense, the school district must, without any unnecessary delay, either file a due process complaint to request a hearing to show that its evaluation was appropriate, or make sure that an IEE is provided at public expense "unless the agency demonstrates in a hearing pursuant to . . . that the evaluation obtained by the parent did not meet agency criteria." 34 C.F.R. § 300.502(b)(2). The burden is on the school district to show that its evaluation is appropriate. *Collette v. District of Columbia*, No. CV 18-1104, 2019 WL 3502927, 74 IDELR 251 (D.D.C. Aug. 1, 2019) (ruling that hearing officer incorrectly shifted burden of showing appropriateness of independent evaluation onto parents).

Unreasonable delays by the school district in requesting the hearing will support an order of reimbursement for the parent. In *L.C. v. Alta Loma School District*, 389 F. Supp. 3d 845, 74 IDELR 260 (C.D. Cal. July 18, 2019), *appeal filed*, No. 19-55968 (9th Cir. Aug. 19, 2019), the parents requested an independent evaluation regarding the student's visual processing. The district delayed filing for due process from the Aug. 21, 2017 request to Dec. 5, 2017, while asking for justification of a fee in excess of the district's area plan limits. The court held that the delay was unreasonable, pointing out that the district failed to provide the parents full information on cost maximums and on how much the parents' chosen evaluator exceeded the maximum. The court said that "a district's unreasonable actions during attempts to resolve a dispute with parents regarding an IEE, including the withholding of pertinent information necessary for the parents to defend their position, could fairly amount to 'unnecessary delay' under the particular circumstances of a given case." *Id.* at 866. The district may have to provide a sufficient breakdown of the evaluator's costs to facilitate negotiation; instead, the district "impermissibly attempted to foist its own responsibility to ensure compliance with the procedures under the IDEA onto Plaintiff's parents and expected Plaintiff's parents to expend needless energy tracking down the necessary information already in the District's possession." *Id.* at 868. *See also Pajaro Valley Unified Sch. Dist. v. J.S.*, No. C 06-0380, 2006 WL 3734289, 47 IDELR 12 (N.D. Cal. 2006) (entering judgment in favor of parent for publicly funded IEE when district lacked justification for waiting 11 weeks before filing due process request challenging demand for IEE and when evidence indicated public school assessment was not adequate).

Parents are entitled to prior written notice when a school district proposes or refuses to initiate or change the evaluation of a child, 20 U.S.C. § 1415(b)(3), but a court found that that provision did not support the parents' claim that they did not receive notice that the district was not going to follow their independent evaluator's conclusions when the district had not made that decision at the time of the notice, but was instead planning a reevaluation in order to review the private psychologist's assessment. *R.Z.C. v. North Shore Sch. Dist.*, 755 F. App'x 658, 660 (9th Cir. 2018). A school district may conduct its own evaluation in addition to one that is privately obtained, and is not bound to rely on the privately obtained evaluation. *A.B. v. Lawson*, 354 F.3d 315, 326 & n.4, 40 IDELR 121 (4th Cir. 2004); *Johnson v. Duneland Sch. Corp.*, 92 F.3d 554, 24 IDELR 693 (7th Cir. 1996); *V.M. v. North Colonie Cent. Sch. Dist.*, 954 F. Supp. 2d 102, 118 (N.D.N.Y. 2013) ("A parent seeking special education services for their child under

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the IDEA must allow the school to evaluate the student and cannot force the school to rely solely on an independent evaluation.”).

Delays in challenging a school district’s evaluation may present limitations barriers. A court has ruled that the IDEA’s two-year statute of limitations for filing a due process hearing request applies to requests for IEEs at public expense; the statute begins running when the parent knew or should have known of grounds to disagree with the district’s evaluation. *D.S. v. Trumbull Bd. of Educ.*, 357 F. Supp. 3d 166, 179, 73 IDELR 228 (D. Conn. 2019), *appeal filed*, No. 19-644 (2d Cir. Mar. 15, 2019). The court did not specify whether the request for the publicly funded IEE tolls the statute or whether it is tolled only by the filing of a due process hearing request. By its own terms, the IDEA statute of limitations cited by the court applies only to the filing of requests for due process hearings, 20 U.S.C. § 1415(f)(3)(C), and under the federal regulation it is the school district that has the obligation to file for due process to show its evaluation is appropriate, rather than the parents’ obligation.

Uses of IEEs

The failure to consider an IEE may result in the denial of FAPE, and that conclusion applies even after a student graduates. In *Dallas Indep. Sch. Dist. v. Woody*, 865 F.3d 303, 70 IDELR 113 (5th Cir. 2017), the court considered a case in which a student with schizophrenia and learning disabilities enrolled in private school in Texas pursuant to a settlement agreement with a school district in California regarding the 2012-13 school year. The parent then changed residency at the start of the 2013-14 school year to a Texas school district, keeping the student in the private school in Texas. Although the court held that the Texas district was not obligated to adopt the California IEP nor offer an immediate interim IEP, and could proceed with reasonable promptness to determine the student’s eligibility and needs, the court also held that the Texas district was obligated to reconsider its proposed IEP in light of an independent evaluation even after the student graduated in the spring of 2014. Thus the district denied the student appropriate education from April 24 to the end of the semester, and the court required tuition reimbursement for that period. *But see J.S. v. New York City Dep’t. of Educ.*, 104 F. Supp. 3d 392 (S.D.N.Y. May 6, 2015) (holding that failure to consider 2011 IEE provided by parents was violation of 34 C.F.R. § 300.502(c)(1) and N.Y. Comp. Codes R. & Regs. tit. 8, § 200.5, but it did not invalidate IEP when later evaluation with similar findings was considered and mother was active participant in CSE meeting who had ability to bring information from 2011 evaluation to committee’s attention), *aff’d*, 648 F. App’x 96 (2d Cir. 2016).

That the district must consider the IEE does not mean that the district has to follow the IEE. In *Mr. P v. West Hartford Board of Education*, 885 F.3d 735, 753, 71 IDELR 207 (2d Cir.), *cert. denied*, 139 S. Ct. 322 (2018), the parents complained that, among other things, the district failed to consider a report from a private neuropsychologist engaged by the parents. The court commented, “While the IDEA required the District to consider this neuropsychological report, the District was not required to implement Dr. Isenberg's suggestions.” *Id.* at 753. Testimony showed that the evaluation was reviewed and commented upon at the relevant IEP meeting. *See also T.S. v. Board of Educ. of Town of Ridgefield*, 10 F.3d 87 (2d Cir. 1993) (finding IEE to

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have been adequately considered); *Y.N. v. Board of Educ. of Harrison Cent. Sch. Dist.*, No. 17-CV-4356, 2018 WL 4609117, 73 IDELR 73 (S.D.N.Y. Sept. 25, 2018) ("It is Defendant's burden to demonstrate which evaluative materials were reviewed during the CSE meeting in reaching the terms of the IEP . . . . Ultimately, Plaintiffs are arguing that the CSE did not adopt, or at least give enough credence to, Dr. Tagliareni's recommendation. However, the CSE was not required to do so, and therefore, this cannot establish a procedural violation of the IDEA.") (internal quotation marks and brackets omitted).

If the school district files a due process complaint to request a hearing and the final decision is that the district'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). Hence, the privately funded IEE must be considered by the district and may be used in an IEP meeting or as evidence in a hearing. *See Letter to Zirkel*, 74 IDELR 142, at Question 2 (OSEP May 2, 2019).

Remedies in IEE Cases

Reimbursement is a proper remedy for an improper denial of an IEE at public expense. The reimbursement should be for the full bill, even if the parents made use of third-party payments. *Jason O. v. Manhattan Sch. Dist. No. 114*, 173 F. Supp. 3d 744, 67 IDELR 142 (N.D. Ill. 2016) (requiring reimbursement for full cost of evaluations, not net cost after insurance payments, noting school district's use of evaluations in lieu of its own), *vacated as moot sub nom. Ostby v. Manhattan Sch. Dist. No. 114*, 851 F.3d 677, 69 IDELR 175 (7th Cir. 2017)

Substantial compliance with agency criteria for the evaluation is all that is required for full reimbursement, but, as noted above, caps on reimbursement may be imposed as long as there is an opportunity to demonstrate unique circumstances supporting an exemption. These caps may diminish otherwise applicable remedies. *Seth B. v. Orleans Parish Sch. Bd.*, 810 F.3d 961, 67 IDELR 2 (5th Cir. 2016) (in case of child with autism whose parents secured assent from school district for independent evaluation at public expense but whose request for reimbursement was rejected on ground evaluation did not meet state criteria, vacating and remanding decision in favor of school district; holding that substantial compliance with educational agency criteria suffices for reimbursement; applying $3,000 cap in light of failure to respond to opportunity to demonstrate unique circumstances supporting exemption); *see also Collette v. District of Columbia*, No. CV 18-1104, 2019 WL 3502927, 74 IDELR 251 (D.D.C. Aug. 1, 2019) (ruling that parents were entitled to reimbursement of full cost of independent evaluation even though it did not include classroom observation and was more expensive than defendant allowed).

As these cases suggest, remedies in IEE cases in which parents prevail will most likely be either an order to fund a prospective evaluation or an order to reimburse parents for an evaluation that has already taken place. There may, however, be some situations in which other remedies, such as compensatory education or tuition reimbursement could be a proper remedy for an inappropriate school district

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evaluation. In *Letter to Zirkel*, 74 IDELR 142 (OSEP May 2, 2019), OSEP responded to the question,

> In a case where the parent files for a due process hearing to claim a child find violation but either: (a) the district's belated evaluation determines that the child is not eligible under IDEA; or (b) the district never evaluated the child, is the parent deprived of the right to a FAPE-denial remedy (e.g., compensatory education or tuition reimbursement) and to attorneys' fees under the IDEA?

The answer: "The determination of a specific remedy resulting from a due process hearing is made on a case-by-case basis in light of the specific facts of each case at the discretion of the hearing officer. . . ." *Id.* Question 3.

In one recent case, an ALJ ordered an IEE at public expense when a school district failed to comply with a scheduling order in a hearing over the parents' right to the publicly funded IEE; a court subsequently denied the district's motion for preliminary relief on the ground that the district did not have a strong likelihood of success on the merits. *Independent Sch. Dist. No. 720 v. C.L.*, No. 18–CV–00936, 2018 WL 2108205, at *6, 72 IDELR 64 (D. Minn. May 7, 2018) ("[H]ere, the ALJ explicitly found that the District was 'attempting to cause unnecessary delay in either proceeding to hearing or in providing the IEE at public expense.' That, in light of the time–sensitive nature of proceedings under the IDEA, can justify the harsh result of a dismissal with prejudice.") (citation to record omitted) (also finding that ongoing needs of child weighed against stay).

When a parent has requested an IEE at public expense and the hearing officer finds that the district evaluation is not appropriate, relief restricted to a redo or enlargement of the district evaluation is not sufficient. *M.Z. v. Bethlehem Area Sch. Dist.*, No. 11–2313, 2011 WL 2669248, 57 IDELR 5 (E.D. Pa. 2011) (requiring publicly funded IEE, finding that hearing officer committed error of law when, after correctly finding school district's report of evaluation on which it based discontinuance of child's special education to be inappropriate, hearing officer did not order IEE requested by parents but instead ordered expansion and updating of district's evaluation), *aff'd*, 521 F. App'x 74, 60 IDELR 273 (3d Cir. 2013).

An IEE may be needed to determine a proper remedy in a case in which parents establish denial of FAPE. As noted above, an IHO may need to order an IEE where evidence about the scope of compensatory education required to remedy a denial of FAPE is deficient. See *Butler v. District of Columbia*, 275 F. Supp. 3d 1, 5, 70 IDELR 149 (D.D.C. 2017).

* * *

Additional Reference: Mark C. Weber, "Independent Evaluation," *Special Education Law and Litigation Treatise* § 4.5 (LRP Pubs. 4th ed. 2017).

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