Fagen Friedman & Fulfrost LLP

Here and Now

A Fresh Look at Independent Educational Evaluations

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What's On the Agenda . . .

- What Is an IEE?
- District Obligations When Parents Request an IEE
- Other Legal Requirements for IEE Requests
- Criteria for IEEs and the IEE Process
- Obligation to "Consider" an IEE
- Funding by ALJ Order

I. What Is an IEE?

What Is an IEE?

- Legal Definition
  - "An evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child"

(34 C.F.R. § 300.502(a)(3)(i); Ed. Code, § 56329)

What Is an IEE?

- Availability of publicly funded IEE is important IDEA procedural safeguard
- Allows parents opportunity to collect additional information from independent source for consideration by IEP team
- Note that parents can obtain and pay for their own independent evaluation at any time and IEP team must consider results

II. District Obligations When Parents Request Funding of an IEE

District Obligations When Parents Request Funding of IEE

- Provide parents with
  - Procedural safeguards notice
  - Information about where an IEE may be obtained
  - Criteria applicable to IEEs
- May ask parents why they object to evaluation, but cannot require explanation

(34 C.F.R. § 300.502(a)-(b); Letter to Anonymous (OSEP 2010) 55 IDELR 106)

District Obligations When Parents Request Funding of IEE

- "Without unnecessary delay" either:
  - File due process complaint to show appropriateness of assessment(s)

  or
  - Ensure that IEE is provided (unless it does not meet district criteria)

- Only legal options available (e.g., cannot propose to reassess instead)

(34 C.F.R. § 300.502(a)-(b); Letter to Anonymous (OSEP 2010) 55 IDELR 106)

"Without Unnecessary Delay"

- No IDEA definition
- OAH: "Some delay in the provision of an independent evaluation is reasonable if the school district and the parents are engaging in active communications, negotiations or other attempts to resolve the matter"
- Fact-specific inquiry

(34 C.F.R. § 300.502(a)-(b); Student v. Alta Loma School Dist. (OAH 2018) Case No. 2017120979, 118 LRP 26023)

"Without Unnecessary Delay"

Recent cases:

- Colton Joint Unified School Dist. (OAH 2017)
  - Three-month delay was not unreasonable when parties were in "continuous and active contact"
- Tracy Unified School Dist. (OAH 2017)
  - Communications with Parent over 43 days prior to filing to help her understand IEE requests was not undue delay
- Los Angeles Unified School Dist. (OAH 2016)
  - 53 days to review entire assessment before filing was reasonable; Parent did not identify any assessment procedure or conclusion she believed was inappropriate

"Without Unnecessary Delay"

Other notable case examples:

- Fremont Unified School Dist. (OAH 2009)
  - Four-month total delay was unreasonable; District waited two extra months after notifying Parents it would not fund
- Los Angeles Unified School Dist. (OAH 2007)
  - 74-day delay was unnecessary; inappropriate for District to wait until Parents filed before filing its own case
- Dixon Unified School Dist. (OAH 2014)
  - Five-month delay was unreasonable; District negotiated "slowly, inadequately and fruitlessly for five months . . . with the agreed-upon assessor"

Practice Pointer: "Without Unnecessary Delay"

- IEP team leaders should bring IEE requests to attention of special education director or other administrator as soon as possible—even a short delay can be significant
- But mistakes are made when IEP teams give parents an answer "on the spot," so inform teams that requirement to respond "without necessary delay" does not mean immediately

Denying IEE Request

- Send parents prior written notice advising them of decision
- File for due process to show appropriateness of assessment
  - If assessment found appropriate, not required to pay for IEE
  - If assessment found inadequate, must fund IEE

(34 C.F.R. § 300.502(b)(3); Ed. Code, § 56329; 34 C.F.R. § 300.503)

Case Example #1

Alhambra Unified School Dist. (OAH 2017)

- **Facts:**
  - District conducted triennial assessments for 15-year-old with autism and ID
  - Parents disputed District's speech and language assessment and OT assessment
  - Requested IEEs in both areas
  - District filed for due process to defend both assessments

Case Example #1

Alhambra Unified School Dist. (OAH 2017)

- **Decision:**
  - S/L assessment was appropriate
    - No legal requirement for parental interview
    - S/L assessor not required to determine why Student was not progressing on his goals
    - No iPad assessment required as part of S/L
  - OT assessment was appropriate
    - No evidence that specific handwriting assessment existed that was normed for Student's age

(Alahambra Unified School Dist. v. Student and Student v. Alhambra Unified School Dist. (OAH 2017) Case Nos. 2017010013 and 2016090921, 117 LRP 30488)

Case Example #2

Tehachapi Unified School Dist. (OAH 2017)

- **Facts:**
  - District conducted psychoeducational assessment of 8-year-old with OHI (diagnosed with ADHD) who had difficulty focusing, absorbing and retaining information
  - Parent disputed assessment and asked for IEE
  - District filed for due process to defend assessment

Case Example #2

Tehachapi Unified School Dist. (OAH 2017)

- **Decision:**
  - ALJ awarded IEE, finding assessment was not appropriate for several reasons
    - No reliable results because four tests were administered on same day and Student was having attention issues
    - Assessment report did not include relevant observational data; certain subtest scores and interpretation of test results were missing
    - Report did not explain Student's SLD ineligibility

(Tehachapi Unified School Dist. v. Student and Student v. Tehachapi Unified School Dist. (OAH 2017) Case Nos. 2017031162 and 2017020218, 117 LRP 30506)

Case Example #3

Riverside Unified School Dist. (OAH 2017)

- **Facts:**
  - Parents signed assessment plan for preschool Student on December 5, 2015
  - Parent had not yet received speech/language pathologist's report (in Spanish) by April 2016
  - Report provided at IEP meeting on June 3, 2016, at which team determined no eligibility
  - District filed to defend assessment

Case Example #3

Riverside Unified School Dist. (OAH 2017)

- **Decision:**
  - Assessment found substantively appropriate
  - But 156 days between time assessment plan signed and delivery of report was too long
  - Delay made assessment non-compliant
  - ALJ awarded speech/language IEE

(Riverside Unified School Dist. v. Student (OAH 2017) Case No. 2017020006, 70 IDELR 82)

Agreeing to Fund IEE

- Notify parents as soon as decision is made
- Exchange information
- Contact evaluator
- Schedule IEP meeting (but can't require examiner's presence)

(34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329; Letter to Anonymous (OSEP 2010) 55 IDELR 206)

Practice Pointer: Fund or File?

- Before making any decision, all assessments in question should be reviewed thoroughly—both substantively and for procedural compliance—and determination made as to their defensibility
- Remember that—as Riverside USD case demonstrates—even though assessment might meet all substantive legal requirements, ALJ can still find it not "appropriate" if it is not completed timely

III. Other Legal Requirements for IEE Requests

Dispute Completed Assessment

- If district has not completed its assessment (or has yet to conduct one), parents are not entitled to request IEE at public expense
- "A parent has the right to an independent educational evaluation at public expense <u>if the parent disagrees with an evaluation obtained by the public agency</u>"

(34 C.F.R. § 300.502(b)(1))

IEEs and RTI

- If parents ask for IEE because they disagree with district's RTI approach, they do not have right to obtain IEE at public expense before district completes its initial assessment for special education eligibility

(Letter to Zirkel (OSEP 2008) 52 IDELR 77; 71 Fed. Reg. 46689 (August 14, 2006))

Areas Not Assessed by District

- Letter to Baus (OSEP 2015)
  - If parent disagrees with district assessment because student was not assessed in a particular area, parent has right to request IEE to assess student in that area
  - As with all IEEs, district then must either fund or file

(Letter to Baus (OSEP 2015) 65 IDELR 81)

Areas Not Assessed by District

- Letter to Carroll (OSEP 2016)
  - "Inconsistent with [IDEA] 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"
  - IDEA does not condition right of parents to request IEE on district's ability to cure defects of evaluation it conducted prior to responding to parents' IEE request

(Letter to Carroll (OSEP 2016) 116 LRP 46076)

Areas Not Assessed by District

- But several OAH decisions subsequent to Letter to Baus and Letter to Carroll have concluded that OSEP did not expand obligation of districts to fund IEEs in fields beyond those already assessed by district

Areas Not Assessed by District

- Torrance USD (OAH 2016)
  - Baus merely "clarified that a parent may seek a publicly funded [IEE] in the same field assessed by the school district, if a particular area within that field was not appropriately included in the district's assessment" [Emphasis added]
- Capistrano USD (OAH 2017)
  - "An evaluation in a different professional field, by assessors with different credentials and licenses and looking at different information, is not a second opinion"
- Lake Elsinore USD (OAH 2016)
  - "Right to an IEE is not triggered until there is an evaluation by district with which parents disagree"

Limit on Number of Requests

- Parents are entitled to only one IEE at public expense each time district conducts evaluation with which they disagree

(34 C.F.R. § 300.502(b)(5); Ed. Code, § 56329, subd. (b))

IEEs and Stay-Put

- After IEP team provides PWN to exit student, parent's request for an IEE alone would not require district to continue current educational placement
- Due process filing by either party triggers stay-put
- If district agrees to parent's IEE request it may:
  - Delay the issuance of PWN concerning IEP team's determination of ineligibility until the IEE has been completed and reviewed by team; or
  - Issue PWN within a reasonable time and discontinue special education services, pending completion and review of IEE

(Letter to Anonymous (OSEP 2018) 118 LRP 28134)

"Public Expense"

- "Public expense" means that district "either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent"
  - Law does not address whether IEE funding should be paid as reimbursement, direct funding to assessor or as cash advance
  - Requiring parents to pay in advance is not prohibited as long as it does not effectively deny them right to publicly funded IEE

(34 C.F.R. § 300.502(a)(3); Letter to Heldman (OSEP 1993) 20 IDELR 621)

Timing of Parents' IEE Request

- Law does not set time limit for how long parents have to ask for IEE once district has completed its own evaluation
- OSEP: "It would not seem unreasonable for the public agency to deny a parent reimbursement for an IEE that was conducted more than two years after the public agency's evaluation"

(Letter to Thorne (OSEP 1990) 16 IDELR 606)

Case Example #1

Placentia-Yorba Linda Unified School Dist. (OAH 2012)

- **Facts:**
  - January 2010: District completed triennial assessments for 16-year-old Student with autism
  - May 2012: Parents informed District of disagreement with assessments, request IEE
  - Three weeks later: District sent PWN refusing to fund IEE and offers to conduct early triennial
  - Filed for due process (not to defend assessment but to determine adequacy of response)

Case Example #1

Placentia-Yorba Linda Unified School Dist. (OAH 2012)

- **Decision:**
  - District not required to file for due process when parents' IEE request objects to assessment that is more than two years old
    - Neither Congress nor California intended parents to be able to request IEEs "in perpetuity"
    - Exception to two-year limit was not applicable; Parent not prevented from exercising rights
  - ALJ refused to require that District reference two-year limit on IEEs in procedural safeguards notice

(Placentia-Yorba Linda Unified School Dist. v. Student (OAH 2012) Case No. 2012051153, 112 LRP 41903)

Case Example #2

Sulphur Springs School Dist. (OAH 2014)

- **Facts:**
  - Parent requested IEE in September 2013, based on disagreement with District's March 2011 triennial psychoeducational assessment
  - District denied funding, claiming request was untimely
  - Parent filed for due process, asserting she was not aware report existed until September 2013

Case Example #2

Sulphur Springs School Dist. (OAH 2014)

- **Decision:**
  - ALJ found for District, reaffirming that two-year statute of limitations applies to IEE requests
  - Refused to apply any exception
    - Evidence established that Parent knew assessment was administered in 2011
    - District also submitted proof report was mailed in 2011
    - Fact that Parent could not find report did not mean she had not received it

(Student v. Sulphur Springs School Dist. (OAH 2014) Case No. 2013100027, 114 LRP 6672)

IV. Criteria for IEEs and the IEE Process

Criteria for IEE Evaluators

- Districts cannot establish stricter rules than those it applies to its own assessors
  - Cannot prohibit association with private schools
  - Cannot require experience in public schools
  - May set licensing rules, provided same licensure required for district assessors

(Letter to Petska (OSEP 2001) 35 IDELR 191)

List of IEE Evaluators

- If list exhausts availability of qualified people within geographic area specified, then district can restrict parents to selecting from among those on list
- If list does not encompass all evaluators with specified area, parents are not limited to names on list

(Letter to Parker (OSEP 2004) 41 IDELR 155; Letter to Young (OSEP 2003) 39 IDELR 98)

Criteria for IEE Location

- Geographic area must be same as that used for district's own assessments
- Parents must be given opportunity to show that evaluator from outside area is required for appropriate IEE

(Letter to Anonymous (OSEP 2010) 56 IDELR 175)

Criteria for IEE Cost

- Can establish reasonable cost criteria
  - Maximum must be established so that it allows parents to choose from among qualified professionals in the area and only eliminates unreasonably excessive fees
- Parents must have chance to justify selection of more expensive evaluator
- If costs exceed criteria, consider due process

(Letter to Kirby (OSEP 1989) 213 IDELR 233; 71 Fed. Reg. 46690 (August 14, 2006); Letter to Petska (OSEP 2001) 35 IDELR 191)

Case Example #1

A.A. v. Goleta Union School Dist. (C.D. Cal. 2017)

- **Facts:**
  - SELPA guidelines imposed $4,500 cap on psychoeducational IEEs
  - Parents asked for $6,000 reimbursement when assessor refused to accept $4,500
  - District believed no unique circumstances existed that would justify exceeding cap

Case Example #1

A.A. v. Goleta Union School Dist. (C.D. Cal. 2017)

- **Decision**:
  - Court upheld District's refusal to pay $6,000
  - SELPA's cost criteria was reasonable
  - Parents' attempt to show unique circumstances (Student's alleged history of seizures) was not credible

(A.A. v. Goleta Union School Dist. (C.D. Cal. 2017) 69 IDELR 156)

Case Example #2

San Diego Unified School Dist. (OAH 2017)

- **Facts:**
  - District agreed to fund S/L IEE, but limited cost to $900, per its IEE policy
  - Parent chose assessor not on District's IEE provider list and whose fee exceeded District's maximum allowable charge by $600
    - Did not provide reason for more expensive assessor
  - Parent filed for due process after District refused to fund IEE

Case Example #2

San Diego Unified School Dist. (OAH 2017)

- **Decision:**
  - ALJ found cost limitation was too restrictive and ordered District to fund $1500 IEE
  - District had paid average of $1040 for S/L IEE
  - ALJ calculated that $1250 was reasonable fee based on typical hourly rate and time to complete
  - Paying additional $250 was not unreasonably excessive

(Student v. San Diego Unified School Dist., et al. (OAH 2017) Case No. 2017020361, 117 LRP 33065)

Practice Pointer: IEE Criteria

- Ensure that all staff who are responsible to respond to IEE requests know exactly what information they need to provide to parents
- Up-to-date information on IEE criteria and notices should be distributed to all relevant personnel
- Criteria should be reviewed periodically to ensure that everything is still current (e.g., to take into account retirement or relocation of assessors)

V. Obligation to "Consider" the IEE

Obligation to "Consider" IEE

- Must "consider" results of IEE, including IEE privately funded by parents, provided it meets district criteria
- Law does not define meaning of "consider"
- Cases have held that "consider" does not require all team members read IEE, nor does it always require substantive discussion

(34 C.F.R. § 300.502(c)(1); T.S. v. Board of Educ. of the Town of Ridgefield (2d Cir. 1993) 20 IDELR 889; G.D. v. Westmoreland School Dist. (1st Cir. 1991) 17 IDELR 751)

Case Example #1

Garvey School Dist. (OAH 2010)

- **Facts:**
  - Parents obtained social-emotional development assessment at their own expense
  - District therapist reviewed report prior to meeting
  - Time limitations prevented private assessor from explaining report to IEP team
  - At reconvened meeting, time expired again before she could complete presentation and make recommendations

Case Example #1

Garvey School Dist. (OAH 2012)

- **Decision:**
  - IEE was adequately "considered"
  - District therapist developed two speech goals based, in part, on IEE
  - Testimony: IEP team read all written reports that were submitted

(Student v. Garvey School Dist. and Garvey School Dist. v. Student (OAH 2010) Case Nos. 2010011021 and 2010030772, 110 LRP 44204)

Case Example #2

Irvine Unified School Dist. (OAH 2016)

- **Facts:**
  - Parents obtained psychoeducational and S/L IEE after District concluded that 3-year-old Student diagnosed with autism was not eligible because he did not require special education
  - IEE claimed District's assessments were flawed by discounting observations that Student exhibited significant delays in pragmatic language

Case Example #2

Irvine Unified School Dist. (OAH 2016)

- **Decision:**
  - IEP team failed to appropriately consider all relevant material available to it, including IEE that pointed out errors in District's assessment
  - ALJ found that IEE correctly criticized District's assessment for failing to give appropriate weight to Parents' and therapists' observations
  - District denied FAPE by failing to find Student eligible under autism category

(Student v. Irvine Unified School Dist. (OAH 2016) Case No. 2016031039, 116 LRP 28342)

Practice Pointer: "Considering" the IEE

- Documentation of IEP team meetings and accurate minutes of those meetings are essential when IEE is being discussed or reviewed
- Inform staff that all IEEs be must "considered," including those that are privately funded
- Never ignore an IEE report
- Remember that obligation to "consider" does not require IEP team to accept IEE, in whole or part

VI. Funding by ALJ Order

Funding By ALJ Order

- ALJ may order district to pay for IEE as equitable remedy for various FAPE violations
  - Child find
  - Failure to conduct timely assessment
  - Others
- Example: Bellflower USD (OAH 2017)
  - Flawed postsecondary transition plan
  - Remedy included order to fund IEE to determine Student's level of living and vocational skills

Take Aways . . .

Many factors to consider when parents ask for an IEE

- Advise IEP team of proper way to respond
- Thoroughly review all assessments in question before making decision
- Keep lines of communication with parents open throughout IEE process

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