Exceptional Children

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Independent Educational Evaluations Under IDEA '97: It's a Testy Matter

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ABSTRACT: *An independent educational evaluation (IEE) provides parents with an opportunity to obtain alternative sources of information concerning the present levels of performance of their children. Although Congress guaranteed this procedural safeguard for parents in 1975 (P. L. No. 94-142), there have been several alterations of these regulations during the past 25 years. Primary areas of concern include: (a) What is an appropriate evaluation? (b) What are the circumstances in which a public agency must pay for an IEE? and (c) What is the timeline to which local educational agencies (LEAs) and parents must adhere? IDEA '97 included modifications of previous federal regulations on IEEs. This article explores these alterations through a review of administrative decisions, court cases, state regulations, and U.S. Department of Education policy and opinion letters.*

A HISTORICAL OVERVIEW OF A CONTROVERSIAL PROCEDURAL SAFEGUARD

With the passage of the Education for All Handicapped Children Act (Pub. L. No. 94-142) in 1975, Code 300.503, Congress granted parents the right to obtain an independent educational evaluation (IEE) at public expense when they disagreed with the evaluation conducted by the public agency (34 Code of Federal Regulations [C.F.R.] §300.502[b][1]). However, the public agency may initiate a hearing under 34 C.F.R. §300.507 "to show that its evaluation is appropriate" (34 C.F.R. §500.502[b][2]). If "the final decision is that the agency's evaluation is appropriate, the parent still has the right to an IEE, but not at public expense" (34 C.F.R. §300.502[b][3]). Whenever "an independent evaluation is at the public expense, the criteria under which the evaluation is obtained . . . must be the same as the criteria which the public agency uses when it initiates an evaluation" (34 C.F.R. §300.502 [e][1]). Although most will not need an independent evaluation, IEEs provide an additional opportunity for parent involvement. IEEs can help to ensure that students with disabilities have a free, appropriate public education.

During the past 25 years, parents and their advocates, as well as school personnel, have been concerned about IEEs. For parents, IEEs represent an alternative to school-based evaluations. To school administrators and other district personnel, IEEs can represent a real challenge, both in terms of dissenting opinions and financial expense. It is likely that hundreds of thousands of dollars are spent on IEEs. The potential effects of recommendations from IEEs can be even more costly to districts across the United States.

IEEs are one of the procedural safeguards guaranteed by the Individuals with Disabilities Education Act (IDEA, 1990; amended 1997). Other parental rights are access to records, consent to evaluations, impartial due process hearings, mediation, and participation in decisions about the student (34 C.F.R. §300.500 through .589 [Subpart E]). Despite the important role of IEEs in the special education process, a recent search of the ERIC and PsychINFO databases resulted in three peer-reviewed articles focusing on IEEs (Hepner & Silverstein, 1988a, 1988b; Knoff & Leder, 1985).

Knoff and Leder (1985) urged their intended audience, school psychologists, to help parents make informed decisions regarding the selection of independent evaluators. They listed five areas of concern including that the evaluators (a) are properly certified, (b) have the necessary skills to conduct the assessment, (c) have appropriate training and supervision, (d) will use an acceptable format to report results, and (e) will disclose all fees and specific payment arrangements. The authors created a nightmare scenario of an inappropriate assessment to underscore many of these points.

Hepner and Silverstein (1988a, 1988b) wrote a pair of articles for parents of exceptional children. In the first article (1988a), they sought to reassure parents of their right to seek a second opinion concerning their child's education by providing specific reasons for using an independent evaluator, by presenting criteria for selecting an evaluator, and by offering suggestions on how to create a positive relationship with the evaluator. The second article (1988b) discussed the immediate ramifications of an independent evaluation including the cost of the assessment, the handling of confidential information, and what an evaluation may include. These articles described the complexities of IEEs to inform parents more fully of their rights as defined by Pub. L. No. 94-142. The three articles (Hepner & Silverstein, 1988a, 1988b; Knoff & Leder, 1985) reflected the parents' need for reliable and understandable information concerning IEEs in particular and the entire special education process in general (see Barton, Barton, Rycek, & Brulle, 1984; Roit & Pfohl, 1984).

The Education for All Handicapped Children Act of 1975 required schools to furnish parents with information about the education of exceptional children and to allow parents to participate fully in any decisions regarding their children. However, in a survey of 822 parents, more than 164 had not received the obligatory information (Barton et al., 1984). It is unknown if the parents must first ask for the information, as in the case of IEEs (34 C.F.R. §300.502[a][2]).

Etscheidt (2003) has recently examined the adequacy, scope, and utility of district evaluations. She analyzed "50 state-level administrative due process hearings or court decisions published in the IDELR between 1997 and 2001 that addressed the adequacy of challenged district evaluations in determining the need or reimbursement for IEEs" (p. 229). Analyses included cases at the elementary, middle, and high school levels across 14 states. Three categories were determined to be significant indicators of the prevailing party in due process hearings: (1) the degree of adequacy of the district evaluation, (2) the scope of the district evaluation, and (3) the usefulness of the district evaluation for individualized education program (IEP) development. Districts prevailed at due process hearings when their evaluations were technically adequate, comprehensive in scope in the suspected area(s) of disability, and directly applicable to a student's educational program. Parents prevailed when districts conducted technically inadequate evaluations, evaluations that were limited in scope, or evaluations that did not adequately address a student's educational needs through an IEP. However, in the cases where parents prevailed on issues of reimbursement for IEEs, the IEEs were determined to have technical adequacy in accordance with IDEA requirements, the scope was sufficiently broad to include all

areas of suspected disability, and the results of the IEE contributed significantly to the child's IEP.

One obstacle to full parental participation in the decision-making process may be the texts used by local and state agencies to explain these rights. Roit and Pfohl (1984) examined the manuals produced or used by 25 state education agencies (SEAs) to "inform parents of their rights in relation to Pub. L. No. 94-142" (p. 498). Up to 10 other states supplied parents with only a copy of the federal law as the explanatory documents. The study also used four readability formulas (Dale-Chall, Fog, Flesch, and New Reading Ease), each with different rating criteria, to determine at what grade level a reader should be to be able to understand the text. Averaging the results of these formulas suggested the need of a sixth-grade education. However, there are additional considerations beyond vocabulary and grammatical structure that might increase the level of difficulty of the texts.

Roit and Pfohl (1984) also examined the readability of the provided texts in terms of the number of pages; the size of the pages; the density of text per page; the use of charts, examples, pictures, and samples; and the print size. Based on their findings, Roit and Pfohl contended that most parents were not fully informed of the special education process and its inherent procedures.

The authors have examined the readability of federal and state regulations (Maine, Massachusetts, New Hampshire, New York, Rhode Island, Tennessee, and Vermont) and of SEA manuals (Connecticut and Texas) regarding IEEs using the Flesch-Kincaid Readability Formula utilized by Microsoft Word 1997. The texts were selected because of their availability on the World Wide Web. Of the 10 documents, 8 required a 12th-grade education to comprehend the text. The texts ranged in ease of reading from 1 to 80. The ease of reading ranges from easy (low numbers) to difficult (high numbers). The average number of words per sentence and the average number of syllables in each word produced these results. As a whole, public education agencies still have a long way to go in providing materials that fully inform parents of their rights in the special education process.

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ROLE AND FUNCTION OF AN INDEPENDENT EDUCATIONAL EVALUATION

An IEE provides parents with an opportunity to obtain an alternative source of information concerning the abilities/strengths and disabilities/needs of their children. IEEs, by definition, are evaluations completed by a qualified specialist or group of specialists who are not employed by the local educational agency (LEA; 34 C.F.R. §300.502[a][3][i]; see Table 1). Evaluators may be clinical psychologists, neurologists, neuropsychologists, physical therapists, psychiatrists, occupational therapists, school psychologists, special educators, speech and language pathologists, or other professionals. Evaluators may specialize in assessing children or adolescents with attention deficit disorders, autism, behavioral or emotional disorders, health disorders, hearing impairments, language disorders, learning disabilities, mental retardation, orthopedic disabilities, severe and profound mental retardation, speech impairments, visual impairments, or other disabilities.

Parents may use an IEE to reexamine decisions regarding a child's eligibility for special education services under the Individuals with Disabilities Education Act of 1990 (IDEA, Pub. L. No. 101-476, formerly the Education for All Handicapped Children Act) or under Section 504 of the Rehabilitation Act of 1973 (Pub. L. No. 93-112). IEEs may explore the classification of a disability, clarify specific areas of disability, reassess present levels of performance, estimate relative gains achieved in general or special education, set annual goals, or provide relevant information for placement options (Hepner & Silverstein, 1988a; Kupper, 1999; Murdick, Gartin, & Crabtree, 2002). In essence, parents may seek an independent evaluation when faced with critical

TABLE 1
34 C.F.R. §300.502 Independent Educational Evaluation

Component	*Specific Provision*
(a) General	(1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section. (2) Each public agency shall provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations as set forth in paragraph (e) of this section. (3) For the purposes of this part— (i) *Independent educational evaluation* means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question; and (ii) *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 §300.301.
(b) 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. (2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either— (i) Initiate a hearing under §300.507 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 under §300.507 that the evaluation obtained by the parent did not meet agency criteria. (3) If the public agency initiates 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 explanation by the parent may not be required and the public agency may not unreasonably delay either providing the independent educational evaluation at public expense or initiating a due process hearing to defend the public evaluation.
(c) Parent-initiated evaluations	If the parent obtains an independent educational evaluation 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 as evidence at a hearing under this subpart regarding that child.
(d) 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.
(e) Agency criteria	(1) If an independent educational evaluation 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 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 [Authority: 20 U.S.C. 1415(b)(1)].

decisions about the education of their children and when in need of a second opinion.

STATE REGULATIONS PERTAINING TO INDEPENDENT EDUCATIONAL EVALUATIONS: SOME CONFLICTS PRIOR TO IDEA '97

Federal regulations pertaining to IEEs remained unchanged from 1975 to the reauthorization of IDEA in 1997 (IDEA '97). Parents across the nation assumed that their rights to a publicly funded IEE were secure. However, this was not the case because many state and local educational agencies developed their own implementation guidelines. Additionally, state and federal courts offered various interpretations of 34 C.F.R. §300.502. For example, the State of Texas specified that its LEAs could address parental concerns about school-based evaluations by permitting districts up to 30 days to correct defects in their evaluations, prior to the authorization of IEEs. In 1988, the U.S. Department of Education's Office of Special Education Programs (OSEP) requested the State of Texas to immediately stop enforcing policies contrary to Federal regulations. The Texas Education Agency had 30 days to instruct its LEAs to follow suit (Letter to Gray, 1988).

A review of state regulations regarding IEEs published between 1988 and 1992 revealed that at least nine other states required parents to submit a written request for an IEE. These states included Alabama, Indiana, Maine, Michigan, New Jersey, Oregon, Rhode Island, Tennessee, and Vermont. For example, Rhode Island Regulations stated:

> A parent has the right to an IEE at the public expense if the parent(s) disagrees with an evaluation obtained by the school district. A parent shall request an IEE in writing, and shall send this request to the school district's special education director. The school district shall respond, in writing, within fifteen (15) school days. (State of Rhode Island, 1990, Section One, IX, 3.4, p. 35)

More recently, the U.S. Department of Education noted that the Rhode Island Department of Education "must ensure that a parent's right to an IEE at public expense, including an IEE obtained during the summer months, is not denied for lack of such notification" (Letter to Imber, 1992). Rhode Island added the following statement to its 1992 revision of the regulations governing the special education of students with disabilities: "The school district may not deny payment for in [sic] independent educational evaluation solely because a parent did not provide prior notification of his or her intent to seek an IEE at public expense" (State of Rhode Island, 1992, Section One, IX, 3.4, p. 42). However, Rhode Island regulations continued to allow LEAs to request parents to provide a written request for an IEE until December 2000. Furthermore, LEAs still had 15 *school* days to respond to a request.

Rhode Island was not the only state to require parents to formally disagree with a school-based evaluation. In a policy letter concerning Maine's proposed regulations on IEEs, the U.S. Department of Education's Office of Special Education Research and Rehabilitative Services (OSERS) noted that the regulations expressed by the 1970 Education of the Handicapped Act, Part B, "afford[ed] a parent the right to obtain, rather than simply to request, a publicly funded IEE if the parent disagrees with an evaluation of the child that was obtained by a public agency." (Letter to Mitchell, 1990). Furthermore, OSERS noted:

> There is no Federal requirement that a parent notify a school district that the parent will be requesting an IEE at public expense. While it is reasonable for a public agency to require that it be notified prior to a parent's obtaining an IEE at public expense, a public agency may not fail to pay for an IEE if a parent does not notify the public agency that an IEE is being sought. (Mitchell, 1990)

Thus, OSERS communicated its acceptance of Maine's proposed regulations that utilized the word "obtain" rather than "request" in its regulations on IEEs.

U.S. DEPARTMENT OF EDUCATION POLICY LETTERS

The U.S. Office of Education's Department of Educational Services (DES) has issued several pol-

icy letters pertaining to IEE. A few years after the implementation of Pub. L. No. 94-142, OSEP maintained that parents' rights to an independent evaluation must be preserved although reasonableness of cost was a significant issue (Letter to Hull, 1979). The next year, OSEP noted that a LEA may not require prior consultation, although it may inform parents of its policies on IEEs (Letter to Bluhm, 1980). Over the next 2 decades, OSEP continued to provide additional clarifications, which reinforced and extended previous policy statements. Thus, states and local school districts could not require prior parental notification nor additional time to correct defects in its own evaluations when parents expressed disagreement (Letters to Gray, 1988; Imber, 1992). Nor could LEAs refuse payment for an IEE simply because a parent failed to give prior notification (Imber, 1992). Other DES policy letters reaffirmed the rights of parents to a publicly funded IEE in any state that receives Education of the Handicapped Act, Part B (1970) funds (Letter to Bartlett, 1989). In fact, OSERS noted that 34 C.F.R. §300.503(b) guarantees these rights. Furthermore, according to 20 U.S.C. 1407 (b) [Education for All Handicapped Children Act], the U.S. Department of Education is prohibited from diminishing, procedurally or substantially, the right to a publicly-funded IEE (Letters to Fields, 1989; Gray, 1988; Imber, 1992; Kirby, 1989; Thorne, 1990).

When schools provide information to parents about where or how they can obtain an IEE, they must utilize an exhaustive list of evaluators [34 C.F.R. §300.502 (a)(2)]. The district must include all qualified independent evaluators within a given geographic area. However, parents may cite "unique circumstances" and go outside the LEA-defined geographic area (Letter to Fields, 1989. Ultimately, the parents determine who will conduct the IEE. (Letters to Imber, 1992; Rambo, 1990).

CASE LAW PRIOR TO THE PASSAGE OF IDEA '97

Before 1997, the manner in which parents requested IEEs, the appropriateness of a LEA's evaluation, the qualifications of independent evaluators, and the number of publicly funded IEEs were four areas of contention between parents and school districts. First, initial case law on IEEs appeared to require prior notification or expression of disagreement as a condition of payment for IEEs at the public expense (Niskayuna Central School District, New York, 1980; *Norris v. Massachusetts Department of Education,* 1981; School District of Superior Wisconsin, 1979; *Tomball Independent School District v. Linda H.*, 1984). A review of more recent case law pertaining to IEEs revealed that a parent's failure to notify a district when obtaining an independent evaluation was not a condition for reimbursement (e.g., Educational Assignment of Holly S., 1986; *Hudson v. Wilson*, 1987; Santa Fe Independent School District, 1989).

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Second, additional case law notes that districts must request a hearing to demonstrate the appropriateness of its evaluation or pay for an IEE [34 C.F.R. §300.502(b)(2)]. Some case law specifies that a district's failure to refer, evaluate, or assess properly may result in IEE costs (Baldwin County [AL] School District, 1991; Fond Du Lac Sch. Dist., 1993; *Gholston v. Berkeley Unified School District*, 1988; *Hiller v. Brunswick Central School District Board of Education*, 1988; In the Matter of J. N., 1986; New Haven Board of Education, 1993).

Third, the case law also seemed to require districts to adhere to reasonable standards of qualifications for independent educational evaluators. For example, SEA decision in Ohio was made discontinuing the practice of limiting student observations conducted only by certified school psychologists (Toledo Public Schools, 1986). Furthermore, the State of Washington deemed inappropriate a district's policy requiring all

independent educational evaluators to be qualified to administer intellectual testing (Kent School District, 1992).

Fourth, parents who sought to encumber districts with the cost of more than one IEE for each district evaluation were prohibited from doing so, except in highly extenuating circumstances (*Hudson v. Wilson*, 1987; Sandwich Public Schools, 1990). In cases where the district's evaluation was determined to be appropriate through a due process hearing, the district was not required to pay for the IEE (Edwardsburg Public Schools, 1989; *Myles S. v. Montgomery County Board of Education*, 1993; Portland Public Schools, 1993; Vallejo Unified School District, 1990). It should also be noted that when an IEE was determined to be inadequate, districts were not required to reimburse parents (Curwensville Area School District, 1989; Otsego [MI] Pub. Sch., 1993).

IDEA '97 AND NEW LANGUAGE FOR IEES

From the time Congress established the regulations that provided parents with the right to an independent educational evaluation in 1975 until the passage of IDEA '97, the federal language on IEEs remained intact. The language under 34 C.F.R. §300.502 is substantially unchanged from the previous regulations at 34 C.F.R. §300.503 (1975).

A comparison of the original language and the new wording reveals that when parents request an IEE, public educational agencies must give parents information about where an IEE may be obtained and the agency criteria applicable for IEEs (i.e., who may perform/conduct an IEE, their minimum qualifications, and the appropriate places for assessment). While public agencies may ask why a parent objects to the district evaluation, they may not require the explanation. Furthermore, the public agency may not unreasonably delay either providing the IEE at public expense or initiating a due process hearing to defend its own evaluation.

Some New England states have developed regulations or explanatory documents consistent with the language included in IDEA '97. The states of Connecticut (1999), Maine (1999), New Hampshire (1996), Rhode Island (2000), and Vermont (1999; Vermont has adopted without change 34 C.F.R. §300.502.) have language consistent with the federal regulations on IEEs. The State of New York (2000) has also utilized language on IEEs consistent with IDEA '97. However, the Commonwealth of Massachusetts's (2000) new regulations appear to be contradictory.

In December 2000, Rhode Island adopted 34 C.F.R. §300.502 word-for-word except for three instances (State of Rhode Island, 2000). First, it changed "public agency" to "local education agency" or "LEA" throughout the document. Second, Rhode Island did not provide a section number for the due process hearing's guidelines that a school district must follow in order to determine the appropriateness of its evaluation. Third, Rhode Island added a time limit to 34 C.F.R. §300.502 (b)(2):

> If a parent requests an independent educational evaluation at public expense, the LEA must, without unnecessary delay, *and not later than 15 calendar days from receipt of a request*, either—(i) Initiate a due process hearing to show that its evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided at public expense, unless the LEA demonstrates in a hearing that the evaluation obtained by the parent did not meet agency criteria. *(Italics added).*

In its previous regulations for children with disabilities, Rhode Island mandated a parent to file a written request for an independent educational evaluation (State of Rhode Island, 1990). Within these regulations, school districts had 15 *school* days in which to respond to the request. In its newly published regulations, Rhode Island (2000) no longer requires parents to make a written request for an IEE. When a parent requests an IEE, a district must respond without an unreasonable delay, (i.e., within 15 *calendar* days). Districts must agree to pay for the IEE or initiate a due process hearing to demonstrate that its evaluation is appropriate. Rhode Island (1992; 2000) also incorporated language permitting districts to inquire about a parent's reason for requesting an IEE. However, it is clear that districts may not compel parents to provide a rationale for such a request. Furthermore, districts may not unreasonably delay a response to the parent's request for an

IEE because the parent has not provided a rationale for requesting an IEE. All of these changes appear to provide parents with access to IEEs consistent with the policies of the U.S. Department of Education as well as with the federal regulations derived from IDEA '97.

Massachusetts has issued new regulations on IEEs that appear to be inconsistent with IDEA '97 (Commonwealth of Massachusetts, 2000). Specifically, they raise questions about a state's right to require parents to furnish school districts with financial information about income or forfeit their right to an IEE at public expense.

The current Massachusetts regulations differ from the federal regulations in five important ways. First, Massachusetts now requires parents to furnish districts with financial information about their income prior to any decision about providing public funding for an IEE. Parental failure to provide this information will result in disqualification for partial or full public funding. Only parents whose children are eligible for free or reduced lunch costs or are in the custody of a state agency with a surrogate parent appointed need not share any information about income.

Second, the language pertaining to a parent's request to evaluate in areas not assessed by the district is far less than clear:

> the parent is requesting an evaluation in an area not assessed by the school district, the student does not meet eligibility standards, or the family chooses not to provide financial documentation to the district establishing family income level, the school district shall respond in accordance with the requirements of federal law. The district shall either agree to pay for the independent educational evaluation or, within five school days, proceed to the Bureau of Special Education Appeals to show that its evaluation was comprehensive and appropriate. [603 C.M.R. §28.04(5)(d)]

It is entirely possible that a district might not assess a child in all areas of suspected disability. It would be reasonable for a parent to request that an independent evaluator conduct a comprehensive evaluation even when such an assessment includes testing in areas that the district elected not to pursue.

Third, the newly revised Massachusetts regulations include an expectation that independent evaluators conduct their evaluations and complete written reports within 30 calendar days from the date the parents requested the IEE, "whenever possible" [603 C.M.R. §28.04(5)(e)]. This expectation appears to be rather restrictive especially in view of the more generous time limits required by federal regulations for district evaluations (Smith, 1990).

Fourth, the Massachusetts regulations also include a proviso that independent evaluators not recommend specific placements, although they may recommend types of placements [603 C.M.R. §28.04(5)(e)]. Federal regulations do not provide for such limitation of an independent evaluation's scope of study. This practice violates the purpose of a procedural safeguard.

Finally, once school districts have received an IEE report, they have a 10 school day time limit for reconvening an evaluation team meeting [603 C.M.R. §28.04(5)(f)]. This time limit ensures that the results of an IEE are discussed in a timely manner. Such a time requirement appears to be in the best interests of the child.

The State of Texas has also revised its parental rights handbook published by the Texas Educational Agency (TEA, 1997) to comply with IDEA '97. The TEA summary of parental rights does not include any statement pertaining to a district's right to inquire about parental objections to its own evaluation. There is no indication from the TEA summary that a district may not require an explanation of a parental objection. The TEA subsection on IEEs omits any statement pertaining to an unnecessary delay created by a school district in response to a request for an IEE.

OSEP AND OSERS OPINION AND POLICY LETTERS SINCE 1995

One concern that continues to arise is the amount of time within which a district must respond to a parent's request for an IEE. In a letter to Anonymous (1995), OSEP once again noted: "Part B imposes no specific timeline for responding to a request for an IEE." However, the OSEP letter stated "a public agency must generally take such action without undue delay and in a manner which does not interfere with a student's right to receive [a free appropriate public education]." In

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a more recent letter, OSEP stated the results of an IEE may be furnished to a school district without parental consent, "[s]ince the results . . . are to be considered when designing the appropriate program for a student" (Katzerman, 1997).

RECENT DECISIONS FROM THE U.S. DEPARTMENT OF EDUCATION'S OFFICE FOR CIVIL RIGHTS

A review of recent U.S. Department of Education's Office for Civil Rights (OCR) opinions revealed at least two decisions in which school districts prevailed. In the first case, OCR found no evidence that the district failed to develop an IEP for the student in question (Buncombe County [NC] Sch. Dist., 1995). Furthermore, there was no evidence that the district failed to incorporate recommendations formulated by a private evaluator. In another matter, OCR concluded a district failed to provide timely notice of procedural safeguards (Warwick [RI] Pub. Sch., 1996). However, there was no violation of Section 504 of the Rehabilitation Act (1973) or Title II of the Americans with Disabilities Act (1990) because no deprivation of services to the student occurred.

RECENT FEDERAL APPELLATE CASE LAW: DISTRICT PREVAILED

In certain recent federal appellate cases, school districts have been successful in matters pertaining to IEEs. In a Fifth Circuit case, parents refused to allow the district to administer any testing for a triennial evaluation (*Andress v. Cleveland Indep. School Dist.,* 1995). Instead, the parents obtained an IEE. The independent evaluator recommended that the district complete no further testing due to concerns about traumatization of the student. The Court denied payment for the IEE because the parents prevented the LEA from conducting its own evaluation. In this lawsuit, the parents expressed no disagreement with the district's evaluation. In another case, parents disagreed with an IEP because it did not include a treatment recommended by an independent evaluator (*Burilovich v. Board of Education of the Lincoln Consolidated Schools*, 2000). The parents were unable to prove that the district's placement was inappropriate. While districts are obligated to review the results of an IEE, federal regulations do not require that any or all recommendations be followed.

RECENT FEDERAL APPELLATE CASE LAW: SHARED DECISIONS

There are four relatively recent federal appellate cases in which the districts and parents each prevailed on certain aspects of court decisions. First, in *Dell ex rel. Dell v. Township High Sch. Dist. 113* (1994), a hearing officer concluded the school district had acted in bad faith. The district had not conducted its own evaluation nor had it considered the recommendations of the independent evaluator. While the district was required to pay for the IEE, the Court awarded reimbursement for $2,000 because the Court considered the actual fee to be excessive. In another matter, the Ninth Circuit Court ruled that although a district was correct in determining a student was ineligible for special education services, the district was responsible for reimbursement for two IEEs (*Norton v. Orinda Union Sch. Dist.,* 1999.).

In 1999 the Third Circuit Court ruled the parents' failure to express disagreement with the district's evaluation prior to obtaining their own IEE did not preclude reimbursement (*Warren G. by Tom G. v. Cumberland County Sch. Dist*, 1999). The Circuit Court agreed with an earlier ruling from a U.S. District Court that it was inappropriate to apply an equitable balancing analysis ("the parents alleged unrealistic and unreasonable demands" and assertions about inappropriate IEPs). In this case, the district's evaluation was considered to be inappropriate because of its lack of clarity. The independent "evaluator identified the students' specific disability areas." The decision

was consistent with an earlier Fourth Circuit Court ruling (*Hudson v. Wilson*, 1987).

Additionally in 1999, the Third Circuit Court determined a parent never agreed to the district's reevaluation (*Holmes by Holmes v. Millcreek Township Sch. Dist,* 1999). However, the parents were unable to demonstrate that the district's evaluation was inappropriate. Although the district considered the results from the IEE, the parents were not entitled to reimbursement.

RECENT FEDERAL APPELLATE CASE LAW: PARENTS PREVAILED

There are three recent federal appellate cases in which the parents were successful. First, in 1994, the Seventh Circuit Court determined that a unilateral placement of the child by the parents was appropriate (*Board of Educ. of Murphysboro Community Unit Sch. Dist. No. 186 v. Illinois State Bd. of Educ*, 1994). Additionally, the parents were reimbursed for one of two IEEs. The matter of payment for a second IEE was remanded to a District Court due to an unclear order. Second, the Ninth Circuit Court of Appeals in 1996 determined that a LEA's evaluation was inappropriate because the "evaluation team did not include anyone who was familiar with the student's disorders" (*Seattle Sch. Dist. No. 1 v. B.S.*, 1996). Thus, the Court concluded the parents were entitled to reimbursement for the IEE. Third, last year in *Kirkpatrick v. Lenoir County Board of Education* (2000) parents requested special education eligibility, reimbursement for three IEEs, and payment for private school tuition. A state hearing officer concluded the student was eligible for special education, but denied reimbursement for private school tuition and the IEEs. However, a North Carolina Review Officer ordered the LEA to reimburse the parents for one IEE at a reduced fee, but not for the tuition. Neither the U.S. District Court nor the U.S. Appellate Court provided further rulings pertaining to the IEEs.

CONCLUSIONS

An analysis of state and federal regulations, of U.S. Department of Education policy letters, as well as of state and federal case law on independent educational evaluations reveals parents have certain rights. Parents have the right to an *unfettered* IEE at the public expense when they disagree with a district's evaluation [34 C.F.R. §300.502(a)]. Parents have the right to be informed about procedural safeguards, including independent educational evaluations [34 C.F.R. §300.502(a)(2)]. Parents have the right to select a "qualified examiner" within a given geographic area [34 C.F.R. §300.502(a)(3)(i); letters to Fields, 1989; Imber, 1992; Rambo, 1990; Thorne, 1990]. Parents have the right to an IEE each time the district conducts an evaluation [34 C.F.R. §300.502(b)(1)]. Districts must consider the results of an IEE for any decisions concerning education of the child [34 C.F.R. §300.502(c)]. Parents have the right to classroom observations through an IEE if the school utilizes such observations as part of their own evaluation procedures or whenever such observation is a regulatory requirement [34 C.F.R. §300.502(e)(1)]. Furthermore, LEAs "may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense" and districts must respond "without unnecessary delay" [34 C.F.R. §300.502(b)(2) and (e)(2)].

However, LEAs also have rights pertaining to independent educational evaluations. Districts may initiate a due process hearing to demonstrate the appropriateness of their own evaluations [34 C.F.R. §300.502(b)(2)(i); Letter to Gramm, 1990]. LEAs have the right to initiate voluntary mediation to negotiate IEE implementation and related costs [34 C.F.R. §300.506; Gramm]. Districts have the right to ensure that those employed to conduct IEEs are at least as qualified as those employed by the LEA for purposes of evaluation [34 C.F.R. §300.502(e)(1)]. Districts have the right to establish reasonable time limits wherein an IEE may be obtained at the public expense (Letter to Thorne, 1990). Districts may establish policies for the reasonable cost of IEEs; however, costs cannot be determined by a simple averaging of expenses of those who conduct IEEs within a given geographic area (Letter to Kirby, 1989). When the district has demonstrated that its own evaluation is appropriate, through a due process hearing, the district is not required to assume fi-

nancial responsibility for an IEE [34 C.F.R. §300.502(b)(3); Gramm].

Generally, school districts employ qualified professionals who conduct comprehensive and appropriate evaluations. However, a parent's right to an IEE is fundamental. Issues such as full inclusion, identification of social maladjustment or severe emotional disturbance, intellectual functioning for those with mental retardation, least restrictive environment, and severe discrepancy for those with learning disabilities are only a few concerns that can be explored through independent educational evaluations. Subtle deviations of federal or state regulations or policies may erode parental access to an independent educational evaluation. A child's access to special education services, the areas of service, the extent of service, the statement of certain goals or objectives, the degree of inclusion, as well as an assessment of educational progress may hinge on such rights. Despite these concerns, many school districts bemoan independent educational evaluations precisely because they provide parents with an opportunity for a second opinion at the taxpayer's expense (see Letter to Bartlett, 1989; *E. W. ex rel B. W v. Millville Bd. of Educ.*, 1997; Letter to Gramm, 1990; *Norton v. Orinda Union Sch. Dist.*, 1999; *P. T. P., IV, by P. T. P,. III, v. Board of Education of the County of Jefferson*, 1997; Letter to Rambo, 1990). Although IEEs may be helpful in clarifying certain aspects of a child's abilities or disabilities, they may also raise issues about the district's evaluations, conclusions, recommendations, IEPs, degrees of service, and placements. IEEs have the potential to create unpredictable and disconcerting increases in school budgets.

Evolving policy letters and emerging case law will continue the dynamic process of clarification with regard to independent educational evaluations and other regulatory matters. However, in 1997, Congress legislated that such policy letters were no longer akin to case law [Pub. L. No. 105-17 607(c) and (f)]. While school districts must have a means of limiting their own financial liabilities derived from IEEs, parents must continue to be afforded the opportunity to exercise their right to an independent educational evaluation in the least restrictive manner as guaranteed by 34 C.F.R. §300.502.

IMPLICATIONS FOR PRACTICE

Implications for District Evaluation Teams

An analysis of the preceding review has implications for the manner in which district evaluation teams practice (see Figure 1). In most cases, when a referral is made to an evaluation team, the team is likely to agree to conduct an evaluation. The likelihood of conducting a district evaluation may be increased when the recommendation to evaluate comes from a school prereferral team who has thoroughly reviewed all available records including representative work samples or behavioral documentation. A district evaluation is also more likely to be implemented when the referral emanates from a parent, especially one who is well informed and well advised.

Although there are some circumstances where the decision to evaluate would seem inappropriate or untimely, members of an evaluation team should recognize the implications of the decision-making process. Should the team elect *not* to conduct an evaluation to determine eligibility for special education, the district may be at financial risk should the parent elect to pursue an IEE. If the results of the IEE identify areas of disability, the district *may* face an obligation to assume financial responsibility for the IEE. Whenever an evaluation team elects not to conduct a district evaluation, it would seem prudent to gain consensus whenever possible and document the reason(s) not to evaluate.

Another consideration for members of the evaluation team is the technical adequacy of its evaluations. Etscheidt (2003) discusses the issue of technical adequacy in terms of IDEA requirements. The district's evaluation materials and procedures must not discriminate on a racial or cultural basis. The instruments must be validated for the specific purpose for which they were used. Furthermore, the test materials must be administered by trained and knowledgeable personnel (30 IDELR 564). Should an evaluation team conduct a technically inadequate evaluation, the results, conclusions, and recommendations of that evaluation may be questioned by the parent or his advocate at a later time.

FIGURE 1

Some Guidelines for District Rights to Independent Educational Evaluations Based Upon a Review of Federal Regulations, U.S. Department of Educational Policies, and Recent Case Law

- A district has the right to insure that independent evaluators are minimally as qualified as its own evaluators. Thus, if a district only employs master's level Special Educators to conduct educational evaluators, it could refuse to pay for a an IEE, when the evaluator had completed only a Bachelor's degree in special education. [34 C.F.R. § 300.502(e)(1)]
- The district has the right to establish reasonable time limits when an IEE may be obtained at the public expense. Thus, should a parent wish to obtain an IEE at public expense more than two years after the district had completed its own evaluation, the district might argue successfully that undue time had elapsed. Special circumstances might mitigate that argument. (Thorne, 1990)
- A district can establish policies for reasonable cost requirements based upon maximum allowable charges for specific tests; however, the determination of fees cannot merely be a simple averaging of fees usually charged in the area by professionals who are qualified to perform the testing. Although, LEAs may not use an assessment's cost to eliminate certain evaluators, LEAs may have policies on fees to limit unreasonably excessive costs. (Kirby, 1989)
- A district may limit reimbursement for a complete IEE for each of its own evaluations (*Hudson v. Wilson,* 1987; Sandwich Public Schools, 1990). Thus, if a district conducts a three-year reevaluation, the parents may obtain one complete independent evaluation at the public expense given that the evaluator(s) is qualified. While parents can obtain several independent evaluations; normally, the district is responsible for one complete reimbursement.
- The district may elect to initiate a voluntary mediation process to negotiate payment for an IEE [34 C.F.R. § 300.506]. The district can initiate a hearing to demonstrate that its own evaluation is appropriate. If the decision of the hearing officer is that the district's evaluation is appropriate, the parents are still entitled to an IEE, but not at public expense [Letter to Gramm, 1990; 34 C.F.R. § 300.502(b)].
- The district normally may have grounds to refuse to pay for an IEE if the parent does not express a disagreement with the district's evaluation. A district may ask the parent to clarify its objection to the district's evaluation; however, the district cannot compel a response or delay due to a parent's failure to explain an objection to the district's evaluation. [34 C.F.R. § 300.502(b)(4)]

Summarized by Steve C. Imber (originally presented and published as Imber, 1994)

Etscheidt (2003) also identified the scope of the evaluation as a significant issue for districts. When districts conduct a comprehensive evaluation in all areas of the child's suspected disability, the district is more likely to prevail when a due process hearing is initiated. Thus, if a general education teacher notes that a child seems to have great difficulty in comprehending grade level material during routine activities, an evaluation for listening comprehension may be warranted. Should a general education teacher document incidences of a child's difficulties in rule following or social interaction, then the team would be wise to include behavioral and social assessments. Even when the district's evaluation is utilized to determine eligibility for special education services, the evaluation needs to be specific enough to make an appropriate differential diagnosis and include some clear recommendations for the development of an IEP.

Federal regulations on IEEs require that the district's evaluation team consider the results of an IEE obtained by a parent. There are some cases in which qualified individuals conducted an IEE, but the district's evaluation team failed to consider the IEE. When evaluation teams fail to consider the results and recommendations of an IEE, the district is at risk for assuming financial responsibility for the IEE. District teams may wish to establish checklists, rubrics, or other means for documenting the review and consideration of an IEE.

Parents have the right to obtain an IEE for their children who are currently identified as "eli-

Although there are some circumstances where the decision to evaluate would seem inappropriate or untimely, members of an evaluation team should recognize the implications of the decision-making process.

gible" for special education services as noted within the text of this article. Once again, the parent has a right to expect the child's IEP team to review the results, conclusions, and especially the recommendations of the IEE in relationship to that child's current IEP. It may be especially helpful for district personnel to develop and implement documentation forms under such circumstances. An IEP team may elect to include the results of an IEE within present levels of performance statements of a child's IEP. Should the team agree that the recommendations from an IEE make an appropriate contribution to a child's IEP, that document should be changed to reflect the team's agreement. Changes in the goals, objectives, areas for service, time of service, and service providers are just some of the areas of an IEP that might be modified.

It seems counterproductive to refuse to accept some useful recommendations because a district may, at a later date, become financially responsible for payment of an IEE. Nevertheless, the IEP team should be aware that when it elects to accept findings and recommendations of an IEE, the district *may* be obligated financially, at least under some circumstances.

Given the complexity and potential financial liability that districts may assume due to the federal regulations pertaining to a parent's right to an IEE, it would seem prudent to conduct schoolwide or districtwide staff development sessions for personnel who routinely serve on evaluation or IEP teams. Such staff development might include a review of the relevant federal and state regulations on IEEs, issues of technical adequacy, scope and utility of district evaluations, a review of state and federal case law on point, and some case examples and specific guidelines for practice (do's and don'ts).

Implications for Special Education Supervisors

Special education supervisors may also find it appropriate to utilize the U.S. Department of Education policy letters to guide their own practices. For example it may be appropriate and even cost effective to agree to a parent-initiated IEE when the district's evaluation is clearly deficient or when the child's unique disabilities warrant specialized personnel to conduct an evaluation. Federal policies note that once the district conducts its own evaluation, the parent has a right to obtain an IEE within a reasonable amount of time (not clearly specified). The district does not have the right to impose its own additional evaluations once it has conducted an evaluation. In some cases, it may be appropriate to refer a dispute about IEEs to mediation; however, mediation is a voluntary process. A due process hearing may be initiated by a district when there is consensus among team members that the district's evaluation is adequate. Supervisors need to determine whether the cost of conducting such a hearing is the most appropriate and fiscally responsible choice to problem-solving. In some instances, supervisors may want to establish a record that the district is not only capable of conducting adequate evaluations but also that it will support its personnel who have participated in conducting such evaluations, even when faced with the expense of conducting a due process hearing. Expense can be measured by standards other than financial. For example, staff morale may be a significant factor when competent work has been done by district personnel.

Implications for Parents

A review of the regulations, policy letters, case law, and relevant literature also yields implications for practice by parents (see Figure 2). Clearly, the regulations empower parents to obtain an IEE whenever there is a disagreement with the district's evaluation. Parents have the right to an IEE in order to increase the probability that their children with disabilities will be protected and supported. In some instances, obtaining an IEE may not be timely or advantageous. Parents need to be cognizant of their rights under federal as well as state regulations. Some state regulations specify

FIGURE 2

Some Guidelines for Parental Rights to Independent Educational Evaluations Based Upon a Review of Federal Regulations, U.S. Department of Educational Policies, and Recent Case Law

- A parent has a right to obtain "an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency" [34 C.F.R. §300.502(b)(1)].
- Although a district may request prior notification, there is no Federal requirement that a parent provide such notification. Parental failure to notify a district of the intent to obtain an IEE may not serve as a basis for denial of payment for an IEE (Letter to Kerry, 1991; Letter to Kirby, 1989; Letter to Imber, 1992).
- While a district may request that a parent specify areas of disagreement with its own evaluation, a public agency may not deny reimbursement for an IEE when a parent has not specified the basis of disagreement with the LEA's evaluation [34 C.F.R. §300.502(b)(4); Letter to Fields, 1989; Kerry, 1991; Letter to Thorne, 1990].
- When a parent elects to obtain an IEE at private or public expense, the results and recommendations of the IEE must be considered by a district in regard to eligibility issues, IEP development, and placement [34 C.F.R. §300.502(c)(1)].
- A parent can request information from the district about where an IEE may be obtained. Districts may provide parents with an exhaustive list of qualified evaluators so long as the list is responsive to the child's needs [34 C.F.R. §300.502(a)(2); Fields, 1989; Imber, 1992; Letter to Rambo, 1990; Thorne, 1990]. When a district fails to list all qualified evaluators within a given geographic area, the parent may choose qualified evaluators who are not listed (Imber).
- Districts cannot delay a parent's request for an IEE, nor can districts require parents to allow them time to conduct additional evaluations as a precondition to an IEE at the public expense (Letter to Gray, 1988; Imber, 1992).
- When a district normally utilizes classroom observations during the course of its own evaluation process, or when regulations require classroom observations (e.g., learning disability evaluations), an independent evaluator also must be afforded an opportunity to conduct classroom observations [34 C.F.R. §300.502(e)(1); Letter to Wessels, 1990].
- Parents have the right to a timely response when they request an IEE at the public expense. Districts may not unreasonably delay in responding to such a request nor in initiating a due process hearing to demonstrate the appropriateness of its evaluation [C.F.R. §300.502(b)(2)].

Summarized by Steve C. Imber (originally presented and published as Imber, 1994).

the timeframe between a district's evaluation and the parent's request for an IEE (usually from at least 1 to 2 years). Parents will need to ensure that they select evaluators who are at least as qualified as personnel employed by the district. Furthermore, parents will need to be clear about the scope and comprehensiveness of the evaluations that they wish to have. In other words, parents need to be informed consumers.

Parents may elect to utilize the services of advocates because of the complexity of the process and of the issues that pertain to IEEs. Advocates also need to be especially well informed about federal and state regulations on IEEs. Although the federal regulations normally take precedence over state regulations, exceptions do exist. When the state regulations provide protections for children with disabilities and their parents that extend beyond the federal regulations, the state regulations would take precedence over the federal regulations. Thus, when state regulations require that a district respond to a parental request for an IEE within 15 calendar days, such a provision is binding even though the federal regulations on IEEs have no such requirement. An advocate should also have knowledge about policy letters written by the U.S. Department of Education so that parents can be afforded sound advice. Furthermore, knowledge of the relevant case law and literature will further ensure that the rights of

children with disabilities will be protected in a competent and responsible manner. An advocate may assist the parent in making reasonable decisions that foster a partnership between home and school. An advocate may be able to assist the parent and other members of the evaluation team or IEP team in achieving resolution on issues pertaining to IEEs. In some instances, an advocate may believe that district personnel are not acting in good faith. In those cases, an advocate needs to be able to advise parents of their rights under federal and state regulations.

Implications for Independent Educational Evaluators

A review of federal and state regulations, policy letters, case law, and the literature on IEEs also has implications for independent evaluators (see Figure 2). Independent evaluators should be knowledgeable about current federal and state regulations so that their advice is consistent with those regulations. A special knowledge of the case law will assist an evaluator in determining what a technically adequate evaluation is. One who conducts an IEE should also understand issues pertaining to the scope and utility of an evaluation. If the independent evaluation provides little additional information beyond what a district has already shared, the evaluation may be of no benefit. Under such circumstances, parental reimbursement is very unlikely. In some cases, a comprehensive independent evaluation that confirms test results and conclusions shared by a district evaluation may perform a useful service. Such a "second opinion" may be helpful in confirming issues about eligibility or service.

Evaluators also need to be clear about the relative degree of independence. If an evaluator is in the employ of a school district, such an evaluator is not truly independent. If the district selects an evaluator, then the evaluator is not independent based on the ruling in *Hudson v. Wilson* (1987).

An evaluator needs to be cognizant of his own area of expertise. An evaluator may have special training, knowledge, and experience in working with certain children or adolescents with disabilities, particular types of disabilities, or specific formal and informal tests. It is appropriate for an independent evaluator to work within his areas of expertise. In some cases, the evaluator may be asked to perform certain types of evaluations when such expertise is lacking. Under those conditions, it would be appropriate to decline serving as an independent evaluator.

An independent evaluator should appreciate that he may be expected to present his findings at an evaluation team or IEP team meeting. It is reasonable for team members to expect that the evaluator be able to describe test contents, procedures, and limitations. Furthermore, the evaluator should also be able to interpret the various test scores in relationship to evaluation results obtained by school personnel.

In some cases, an independent evaluator may be called upon by a parent or his attorney to share results, conclusions, and recommendations at a mediation session or a due process hearing. Under such conditions, an evaluator may need to understand his role in such proceedings as well as the more formal issues in responding to questions under direct and cross examinations.

The ethical responsibilities of independent evaluators are also very complex. One who conducts such evaluations is more likely to perform in a professional manner by responsible interpretation. Independent evaluators have a certain degree of latitude when drawing conclusions based upon all available data. However, when one goes beyond the data, the objectivity of the evaluator may become an issue.

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