NOT ANOTHER IEE REQUEST!
ACSA Every Child Counts Symposium
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Introduction

- What to expect:
  - IEE requirements
  - IEE criteria and limitations
  - Responding to IEE requests
  - Case law and practice tips
  - Practical applications

Right to IEE

- Under certain circumstances, a parent has the right to an independent educational evaluation ("IEE") at public expense if the parent disagrees with an evaluation obtained by the public agency.
  (34 C.F.R. § 300.502; Ed. Code, § 56329.)
IEE Information

- Each public agency must 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 IEEs.

Response Options for IEE Request

Districts should provide parent with prior written notice upon receipt of IEE request, documenting response and explanation for decision, as well as information provided to parents.

Practical Application

- When should a district file for due process?
- When should a district agree to fund the IEE?
- Factors to consider:
  - Does our assessment pass legal muster?
  - Would our assessor make a good witness?
  - Will filing for due process open Pandora's Box?
  - Could the IEP team use a second opinion?
  - Is the IEP team already headed for due process?
IEE Criteria

- If an IEE is conducted at public expense, the criteria under which the assessment is obtained must be the same as those used to initiate the district assessment.

Includes: location, limitations, qualifications, cost limits, and use of approved instruments.

(34 C.F.R. § 300.502(e)(1).)

NOTE: Requiring a parent to choose from a list of district or SELPA approved assessors has been deemed an inappropriate limitation.

However, reasonable criteria can be established so long as they apply to district evaluations and IEEs.

Exceptions to Criteria

- Criteria must be reasonable.
- Parents must be given opportunity to demonstrate an individual need for an exception to the criteria.

(Letter to Anonymous, 20 IDELR 1219 (OSEP 1993).)
Practical Application

* All districts/SELPAs should have an IEE policy and guidelines.
* Consider creating a list of approved IEE assessors to give parents a visual aid.
* Consider suggesting an assessor in the prior written notice letter.
* Consider a referral to the Diagnostic Center.
* Consider suggesting a district reevaluation.
* Any agreement on assessors must be stated in writing.
* If parents agree to the Diagnostic Center or a district assessor, make sure parents withdraw their IEE request in writing.

Timing of IEE Request

* A parent is entitled to only one IEE at public expense each time an agency conducts an evaluation with which the parent disagrees. (34 C.F.R. § 300.502(b)(5).)

Timing of IEE Request

* Refusing to allow a public agency to conduct an assessment may result in parent's forfeiture of IEE rights.
* Parent placing restrictions or limits on agency's evaluation process may be seen as refusal to consent. (Muscogee County Sch. Dist., 6 ECLPR 55 (SEA GA 2008).)
Timing of IEE Request

- Parent's delay in seeking an IEE and/or expressing disagreement with agency assessment, may result in a reduction of parent's right to reimbursement for IEE.

Lafayette Sch. Dist., OAH Case No. 2008120161

- Parents' request for reimbursement of IEE reduced by half due to their delay in requesting IEE.
- Parent's waited seventeen months after the district evaluation was completed to state a disagreement.
- Parent's consented to two annual IEP's in the interim, developed in reliance on the district evaluation.

Lafayette Sch. Dist.

- "The intended usefulness of an IEE is in comparing it to the disputed district assessment so that IEP decisions can be made on the basis of both. Here, the time for that use of the IEE is long past."
Lafayette Sch. Dist.

- "Because of the parents’ delay, the IEE fails to serve most of the purpose for which it is intended. While parents delayed, the district relied to its detriment on the assessment in crafting IEP’s which parents now challenge in litigation."

Lafayette Sch. Dist.

- "Equity requires a substantial reduction in the amount parents should be reimbursed for the IEE they obtained."

M.M & E.M. v. Lafayette School District, CV 09-4624 and 10-04223 SI

The United States District Court, Northern District affirmed the ALJ’s decision reducing reimbursement for the IEE due to parents’ delay.

However, the District Court reversed the ALJ’s determination that parents were only entitled to costs of the evaluation, not the cost of the presentation of the evaluation’s results at the IEP.
M.M. & E.M. v. Lafayette School District

"The purpose of the IEE is to ensure that parents, in contesting a district's assessment are not left to challenge the government without a realistic opportunity to assess the necessary evidence, or without an expert with the firepower to match the opposition." (Citing Schaffer v. Weast, 546 U.S. 49, 60 (2005)).

"It would be difficult for many parents to 'match the firepower' of the government if they could not afford to pay the evaluator to present her findings at an IEP meeting that necessarily includes the district's assessment team."

Rescue Union Sch. Dist.,
33 IDELR 261 (SEA CA 2000)

- District assessed student in 1997.
- IEP meetings were convened in 1997 and 1998.
- In 1999, the district proposed new assessment and parent requested an IEE instead, asserting a disagreement with the 1997 assessment.

Rescue Union Sch. Dist.

- "Where the district acted immediately to conduct new assessments, there was not yet any assessment with which the parent could disagree. Thus, parents were premature in obtaining IEEs before reviewing the district's new assessment reports."
- Reimbursement was denied.
Disagreement

- Right to IEE is conditioned on disagreement with an agency assessment. (34 C.F.R. § 300.502(b)(1).)
- District has right to conduct own evaluation prior to IEE request.

Hudson Pub. Schs., 109 LRP 42523 (SEA MA 2009)

- District referenced student's behavioral problems in an IEP but did not conduct an FBA.
- Parent sought IEE in response to failure to assess.
- District offered to conduct FBA.
- Parent refused and demanded IEE.

Hudson Pub. Schs.

- Because district had not been allowed to conduct its own assessment, parent was not entitled to an IEE at public expense.
- "The whole concept of an IEE is that if parents disagree with the evaluations performed by the [district], they then have the right to seek a publicly funded IEE as, essentially, a second opinion."
Disagreement

NOTE: Statutory right to an IEE is conditioned on disagreement with a district assessment. However, court retains broad authority to grant relief if it deems appropriate.

In Los Angeles Unified Sch. Dist. v. D.L., 49 IDELR 252 (C.D. Cal. 2008), District Court awarded independent assessment as equitable remedy for the district's failure to assess.

Disagreement

* OSEP has indicated that an IEE is not warranted just because a parent objects to its use of RTI.
* Parent must wait until the district completes its evaluation to express disagreement and request an IEE. (Letter to Zirkel, 52 IDELR 77 (OSEP 2008).)

Practical Application

* Ambiguity remains regarding assessment timelines during utilization of RTI. If parent requests an IEE due to disagreement with RTI process, best practice would be for the district to offer to conduct its own formal assessment, to avoid an allegation the district failed to comply with assessment and referral timelines as well as child find.
* Consider the two-year statute of limitations.
Timeline for IEE Response

- Law requires a response without "unreasonable delay."

Whether a delay is unreasonable will turn on the facts of the case.
(Los Angeles Unified Sch. Dist., 48 IDELR 293 (SEA CA 2007).)

Timeline for IEE Response

- A district cannot merely ignore the request.
(In re Baldwin County Bd. of Educ., 21 IDELR 311 (SEA AL 1994).)
- A district cannot impose conditions, timelines or extra procedural steps resulting in delay.
(34 C.F.R. § 300.502(e)(2).)

So, what does unnecessary delay look like?

- District waited three weeks to respond to the IEE request and then demanded that the parents reiterate their request.
- District then waited another eight weeks to respond.

**Pajaro Valley Unified Sch. Dist.**

- Court determined delay was unnecessary due to:
  - Requirement parents reiterate request multiple times.
  - Two-month delay without a reasonable explanation.

**Capistrano Unified Sch. Dist., OAH Case No. 2005090873**

- Parent requested an IEE on August 9th.
- District convened an IEP on August 30th.
- District filed for hearing on September 28th.
- Hearing Office determined that filing for hearing within one month of the IEP was reasonable.
Capistrano Unified Sch. Dist.,
OAH Case No. 2011030307

- On January 26, 2011, the district received parent's request for an IEE based on parent's disagreement with the district's recent OT assessment.
- District gathered information to determine whether its OT assessment was appropriately done.
- On February 23, 2011, the district wrote parent and denied the IEE request.
- On March 7, 2011, the district filed its due process request.

Capistrano Unified Sch. Dist.,
OAH Case No. 2011030307

- ALJ determined that filing for hearing within 41 days of the IEE request did not constitute undue delay.
- Since the district's OT assessment was found to be appropriate and since the district filed without undue delay, parent was not entitled to an IEE.

C.W. v. Capistrano Unified Sch. Dist., SACV 11-1157 DOC(RNBx)

- Student's appeal of Capistrano Unified Sch. Dist. to U.S. District Court, C.D. Cal.
  - District Court affirmed ALJ's decision, determining it was thorough and careful (noting that the student did not object to any factual findings).
  - Affirmed that 41 days between student's vague notice of disagreement and the district's request for due process was not an unnecessary delay.
C.W. v. Capistrano Unified Sch. Dist.

District Court found student's arguments for "unnecessary delay" frivolous:

- Student cited no absolute authority showing that 41 days was unnecessary delay;
- Delay, if any, was necessitated by mother's vague letter disagreeing with OT report, but not stating the reasons for her disagreement. This caused the district to reevaluate the entire OT report before deciding to go to hearing.

C.W. v. Capistrano Unified Sch. Dist.

The court offered to entertain a future motion from the district for attorneys' fees:

- In this case, the district agreed the child was eligible for special education services, agreed to conduct an additional assessment, and thoroughly reevaluated the assessment report when the parent informed the school that she thought the report was "stupid";
- PAPE is not free in the sense that the money must come from somewhere, namely school district budgets;

C.W. v. Capistrano Unified Sch. Dist.

- IDEA appeals process and remedies are designed to ensure disabled children are accommodated, not to drain district budgets;
- Mother here advanced frivolous arguments causing the district to incur expenses that could have funded special education, including mother's own child.
• On December 5, 2012, court granted the district's attorneys' fees and costs motion and awarded the district $96,660.55.

• Regarding the frivolousness of mother's "unnecessary delay" claim:
  - Mother sought a remedy for a harm actually caused by mother.
  - "Mother's argument was frivolous, unreasonable, and without foundation because mother caused the very harm—the District's delay—that she alleged."

• Regarding mother's claim that the district was not allowed to require her to explain why she requested an IEE:
  - "Simply because the district may not require mother to provide an explanation for her disagreement does not mean that mother is entitled to sue district for a purported delay caused by mother. Nothing in 34 CFR Section 300.502(b) permits mother to have her cake and eat it too."

• Regarding the mother's "improper purpose" for the litigation:
  - "Mother's offer to ransom her child's IDEA appeal in exchange for money to which her non-attorney advocate was not entitled shows that the purpose of this appeal was not to vindicate the rights of her disabled child. Rather, mother's purpose was to harass and unnecessarily increase the litigation costs incurred by the district until it acquiesced to lining the pockets of her non-attorney advocate, who is also the spouse of mother's attorney on this appeal."
J.P. v. Ripon Unified Sch. Dist.,
52 IDELR 125
(E.D. Cal. April 14, 2009)

- Court found a delay of over two months not unreasonable because the district produced a series of letters showing its attempts to resolve the matter.
- Final impasse was not reached in this process until three weeks before the district filed for hearing.

Los Angeles Unified Sch. Dist.,
48 IDELR 293 (SEA CA 2007)

- District waited 74 days to request a due process hearing.
- After the delay, the district could not avoid liability by establishing the appropriateness of its own assessment.
- Parent was awarded independent psychoeducational and speech-language assessments.

Practical Application

- Because “unnecessary delay” will be evaluated on the facts of each case, consider the facts of your case carefully.
- Do NOT require a reiteration of an IEE request.
- Document all efforts to cooperatively resolve the issue with parents.
Practical Application

- If working with parents toward resolution, do so actively, with evidence of progress.
- Realize when a final impasse has been reached and act immediately.
- Consider convening an IEP meeting to discuss issue.

Practical Application

- Most protective position a district can take is to immediately respond to any IEE request by either granting the request or filing for due process hearing.

Consideration of IEE

- An IEE, if it meets agency criteria, must be considered by the IEP team, in any decision made with respect to the provision of FAPE.

(34 C.F.R. § 300.502(c)(1); T.S. ex rel. S.S. v. Bd. Of Educ. Of the Town of Ridgefield, 20 IDELR 889 (2d Cir. 1993).)
Consideration of IEE

- District's obligation to consider the report does not translate into an obligation to accept the report or to adopt its recommendations.

(T.S. ex rel. S.S. v. Bd. Of Educ. Of the Town of Ridgefield, 20 IDELR 889 (2d Cir. 1993)).

Practical Application

- District should document how IEE was made available/presented to members of the IEP team.
- District should document discussion and consideration of report by team.
- To the extent the district disagrees with IEE recommendations, the district should document basis for disagreement and its own recommendations and explanations.

Defending a District Assessment

- If a parent requests an IEE at public expense, the public agency may file a due process complaint to request a hearing to show that its evaluation is appropriate.

(34 C.F.R. § 300.502(b)(2)).
Defending a District Assessment

- If the public agency demonstrates at hearing that its evaluation was appropriate, the parent still has the right to obtain an IEE and have it considered by the IEP team, but not at public expense.

(34 C.F.R. § 300.502(b)(3).)

Defending a District Assessment

- Where the district complies with the IDEA in conducting an evaluation, parent is not entitled to an IEE, even though she disagrees with the results.

(Blake B. by Jack and Yvonne B. v. Council Rock Sch. Dist., 51 IDELR 100 (E.D. Pa. 2008).)

Saddleback Valley Unified Sch. Dist.,
OAH Case No. 2010090212;
2010100932

- On December 21, 2009, parent of 16-year old student requested pupil records, an assessment plan and referral to the county mental health provider.

- On December 28, 2009, police detained student along with two young men who were in possession of drugs. Mother informed police that student would be enrolled in an RTC shortly. Police released student to parent’s custody without charges.
- Parent placed student in out-of-state RTC. Student was admitted at the RTC for mood swings, parent-child conflict, substance abuse, poor academic performance and poor peer relationships.

- District convened an SST meeting and offered an assessment plan. On January 12, 2010, mother signed the assessment plan.

- District conducted a psycho-educational assessment and convened an IEP meeting on March 26, 2010.

- On September 27, 2010, six months after the March 26, 2010 IEP meeting, mother, through her attorneys, notified the district that she objected to the district's March 2010 psycho-educational report and requested that the district fund an IEE by Mitchel Perlman, Ph.D.

- District denied the IEE request and filed a request for due process hearing on October 18, 2010 to defend the appropriateness of its assessment.

- In October of 2010, mother and her attorneys engaged psychologist Perlman, to conduct a psycho-educational IEE of student and to serve as student’s expert witness in this due process matter.
Periman began his assessment in October of 2010, but did not finalize his report until May of 2011, shortly before the hearing of this matter. Mother reviewed and commented on a draft of the report before it was finalized.

District first received the report five days before the hearing on this matter. The report was not available to the March 26, 2010 IEP team or the February 11, 2011 IEP team.

The ALJ found: "although Periman's report purports to be an IEE, it does not appear to be an objective assessment of student. Although Periman conducted an assessment of student and the results of the assessment are contained in the report, Periman acknowledged that the report was prepared in anticipation of litigation. As such, it focused on strategies to discredit the district assessor and weaknesses in the IEP."

Mother presented evidence that she had incurred $5,861.50 for the assessment and expert witness services of psychologist Mitchel Periman. Periman testified that only $1,500.00 of the charge was for the evaluation.

The ALJ held the district assessor was a highly qualified school psychologist who held the appropriate credentials. He had completed all coursework for a doctorate in education.
The ALJ also found the school psychologist:
- used a variety of tools to assess student including observation, interview, standardized testing, rating scales and review of available records;
- administered the testing in student’s primary language, and according to the test administration instructions;
- selected and administered the assessment so as not to be racially, culturally or sexually discriminatory; and,
- completed a comprehensive written report of his findings and conclusions.

Because the district’s assessment was appropriate, student was not entitled to an IEE at public expense.

Practical Application

- When an IEE request is received, evaluate the district assessment, report and protocols thoroughly to determine defensibility.
- Do so expeditiously so as not to delay a response to the IEE request.
Thank you

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