

Independent Educational Evaluation Reimbursement under the IDEA: An Update*

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The 2004 Individuals with Disabilities Education Act (IDEA) legislation¹ and the 2006 IDEA regulations² left largely unchanged the parent's conditional right to obtain an independent educational evaluation (IEE) at public expense.³ The specified conditions⁴ form what amounts to a flowchart-like framework akin to the multi-step test for tuition reimbursement under the IDEA.⁵ The extensive amount of hearing and review officer decisions concerning IEEs at public expense evidence not only the frequency of the issue but also the need for a careful legal analysis informed by the this regulatory framework, the pertinent court decisions, and the various policy letters issued by the U.S. Office of Special Education Programs (OSEP).⁶ The purpose of the *ELA Notes* article is to provide an updated practical legal checklist that synthesizes the court decisions,⁷ with supplemental attention to the OSEP policy interpretations.⁸ For ease of differentiation, the updated parts are highlighted in gray.

The IEE reimbursement⁹ checklist is arranged in the same sequence as the relevant regulation, starting with the successive pair of procedural steps and culminating in the respective pair of the substantive steps.¹⁰ The questions **subject to** court decisions are in bold italics, whereas those based on OSEP letters are in italics alone.¹¹ The consequences of the answers are in regular typeface. Finally, the checklist items for the two substantive steps are worded as neutral questions to avoid the unsettled issue of burden of proof.¹²

IEE Reimbursement Checklist

Procedural Steps:

1. *Did the parent disagree with the district evaluation?*

- *via notification to the district within a reasonable period of time?*¹³

If not, in majority of jurisdictions and circumstances,¹⁴ it may be an equitable consideration but it is not an absolute prerequisite; thus, move on to the subsequent steps in this analysis.¹⁵

2. *Did the district file for a due process hearing ...*

- *at all?*

If not, this will likely end the analysis in favor of reimbursement¹⁶ unless there are multiple issues¹⁷ or special circumstances,¹⁸ including the parent's failure at step 1.¹⁹

- *without unnecessary delay?*

A delay of more than 2-3 months is likely fatal to the district's case,²⁰ although the exact length will depend on the circumstances rather than being a bright-line test.²¹

Substantive Steps

3. *Was the district's evaluation (or reevaluation or necessary FBA)²² appropriate?*

In light of the relatively skeletal substantive criteria for district evaluations and the restricted role of the procedural standards, the court outcomes have varied widely depending on the specific facts of the case and the degree of judicial deference to district actions.²³

4. *Was the parent's IEE appropriate²⁴*

...

- *according to district criteria that are no more and, if necessary,*

less restrictive than applicable to the district's evaluation?

- As for procedures, the district may require the parents to submit the IEE report by a date certain within any state imposed deadlines,²⁵ but authority is split as to whether the district may require advance clearance.²⁶

- As for timing, the parent's IEE need not be before the district's filing.²⁷

- As for IEE location and evaluator qualifications, the district may:

- (a) limit the parents to a comprehensive list if there is allowance for individual exceptions²⁸;
- (b) include the criteria established by the producer of evaluation instruments²⁹;
- (c) impose a mileage limit on the IEE as long as this does not prevent the parent from getting an appropriate evaluation³⁰;
- (d) restrict IEEs to evaluators within the state if there is a sufficient number of qualified evaluators within those boundaries and the parents have the opportunity for an exception based on unique circumstances³¹; and
- (e) require the IEE examiner to hold, or be eligible to hold, a particular license when the district does the same for personnel who conduct corresponding evaluation for the district unless only the district personnel may obtain said license.³²

Conversely, the district may not require (i) specified experience or non-affiliation,³³ or (ii) criteria for qualifications different from those required for the district's own evaluations.³⁴

- As for methodology, the IEE need not be the same as the district's evaluation.³⁵

- As for contents, the district may not prohibit the IEE evaluator from including age and grade level standards.³⁶

- As for costs, a district may:

(a) establish maximum allowable charges for specific tests if said maximum (i) allows a choice among qualified professionals, (ii) is not limited to the average fee customarily charged in that area, and (iii) allows for exceptions for justified unique circumstances;³⁷ and

(b) establish "reasonable cost containment criteria applicable to [both district and parent evaluators]" but only with a provision for an exception when the parents shows unique circumstances justifying a higher fee.³⁸

Conversely, if an IEE is necessary outside the district boundaries, the district may be required—if the parent meets the "unique circumstances" exception—to pay for the expenses incurred by the parent for travel or other related costs,³⁹ and the district may not require parents to submit the charges first to their health care insurer.⁴⁰

Finally, according to limited case law authority to date, if the parents are entitled to reimbursement, it extends to the costs of the private evaluator's presentation at the IEP meeting.⁴¹

EHLR 213:260 (OSERS 1989). In a recent decision, a federal district court rejected the magistrate judge's recommended ruling that the regulation exceeded the scope of the statute. *Phillip C. v. Jefferson County Bd. of Educ.*, 57 IDELR ¶ 97 (N.D. Ala. 2011).

³ The scope of this checklist does not extend to IEE case law concerning issues other than reimbursement. See, e.g., *K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795 (8th Cir. 2011); *T.S. v. Bd. of Educ.*, 10 F.3d 87 (2d Cir. 1993) (concluding that district met its obligation to "consider" parent's IEE); *L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 90 (2009) (ruling that failure to provide equivalent opportunity for IEE observation, as required by state law, did not amount to denial of FAPE); *Bd. of Educ. v. A.H.*, 56 IDELR ¶ 156 (S.D.W.Va. 2011), *aff'd mem.*, 57 IDELR ¶ (4th Cir. 2011) (district's insistence on its choice of psychologist to conduct IHO-ordered IEE violated parents' opportunity for meaningful participation); *Sch. Bd. of Manatee County v. L.H.*, 53 IDELR ¶ 149 (M.D. Fla. 2009) (upholding ALJ's order to provide equivalent opportunity for IEE observation); *Harris v. Dist. of Columbia*, 561 F. Supp. 63 (D.D.C. 2008) (ruling that IEEs include parentally requested independent functional behavioral assessments). It also does not include OSEP policy interpretations concerning IEEs more broadly. See, e.g., *Letter to Fisher*, 23 IDELR 565 (OSEP 1995) (interpreting the right to an IEE to extent to assistive technology assessments).

⁴ 34 C.F.R. § 300.502(b) (2006):

(1) A parent has the right to an [IEE] at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the [following] conditions.

(2) If a parent requests an [IEE] at public expense, the public agency must, without unnecessary delay, either--

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an [IEE] is provided at public expense, unless the agency demonstrates in [an impartial hearing under the IDEA] ... that the evaluation obtained by the parent did not meet agency criteria

For the additional regulatory language concerning agency criteria at the last step, see *id.* § 300.502(e) (2006):

(1) If an [IEE] is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an [IEE].

(2) Except for the criteria described in [the previous] paragraph ..., a public

agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

⁵ See, e.g., *id.* § 300.148(b)-(e) (2006). For an analysis of the case law, see, e.g., Thomas Mayes & Perry Zirkel, *Special Education Tuition Reimbursement Claims: An Empirical Analysis*, 22 REMEDIAL & SPECIAL EDUC. 350 (2001). For an analogous flowchart-like synthesis, see Perry A. Zirkel, *Tuition and Related Reimbursement under the IDEA: A Decisional Checklist*, __ EDUC. L. REP. __ (in press).

⁶ For a synthesis showing the frequency of IDELR-published hearing/review officer decisions specific to one step of the applicable test—the appropriateness of school district evaluations—and the relative neglect of these other legal sources, see Susan Etscheidt, *Ascertaining the Adequacy, Scope, and Utility of District Evaluations*, 69 EXCEPTIONAL CHILD. 227 (2003).

⁷ For the original version, see Perry A. Zirkel, *Independent Educational Evaluation Reimbursement: A Checklist*, 231 EDUC. L. REP. 21 (2008). For a detailed treatment, see Perry A. Zirkel, *Independent Educational Evaluations at District Expense under the Individuals with Disabilities Education Act*, 38 J.L. & EDUC. 223 (2009).

⁸ The checklist does not include either hearing/review officer decisions or state law requirements; thus, these sources should be checked for any jurisdictional differences.

⁹ The term IEE reimbursement is used generically herein because most of the pertinent cases arise from a request for reimbursement, although a few are limited to the threshold right, where the IEE is yet to happen and thus its appropriateness and payment are prospective only. See, e.g., *M.Z. v. Bethlehem Area Sch. Dist.*, 57 IDELR ¶ 5 (E.D. Pa. 2011) (reversed hearing officer's order for district to expand its inappropriate evaluation, instead ruling that district must provide publicly funded IEE).

¹⁰ See *supra* note 4.

¹¹ For the legal effect of such policy interpretations, see, e.g., *Raymond S. v. Ramirez*, 918 F. Supp. 1280 (N.D. Iowa 1996); see also Perry A. Zirkel, *Do OSEP Policy Letters Have Legal Weight?* 171 EDUC. L. REP. (WEST) 391 (2003).

¹² The language in the regulation puts the burden on the district, but the intervening effects of the Supreme Court's decision in *Schaffer v. Weast*, 546 U.S. 49 (2005) and any opposing state law leaves this matter an open question.

¹³ See, e.g., *Letter to Fields*, EHLR 213:260 (OSERS 1989). However, the parent's failure to provide notification does not nullify the parent's otherwise justified right to reimbursement. See, e.g., *Letter to Anonymous*, 55 IDELR ¶ 106 (OSEP 2010); *Letter to Imber*, 19 IDELR 352 (OSEP

Endnotes

* The original version of this checklist appeared in *West's Education Law Reporter*, 2008, v. 231, pp. 21-24. The highlighted items are updates since the original publication.

¹ 20 U.S.C. § 1415(B)(1) (2005); see also *id.* § 1415(d)(2)(A) (2005).

² 34 C.F.R. § 300.502 (2006). The only change was to limit the parent to only one IEE at public expense each time the school district conducts an evaluation with which the parent disagreed. *Id.* § 300.502(b)(5) (2006). This change represents reinstitution of a previous limitation. See, e.g., *Hudson v. Wilson*, 828 F.2d 1059 (4th Cir. 1987); *Letter to Fields*,

- 1992); Letter to Kerry, 18 IDELR 527 (OSEP 1991). However, courts have split on whether a notification requirement applies without addressing the OSEP interpretations. Compare Phillip C. v. Jefferson County Bd. of Educ., 57 IDELR ¶ 97 (N.D. Ala. 2011), with R.A. v. Amador Cnty. Unified Sch. Dist., 58 IDELR ¶ 152 (E.D. Cal. 2012); cf. T.G. v. Midland Sch. Dist., ___ F. Supp. 2d ___ (C.D. Ill. 2012) (lack of notification in combination with same in hearing complaint was fatal).
- 14 Compare P.R. v. Woodmore Local Sch. Dist., 49 IDELR ¶ 31 (6th Cir. 2007); Warren G. v. Cumberland County Sch. Dist., 190 F.3d 80 (3d Cir. 1999); Bd. of Educ. of Murphysboro Cmty. Unit Sch. Dist. v. Illinois St. Bd. of Educ., 41 F.3d 1162 (7th Cir. 1994); Hudson v. Wilson, 828 F.2d 1059 (4th Cir. 1987); Raymond S. v. Ramirez, 918 F. Supp. 1280 (N.D. Iowa 1996); Mullen v. Dist. of Columbia, 16 EHLR 792 (D.D.C. 1990); Hiller v. Bd. of Educ. of Brunswick Cent. Sch. Dist., 687 F. Supp. 735 (N.D.N.Y. 1988); cf. Los Angeles Unified Sch. Dist. v. D.L., 548 F. Supp. 2d 815 (C.D. Cal. 2008), with P.P. v. W. Chester Area Sch. Dist., 585 F.3d 727 (3d Cir. 2009); M.S. v. Mullica Twp. Bd. of Educ., 485 F. Supp. 2d 555 (D.N.J. 2007), *aff'd*, 263 F. App'x 264 (3d Cir. 2008); R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d 222 (D. Conn. 2005); D.H. v. Manheim Twp. Sch. Dist., 45 IDELR ¶ 38 (E.D. Pa. 2005); Krista P. v. Manhattan Sch. Dist. 225 F. Supp. 2d 873 (N.D. Ill. 2003); P.T.P. v. Bd. of Educ. of County of Jefferson, 488 S.E.2d 61 (W. Va. 1997); cf. K.B. v. Pearl River Union Sch. Dist., 58 IDELR ¶ 108 (S.D.N.Y. 2012); Sch. Bd. of Lee County v. E.S., 49 IDELR ¶ 251 (M.D. Fla. 2008) (vague request); Norris v. Massachusetts Dep't of Educ., 529 F. Supp. 759 (D. Mass. 1981) (state law).
- 15 However, if the parents request an IEE at public expense before completion of the district's evaluation, they may have equitably eliminated any entitlement to reimbursement. See, e.g., G.J. v. Muscogee County Sch. Dist., 668 F.3d 1258 (11th Cir. 2012); C.S. v. Governing Bd. of Riverside Unified Sch. Dist., 321 F. App'x 630 (9th Cir. 2009); D.K. v. Abington Sch. Dist., 54 IDELR ¶ 119 (E.D. Pa. 2010); D.Z. v. Bethlehem Area Sch. Dist., 2 A.3d 712 (Pa. Commw. Ct. 2010); Letter to Zirkel, 52 IDELR ¶ 78 (OSEP 2008); cf. P.P. v. W. Chester Area Sch. Dist., 585 F.3d 727 (3d Cir. 2009); R.H. v. Fayette County Sch. Dist., 53 IDELR ¶ 86 (N.D. Ga. 2009) (prior to the initial evaluation altogether).
- 16 See, e.g., Bd. of Educ. of Murphysboro Cmty. Unit Sch. Dist. v. Illinois St. Bd. of Educ., 41 F.3d 1162 (7th Cir. 1994); Evans v. Dist. No. 17 of Douglas County, 841 F.2d 824 (8th Cir. 1988); K.B. v. Haledon Bd. of Educ., 54 IDELR ¶ 230 (D.N.J. 2010). But see Phillip C. v. Jefferson County Bd. of Educ., 57 IDELR ¶ 97 (N.D. Ala. 2011).
- 17 See, e.g., Dudley v. Lower Merion Sch. Dist., 58 IDELR ¶ 12 (E.D. Pa. 2011); Myles v. Montgomery County Bd. of Educ., 824 F. Supp. 1549 (M.D. Ala. 1994).
- 18 See, e.g., P.R. v. Woodmore Local Sch. Dist., 49 IDELR ¶ 31 (6th Cir. 2007).
- 19 See, e.g., R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d 222 (D. Conn. 2005).
- 20 Compare D.H. v. Manheim Twp. Sch. Dist., 45 IDELR ¶ 38 (E.D. Pa. 2005) (8 months); Pajaro Valley Unified Sch. Dist. v. J.S., 47 IDELR ¶ 12 (N.D. Cal. 2006) (3 months), with J.P. v. Ripon Unified Sch. Dist., 52 IDELR ¶ 125 (E.D. Cal. 2009) (3 months, but 3 weeks from impasse); L.S. v. Abington Sch. Dist., 48 IDELR ¶ 244 (E.D. Pa. 2007), *reconsideration denied*, 50 IDELR ¶ 37 (E.D. Pa. 2008) (1.5 months not fatal); Ms. H. v. Montgomery Cnty. Bd. of Educ., 56 IDELR ¶ 73 (M.D. Ala. 2011) (1.7 months but intervening justifiable events).
- 21 See, e.g., Letter to Anonymous, 56 IDELR ¶ 175 (OSEP 2010); Letter to Anonymous, 23 IDELR 721 (OSEP 1994); Letter to Anonymous, 21 IDELR 1185 (OSEP 1994); Letter to Saperstone, 21 IDELR 1127 (OSEP 1994); cf. Letter to Smith, 16 IDELR 1080 (OSERS 1990) (45-day deadline starts after filing and, thus, is not applicable).
- 22 Letter to Scheinz, 34 IDELR ¶ 34 (OSEP 2000).
- 23 Compare Warren G. v. Cumberland County Sch. Dist., 190 F.3d 80 (3d Cir. 1999); Seattle Sch. Dist. No. 1 v. B.S., 82 F.3d 1493 (9th Cir. 1994); S.F. v. McKinney Indep. Sch. Dist., 58 IDELR ¶ 157 (E.D. Tex. 2012); Indep. Sch. Dist. No. 701 v. J.T., 45 IDELR ¶ 92 (D. Minn. 2006); A.S. v. Norwalk Bd. of Educ., 183 F. Supp. 2d 534 (D. Conn. 2002); Pajaro Valley Unified Sch. Dist. v. L.S., 47 IDELR ¶ 12 (N.D. Cal. 2006 (parents won), with Council Rock Sch. Dist. v. Bolick, 58 IDELR ¶ 122 (3d Cir. 2012); C.S. v. Governing Bd. of Riverside Unified Sch. Dist., 321 F. App'x 630 (9th Cir. 2009); Holmes v. Millcreek Twp. Sch. Dist., 205 F.3d 583 (3d Cir. 2000); M.C. v. Katonah/Lewisboro Union Free Sch. Dist., 58 IDELR ¶ 196 (S.D.N.Y. 2012); T.G. v. Midland Sch. Dist., ___ F. Supp. 2d ___ (C.D. Ill. 2012); Dudley v. Lower Merion Sch. Dist., 58 IDELR ¶ 12 (E.D. Pa. 2011); Ms. H. v. Montgomery Cnty. Bd. of Educ., 56 IDELR ¶ 73 (M.D. Ala. 2011); Ka.D. v. Solana Beach Sch. Dist., 54 IDELR ¶ 310 (E.D. Cal. 2010); J.P. v. Ripon Unified Sch. Dist., 52 IDELR ¶ 125 (E.D. Cal. 2009); Blake B. v. Council Rock Sch. Dist., 51 IDELR ¶ 100 (E.D. Pa. 2008); L.S. v. Abington Sch. Dist., 48 IDELR ¶ 244 (E.D. Pa. 2007), *reconsideration denied*, 50 IDELR ¶ 37 (E.D. Pa. 2008); DeMerchant v. Springfield Sch. Dist., 48 IDELR ¶ 181 (D. Vt. 2007); Wachlarowicz v. Sch. Bd. of Indep. Sch. Dist. No. 832, 42 IDELR ¶ 7 (D. Minn. 2004); Judith S. v. Bd. of Educ. of Cmty. Unit Sch. Dist. No. 200, 28 IDELR 728 (N.D. Ill. 1998) (district won).
- 24 The results at this step have also varied, although the courts have not shown the same deference to districts as they have for the previous step. See, e.g., Breanne C. v. S. York County Sch. Dist., 732 F. Supp. 2d 474 (M.D. Pa. 2010). For a recent decision where a court upheld reimbursement in a "child find" case where the district delayed its evaluation and used the parents' IEE despite an ultimate determination that the child was not eligible, see J.P. v. Anchorage Sch. Dist., 260 P.3d 285 (Alaska 2011).
- 25 Letter to Anonymous, 58 IDELR ¶ 19 (OSEP 2011).
- 26 Compare P.L. v. Charlotte-Mecklenburg Bd. of Educ., 55 IDELR ¶ 46 (W.D.N.C. 2010) (denying reimbursement for IEE where parents did not obtain written approval per district's handbook), with Letter to Bluhm, EHLR 211:206 (OSEP 1980) (opining that the district may not require advance consultation or clearance).
- 27 A.S. v. Norwalk Bd. of Educ., 183 F. Supp. 2d 534 (D. Conn. 2002); cf. Letter to Reedy, 16 EHLR 1364 (OSEP 1990) (after the district's evaluation).
- 28 See, e.g., Letter to Anonymous, 56 IDELR ¶ 175 (OSEP 2010); Letter to Parker, 41 IDELR ¶ 155 (OSEP 2004); Letter to Young, 39 IDELR ¶ 98 (OSEP 2003).
- 29 Letter to Anonymous, 22 IDELR 636 (OSEP 1994).
- 30 Letter to Bluhm, EHLR 211:227 (OSEP 1980).
- 31 Letter to Anonymous, 20 IDELR 1219 (OSEP 1993).
- 32 *Id.* at 46,689 (Aug. 14, 2006); see also Letter to Anonymous, 56 IDELR ¶ 175 (OSEP 2010).
- 33 Letter to Petska, 35 IDELR ¶ 191 (OSEP 2001) (may not prohibit affiliation with private schools and advocacy organizations or expert witnesses who consistently testified on the parents' side, and may not require recent and extensive experience in public schools).
- 34 34 C.F.R. § 300.502(e)(1).
- 35 A.S. v. Norwalk Bd. of Educ., 183 F. Supp. 2d 534 (D. Conn. 2002).
- 36 Letter to LoDolce, 50 IDELR ¶ 106 (OSEP 2008).
- 37 See, e.g., Letter to Anonymous, 22 IDELR 637 (OSEP 1995); see also Letter to Fields, EHLR 213:259 (OSERS 1989).
- 38 71 Fed. Reg. at 46,689-46,690 (Aug. 14, 2006).
- 39 Letter to Petska, 35 IDELR ¶ 191 (OSEP 2001); Letter to Heldman, 20 IDELR 621 (OSEP 1993).
- 40 Letter to Thompson, 34 IDELR ¶ 8 (OSEP 2000).
- 41 M.M. v. Lafayette Sch. Dist., 58 IDELR ¶ 132 (N.D. Cal. 2012). ■