

## **Child Find and Evaluation**

### **Tri-State Regional Special Education Law Conference**

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#### **I. Identification**

##### **A. Child Find (IDEA Regulations 34 CFR 300.111,131 and 301)**

1. Each state must have policies and procedures to ensure that all children with disabilities who are in need of special education and who are residing in the state are identified, located and evaluated.

The IDEA clarifies that the child find requirements apply to highly mobile children (such as migrant children), homeless children, children who are wards of the state and children who may have a disability and be in need of special education even though they are advancing from grade to grade.

Note: The definition of a homeless child includes not only those children and youth who are living on the streets, cars, parks, etc., but also includes migratory children and children who are sharing housing of other persons due to loss of housing, economic hardship, or a similar reason (McKinney-Vento Homeless Assistance Act, 42 U.S.C. 11434a, Section 725).

In addition, the child find responsibility covers all children with disabilities, including students attending private schools placed by their parents.

The IDEA places the responsibility for child find activities on the Local Education Agency (LEA) of residence except if the child has been parentally placed in private nonprofit elementary or secondary school or is homeless. If the child

has been placed in a private school by their parents, the LEA where the private elementary or secondary school is located is also responsible for child find regardless of the residency status of the student.

In such case, parental consent must be obtained before personally identifiable information is released between officials in the LEA where the private school is located and officials in the LEA of the parent's residence. (34 CFR 300.622 (a))

The United States Department of Education issued a guidance letter stating that parents of students who they have placed in private non-profit elementary or secondary schools may request a special education evaluation from the LEA where the private school is located (for the purpose of considering the student for equitable services) and from the LEA of residence assuming the private school is not located in the district of residence (for the purpose of making a FAPE available). Both districts would be required to conduct an evaluation. The Department of Education noted that although parents have this right, the Department discourages parents from requesting an evaluation from two districts. Letter to EIG 52 IDELR 136 (United States Department of Education, Office of Special Education Programs (2009)).

Child find activities must allow for the equitable participation for parentally placed private school students. The IDEA also requires that the LEA consult with appropriate representatives of private schools that serve children with disabilities and representatives of parents who have placed their children in private schools on how to carry out child find activities. In addition, expenditures for child find are not considered as part of the pro rated amount which LEAs need to spend on services for private school children with disabilities.

Children placed by their parents in for profit private elementary or secondary schools are not included in the IDEA's definition of parentally placed private school children. The LEA of residence would generally be responsible for child find; however, a State can determine

which local education agency would be responsible for child find Letter to Chapman, 49 IDELR 163 (United States Department of Education, Office of Special Education (2007)).

As applied to preschoolers, ages 3-5, the agency responsible for child find depends on whether the child is parentally placed in a day care center or preschool, meeting the state's definition of an elementary school. If yes, the LEA where the private preschool program is located is responsible for child find. If no, the LEA of residence is responsible for child find Letter to Smith, (United States Department of Education, Office of Special Education Programs (2006)).

B. Early Intervening Services ( 34 CFR 300.226)

1. The IDEA allows a Local Education Agency (LEA) to use up to 15% of its IDEA funds under Part B to develop and implement coordinated, early intervening services (EIS) for students K-12 (with particular emphasis on students K-3) for students not currently identified as needing special education, but who need additional academic and behavioral support to succeed in general education. These general education supports should be viewed as pre-referral efforts before a child is referred for a special education evaluation. EIS is not limited to students suspected of having a specific learning disability.
2. If the LEA has been determined to have significant disproportionality problems in the identification and placement of students with disabilities, the LEA must use 15% of its IDEA Part B funds to provide comprehensive coordinated early intervening services particularly to those children who were overidentified.
3. Early intervening services include professional development for teachers and other staff to enable personnel to deliver scientifically based academic and behavior interventions including scientifically based literacy instruction. In addition EIS may include providing educational and behavioral evaluations, services and supports.
4. If the LEA uses Part B funds to provide EIS, the LEA must annually report to the SEA on: the number of students serviced

with EIS, the number of the students receiving EIS who subsequently received special education services during the preceding two year period.

### **2006 IDEA Regulations**

- The Comments to the IDEA Regulations emphasize that the use of early intervening services may not delay an appropriate evaluation for special education although there is no specific time limit for receiving such services before an evaluation. (Federal Register, Volume 71, No. 156, Page 46626)
- The Comments explain the early intervening services may not be used for preschoolers. (Page 46627)

#### C. Response To Intervention (RTI)

1. LEA may opt out of using the severe discrepancy part of the specific learning disabilities definition (SLD) and replace it by using a “response to scientific research based intervention” (RTI) model of eligibility as part of the evaluation procedures. (34 CFR 300.307)
2. States must adopt criteria for determining SLD. A State must permit a process that determines if a child responds to scientific research-based interventions and may permit the use of other alternative research based procedures. (300.307 (a)).

Note: The language in the proposed regulations would have allowed a State to prohibit the use of severe discrepancy was removed from the final regulations. The Comments to the regulations state that States are “free to prohibit the use of a discrepancy model.” (Federal Register, August 14, 2006, Page 46646 )

### **United States Department of Education Guidance**

- Although the U.S. Department of Education does not subscribe to a particular RTI model, they listed four characteristics that underpin all models: (1) students receive high quality research based instruction in their general education setting; (2) continuous monitoring of student performance; (3) all students are screened for academic and behavioral problems; and (4) multiple levels (tiers) of instruction that are progressively more intense, based on the student’s response to instruction (Questions and Answers on Response to Intervention and Early Intervening Services, Question F-5 (OSERS (2007))).
- The definition of an SLD goes beyond a mere determination of whether the student is experiencing a “severe discrepancy” or is not successful under a RTI process model. As the comments to the IDEA regulations state, “the evaluation of a child suspected as having a disability, including an SLD, must include a variety of assessment tools and strategies and cannot rely on any single procedure as the sole criterion for determining eligibility” (Federal Register, Page 46646). “An RTI process does not replace the need for a comprehensive evaluation. A public agency must use a variety of data gathering tools and strategies even if an RTI process is used. The results of an RTI process may be one component of the information reviewed as part of the evaluation procedures required...” (Federal Register, Page 46648).
- If a State or LEA requires the use of RTI in identifying children with SLD, then all children suspected of having a SLD in all schools in the LEA would be required to use the process. An LEA cannot use RTI for purposes of eligibility determinations until RTI was fully implemented in the LEA. Questions and Answers on Response to Intervention and Early Intervening Services, Question F-4 (OSERS (2007)).
- In response to an inquiry clarifying the above statement, OSEP responded that if RTI is not required but permitted by the LEA, a school would not have to wait until RTI is fully implemented in all schools in

the LEA before using RTI as part of the identification of a student with SLD (Letter to Cernosia (OSEP (2007))).

3. A child may be deemed to have a SLD if:
  - a. the child does not achieve adequately for the child's age or does not meet State approved grade level standards in one or more of the following areas when provided with learning experiences and instruction appropriate for the child's age or State approved grade level standards:
    - oral expression, listening comprehension, written expression, basic reading skills, reading fluency skills, reading comprehension, math calculations, math problem solving
  - b. the child does not make sufficient progress to meet age or State approved grade level standards when using a process based on response to scientific, research-based interventions or
  - c. the child exhibits a pattern of strengths and weaknesses in performance, achievement, or both relative to age, State approved grade level standards or intellectual development relevant to determining a SLD using appropriate assessments. (300.309 (a)(1))
4. The eligibility team must consider data that prior to, or as part of the referral process, the child was provided appropriate instruction in regular education settings delivered by qualified personnel and repeated data based documented assessments of achievement at reasonable intervals, reflecting formal assessments during instruction which was reported to the parents. (300.309 (b)).

#### Regulatory Comments

- Children may not be identified as having

SLD if there is no documentation of appropriate instruction, consistent with the Act and the ESEA. (Federal Register, Page 46652)

- For students in private schools or home schools, the public school may need to get information from parents/teachers, current class based assessments and observations. Special Ed eligibility requirements do not differ by location or venue of the child's education. (Federal Register, Page 46656)
  - Data based documentation refers to an objective and systematic process of documenting a student's progress. There is no definition of repeated assessments or intervals since instructional models vary. (Federal Register, Page 46657)
  - The information referred to as data based documentation of repeated assessments at reasonable intervals may be collected as part of the evaluation process or may be existing information from the regular instructional program. It must be reviewed and weighed by the evaluation team. Letter to Zirkel 50 IDELR 49 (United States Department of Education, Office of Special Education Programs (2008)).
5. Parental consent must be promptly requested to evaluate if the child needs special education and related services. If the child has not made adequate progress after an appropriate period of time, a referral for a special education evaluation must be made. (300.309 (c )) The terms "promptly" and adequate" are not defined in the IDEA regulations. A State may choose to establish a specific timeline that would require an LEA to seek parental consent for an evaluation if a student has not made progress that the district deemed adequate. Questions

and Answers on Response to Intervention and Early Intervening Services, Question C-5 (OSERS (2007))

The IDEA allows parents to request an evaluation at any time. If the LEA is using the RTI process and the parents request an evaluation, the LEA must conduct the evaluation or provide the parent with prior written notice of its refusal to evaluate. The parent can then request a due process hearing to resolve the dispute. Questions and Answers on Response to Intervention and Early Intervening Services, Question C-1 (OSERS (2007)).

6. The 60 day timeframe for evaluation must be adhered to unless extended by mutual written agreement. (300.309(c )

Note: Under the IDEA disciplinary regulations ( 300.534 (d)(2), if a request is made for an evaluation during the time the child is subjected to disciplinary measures, the evaluation must be conducted in an expedited manner.

OSEP issued a letter applying this requirement to RTI. Following the request for the evaluation, and once parental consent has been obtained, a local educational agency may not refuse to conduct the evaluation of a child during the time period in which disciplinary measures are used because the RTI process is ongoing. Note also that, although the U.S. Department of Education has not specified a precise timeline for an expedited evaluation because the need for collecting additional information may vary, the Department's position is that the expedited evaluation "should be conducted in a shorter period of time than a typical evaluation conducted pursuant to section 614 of the Act." 71 Federal Register 46540, 46728 (August 14, 2006).

In addition, OSEP noted there may be situations where a child has not participated in an RTI process prior to the request for the evaluation under this disciplinary provision. In those instances, the LEA would need to rely on other assessment tools and strategies to ensure that the evaluation can be conducted in an expedited manner. Letter to Combs 52 IDELR 46 (United States

Department of Education, Office of Special Education Programs (2008)).

7. If RTI was used, documentation is required addressing: the instructional strategies used and the student centered data collected; parent notification of the State's policies regarding the amount and nature of student performance data that would be collected and the general education services that would be provided; strategies for increasing the child's rate of learning; and the parent's right to request an evaluation. (300.311 (a)(7))

D. General Education Intervention/Child Find Cases

1. The Court determined that the district complied with the IDEA when it attempted pre-referral intervention before placing a student in special education. Furthermore, state policy expected that general education interventions would be considered before referring a student for a special education evaluation (Johnson v. Upland Unified School District, 36 IDELR 2, 29 Fed. Appx. 689 (United States Court of Appeals, 9<sup>th</sup> Circuit (2002)). This is an unpublished decision.
2. The Court rejected the parent's allegations that the school failed to fulfill its child find responsibilities. The child find activities included distribution of information to schools, day care centers, nursery schools and medical personnel who work with children. The school had no obligation to individually contact parents of private school students (Doe v. Metropolitan Nashville Public Schools, 34 IDELR 256, 9 Fed.Appx. 453 (United States Court of Appeals, 6<sup>th</sup> Circuit (2001)).
3. The Court affirmed the District Court's conclusion supporting the use of a general education intervention team as part of the regular pre-referral process before a student would be evaluated for special education services. The Court noted that the use of alternative programs is not inconsistent with the IDEA for it is sensible policy for a school to explore options in the regular education environment before designating a child as a special education student. The process did not act as a "roadblock" to prevent the parents from requesting an

evaluation at any time. In this case, the parents had never submitted a request to have their child evaluated.

Lastly, the Court concluded that the IDEA's procedural safeguards do not apply to general education interventions and therefore the parents do not have a legal right to be part of such team. The mere discussion of a possible special education referral by the team does not become a special education referral triggering the IDEA's procedural protections. A.P. v. Woodstock Board of Education 370 F.Appx. 202, 55 IDELR 61 (United States Court of Appeals, 2<sup>nd</sup> Circuit (2010)). Note: This is an unpublished decision.

4. The Court found that the school district failed to adhere to its child find efforts under the IDEA. Based on the student's record of consecutive failures on state assessments, continuing difficulty in multiple subjects and the inability of prior accommodations under Section 504 to improve his performance, the school had reason to suspect the student had a disability.  
In addition, the Court found that when a parent requests a special education evaluation, the IDEA gives the parent a right to the evaluation and overrides local district policy which would require a general education intervention team to first consider interventions before conducting the evaluation. In those instances, the required use of the general education intervention team impedes the exercise of rights guaranteed by federal law and would violate the IDEA. El Paso Independent School District v. Richard R., 50 IDELR 256, 567 F. Supp. 2d 918 (United States District Court, Western District, Texas (2008)). Appealed on other grounds.
5. The Court found that the school failed to fulfill its child find obligations by not referring the student for an evaluation in a timely manner. As a result, the Court found that the parents were entitled to be reimbursed the costs of hospitalization as a related service under the IDEA (Department of Education, State of Hawaii v. Cari Rae, 35 IDELR 90, , 158 F. Supp. 2d 1190 (United States District Court, Hawaii (2001))).
6. The Court found that the school district violated the IDEA and denied a FAPE when it stopped the evaluation process of

a student who was placed in an out of state residential school by his parents. Further, the Court stated the child find process under the IDEA does not prevent a parent from initiating a request for the initial evaluation from the LEA of residence in addition to the LEA where the private school is located (District of Columbia v. Abramson, 48 IDELR 96, 493 F. Supp. 2d 80 (United States District Court, District of Columbia (2007))).

7. The Court found that the school district systematically failed to adhere to its child find efforts under the IDEA. The district failed to refer children with suspected disabilities in a timely fashion and improperly extended the initial evaluation process. The Court found not only that the school district was in violation but that the State Department of Education also violated its legal responsibility under the IDEA to provide general supervision and to monitor local agencies for compliance. (Jamie S. v. Milwaukee Public Schools, 519 F.Supp.2d 870, 48 IDELR 219 (United States District Court, Eastern District, Wisconsin (2007))). The State Department of Education settled the case with the Plaintiffs, Disability Rights Wisconsin. The settlement includes benchmarks for meeting child find requirements that will be reviewed by a state paid outside authority to monitor the School District, training for school district staff, and a new parent trainer position to support the parents in the school district. The school district objected to the settlement. The Court found the settlement to be fair, reasonable, and adequate. Jamie S. v. Milwaukee Public Schools 50 IDELR 127 (United States District Court, Eastern District, Wisconsin (2008)). In addition, the Court has ordered the school district to identify all class members and to establish a “hybrid” IEP Team to determine what, if any, compensatory education services will be provided each class member. The process will be overseen by an independent monitor. Jamie S. v. Milwaukee Public Schools 52 IDELR 257 (United States District Court, Eastern District, Wisconsin (2009)).
8. The Court certified a class action lawsuit against the school district and State Education Agency on their alleged failure to implement the IDEA’s child find requirements of identifying, evaluating and serving students with disabilities in a timely manner.

The complaint alleges the school district did not hold timely meetings with parents who made had requested special education evaluation. In addition, it is alleged that the district maintained waiting lists for special education evaluations. The complaint also alleges that the SEA failed to monitor the district and maintain adequate complaint resolution procedures. M.A. v. Newark Public Schools and the New Jersey Department of Education 53 IDELR 233 (United States District Court, New Jersey (2009)). This is an unpublished decision.

9. The Court found that the school district violated its responsibility under the child find provision of the IDEA when it did not conduct a special education evaluation of a student. The 10<sup>th</sup> grade student was referred by the school to a mental health counselor since the student failed every subject and the teachers reported that her work was “gibberish and incomprehensible”, she played with dolls in class and urinated on herself in class. Although the mental health counselor recommended a special education evaluation, the school district did not refer her for an evaluation and instead promoted her to the 11<sup>th</sup> grade. The school did finally conduct an evaluation when the parent made a referral. Compton Unified School District v. Addison 598 F.3d 1181,54 IDELR 71 (United States Court of Appeals, 9<sup>th</sup> Circuit (2010)).
10. The Court held that the school district denied the student a FAPE by violating its responsibility under child find when it failed to evaluate a student who was placed in a psychiatric hospital and subsequently placed in a therapeutic placement in another state. The school district argued that the fact that the student was admitted to a psychiatric hospital does not necessarily mean that she would qualify for special education. However, the standard for triggering the child find duty is suspicion of a disability rather than factual knowledge of a qualifying disability. Here, the district had been informed of the student’s prior diagnosis of depression, her use of medication, and her psychiatric hospitalization that prevented her from commencing classes at the public school. This information is sufficient to raise a suspicion that the student may have suffered from an emotional disturbance over a long period of time.

In addition, the school failed to provide the parents with their special education procedural safeguards, and the parents remained unaware of special education processes for evaluation, referral and program development.

The Court concluded that this “gross procedural violation” denied the student a FAPE and ordered reimbursement of the student’s therapeutic placements and award of compensatory education. Regional School District No.9 v. Mr. and Mrs. M. 53 IDELR 8 (United States District Court, Connecticut (2009)).

## **II. Initial Evaluation (34 CFR 300.301)**

A. An initial evaluation shall be conducted, pursuant to a request by the parents or the public agency, before the initial provision of special education and related services to a child with a disability.

1. The IDEA regulations allow a parent to revoke consent for IEP services at any time. (See 34 CFR 300.300(b)(4)) Such revocation is not subject to a legal challenge by the school district. The Comments to the Regulations note that if a parent revokes consent for special education services, the parent may request at any time that the student be re-enrolled in special education. In such case, the request shall be treated as a request for an initial evaluation. The Comments highlight that the parent may want to consider making an evaluation request when their child has a discipline issue or in meeting graduation requirements. There is no limitation on the number of times a parent may revoke consent for special education and then subsequently request reinstatement in special education. (Federal Register, Volume 73, No. 231, Page 73014)

If a parent makes a request for a special education evaluation, the student should be treated as any other student in the child find process. Depending on the data available the new evaluation may consist of a review of existing evaluation data. Based on a review of existing data that includes information provided by the parents, current classroom, local and/or State assessments and observations by teachers and related service providers, the IEP Team and other qualified professionals will determine what, if any, evaluation data are needed to determine whether the student qualifies for special

education and, if so, the educational needs of the student.  
(Federal Register, Volume 73, No. 231, Page 73015)

2. In conducting the evaluation, the LEA must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information to determine whether the child is special education eligible and the content of the child's IEP.
3. The evaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the child's disability category. Also, if appropriate, members of the IEP Team and other qualified personnel review existing information to determine what additional data needs to be collected as part of the evaluation.
4. The evaluation must be completed within 60 days from the date of consent unless the State establishes a different timeframe. Exceptions are permitted in situations where the student moves to a new LEA prior to the eligibility determination (in which case the LEA and the parent must agree to a specific time when the evaluation will be completed) or if the parent fails to produce the student for the evaluation.
5. Screening by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation is not deemed an evaluation.  
Nothing in either the IDEA or its implementing regulations requires a State or local educational agency to, or prohibits a State or LEA from, developing and implementing policies to temporarily remove a student from his or her classroom for purposes of administering screening instruments to determine appropriate instructional strategies for the student. In addition, there is nothing in the IDEA that requires a State or LEA to, or prohibits a State or LEA from, developing and implementing policies that permit screening children to determine if evaluations are necessary. Letter to Torres 53 IDELR 333 (United States Department of Education, Office of Special Education Programs (2009))

6. In addition, an evaluation involving two school districts in the same academic year shall be coordinated and expeditiously completed.

B. Evaluation Contents (34 CFR 300.305)

1. Relevant functional and developmental information
2. Information from parents
3. Information related to enabling access in and progress in the general curriculum
4. Technically sound instruments that assess cognitive and behavioral factors in addition to physical and developmental factors
5. Review of existing data
6. Current classroom-based assessments and observations
7. Teacher and related service providers' observations
8. Evaluations are to be administered in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally unless not feasible.  
Materials and procedures used to assess a child with limited English proficiency are selected and administered to ensure that they measure the extent to which the child has a disability and needs special education, rather than measuring the child's English language skills

C. Notice/Consent for initial evaluation (34 CFR 300.300)

1. Written notice of initial evaluation

Prior written notice must be provided to the parents when the school is proposing to change or refusing to change the child's identification or evaluation. (300.503 (a)). A copy of the procedural safeguards must be given to the parents upon the initial referral or parent request for an evaluation. (300.504 (a)).

If the LEA does not agree with the parent's request for an initial evaluation since it does not suspect that the child has a disability and is in need of special education, the LEA may refuse to conduct the evaluation. In that instance, the LEA must provide the parents with written notice of its decision and the parents have procedural safeguards available including the right to request a due process hearing. Letter to Anonymous 19 IDELR 498 (United States Department of Education, Office of Special Education Programs (1992)).

2. Consent for initial evaluation

The LEA, after providing the parents with written notice of its proposal to conduct an initial evaluation, must obtain informed written consent from the parent before conducting the evaluation.

Parental consent is not required before reviewing existing data as part of an evaluation or administering a test/evaluation administered to all children.

3. Refusal to consent.

If the parent does not provide consent for the initial evaluation or reevaluation, the LEA may pursue the issue through mediation or a due process hearing. The LEA does not violate its child find responsibilities if it declines to pursue the evaluation after making reasonable efforts to obtain parental consent. (300.300 (a)(3)(ii) and (c)(i))

If a parent of a student who is home schooled or parentally placed in a private school does not provide consent for the initial evaluation or reevaluation, the LEA may not use mediation or a due process hearing to override the parent's refusal. The LEA is not required to consider such child as eligible for services. (300.300 (d)(4))

4. If the child is a ward of the state (which does not include a child who has a foster parent) and not residing with a parent, reasonable efforts shall be made to obtain parent consent. No parental consent is required if the parent cannot be found,

parental rights have been terminated, or a judge has appointed an individual with educational authority.

D. Evaluation Cases

1. The Court found no substantive harm when school officials and its evaluators conferred without the parents present to coordinate the drafting of an assessment report which discussed eligibility. The parent was an active participant in the final determination of eligibility N.L. v. Knox County Schools, 38 IDELR 62, 315 F.3d 688 (United States Court of Appeals, 6<sup>th</sup> Circuit (2003)).
2. The Court affirmed the school's right to conduct a medical evaluation of a student, as part of a reevaluation, in spite of the guardian's refusal to consent to such evaluation. It was found that the school articulated reasonable grounds for the necessity of the evaluation. The Court rejected the argument that the medical evaluation would violate the student's right to privacy stating that the guardian could decline special education under the IDEA rather than to decline to have the medical evaluation. Shelby S. v. Conroe Independent School District, 45 IDELR 269, 454 F.3d 450 (United States Court of Appeals, 5<sup>th</sup> Circuit (2006)).
3. In an action raising several procedural issues under the IDEA, one claim by the parents of a student with a disability was that the school district failed to assess the student in his primary language, in particular the psychological assessment. A language interpreter was present during the verbal portions of the assessment but direct verbal cues were not given. The hearing officer agreed with the psychologist that verbal cues would have disturbed the validity of the test and therefore native language administration was not feasible. The Court of Appeals commented that even if they disagreed and found that native language assessment was feasible, there was no evidence in the record that the results of the psychological assessment resulted in the student being denied a suitable educational opportunity Park v. Anaheim Union High School District, 45 IDELR 178, 444 F.3d 1149 (United States Court of Appeals, 9<sup>th</sup> Circuit (2006)).

4. Once a test has been given to a student and has personally identifiable information (such as the student's name, social security number or school number) it becomes an educational record. Therefore, the parents must have access to the test protocol under the Family Educational Rights and Privacy Act (FERPA) Letter to Kelly 211 IDELR 240 (United States Department of Education, Office of Special Education Programs (1980)).
5. FERPA (the Buckley Amendment) requires that a school respond to reasonable requests for explanations and interpretations of education records such as test answer sheets or test protocols not accompanied by the question booklet. Thus, a school should, upon request, provide the parent an opportunity to review the test booklet by either showing the test question booklet, read the questions to the parent or provide an interpretation for the responses in some other manner adequate to inform the parent Letter to Scott City School District, 107 LRP 47713 (United States Department of Education, Family Policy Compliance Office (2007)).
6. The school, by referring a family to an evaluation center to determine whether the child with a disability was also autistic, violated its obligation under the IDEA to evaluate the student in all areas of suspected disability. The Court held that a school cannot abdicate its affirmative duties under the IDEA by simply referring the parents to an evaluation center since it would not ensure that the child is assessed. The Court concluded that such procedural deficiency denied the student a FAPE. N.B. v. Hellgate Elementary School District 50 IDELR 241, 541 F.3d 1202 (United States Court of Appeals, 9<sup>th</sup> Circuit (2008)).
7. The parents were denied reimbursement for private services obtained for their twins with autism. The Court found that the school's evaluation was timely since there was no reason to suspect the twins were autistic until the private service provider contacted the district. However, the parents were partially reimbursed for the private evaluation due to the delay in sending the parents prior written notice of the school's intent to evaluate along with a copy of the procedural safeguards. J.G. v. Douglas County School

District , 51 IDELR 119, 552 F.3d 786 (United States Court of Appeals, 9<sup>th</sup> Circuit (2008)).

8. The Court held that the school district could not proceed with an initial special education evaluation when one parent provided written consent for the evaluation and the other parent provided a written refusal to consent to the evaluation. Both parents had equal legal rights in this matter. The parents are free, however, to litigate any dispute regarding their relative educational decision making rights in the family court. In the Matter of J.H. v. Northfield Public School District 52 IDELR 165 (Minnesota Court of Appeals (2009)). Note: This is an unpublished decision.
9. If a student with a disability on an IEP transfers to a new school district in another state and a new evaluation is required to determine whether the student is eligible for special education in the new state, the evaluation is considered a new evaluation and not a reevaluation. Letter to Champagne 53 IDELR 198 (United States Department of Education, Office of Special Education (2008)).

### **III. Reevaluations (34 CFR 300.303)**

- A. A reevaluation is required to be conducted if conditions warrant, if the child's parent or teacher requests, but at least once every three years. The three year reevaluation may be waived by agreement of the LEA and the parents. In addition, a reevaluation need not be conducted more than once per year unless the parents and the LEA both agree.

The Analysis and Comments to the Regulations published in the Federal Register of August 14, 2006 state that if the parent requests a reevaluation more than once per year and the LEA does not agree that it is needed, the LEA shall provide the parents with written notice of the agency's refusal to conduct the reevaluation. (Page 46640 of the Federal Register)

- B. Consent and Notice required.
  1. A district may conduct the reevaluation without consent if it has taken reasonable measures to obtain consent and the parent has not responded. The IDEA requires that the agency

have a record of its attempts in requesting consent for reevaluation in meeting the reasonable measure requirement.

2. If the parent does not provide consent for the reevaluation and the LEA chooses not to pursue the reevaluation by using the consent override provision (such as a due process hearing or mediation) the LEA need not continue to provide FAPE to the child if the LEA determines that based on existing data the child does not continue to meet special education eligibility criteria.

In such case, the LEA must provide the parent with prior written notice of its proposal to discontinue the provision of FAPE to the child (Questions and Answers on IEPs, Evaluations, and Reevaluations, Questions D-2 (United States Department of Education, Office of Special Education and Rehabilitative Services (OSERS) (2007)).

3. The Court held that by imposing numerous conditions on the reevaluation (including the requirement that the parents meet with the evaluators prior to and after the evaluations prior to the submission to the Team, that all evaluations be conducted in the presence of the parent and the evaluation shall not be submitted to anyone without parent consent) the parents in effect refused to consent. The Court ordered the parent to consent to the reevaluation and held that the parents were not entitled to an Independent Educational Evaluation at public expense. G.J. v. Muscogee County School District 54 IDELR 76 (United States District Court, Middle District, Georgia (2010).

C. Scope of Reevaluation (34 CFR 300.305)

1. If the IEP Team and “other qualified professionals” determine that no additional data is needed to confirm continued eligibility, the District shall:
  - a. Provide notice to parents.
  - b. Afford the right of parents to request additional assessments. The district is not required to conduct the assessment unless requested by the parents.

2. The IDEA permits the IEP Team and other qualified individuals to review the existing evaluation data to determine the scope of the evaluation without a Team meeting required.
3. There is no requirement under the IDEA that a school district conduct a reevaluation of a child with a disability or additional testing solely to satisfy the eligibility criteria established by the College Board or other testing programs to secure testing accommodations on the SAT/ACT. However, there is nothing in the IDEA that prevents a student from submitting to the College Board or other testing organization the results of testing done as part of a reevaluation. Moreover, there is nothing in the IDEA that bars a District from conducting testing to satisfy the eligibility criteria established by the College Board or other testing programs but such testing generally would not be covered by Part B of the IDEA and would have to be paid for out of an alternate funding source. Letter to Moffit 54 IDELR 130 (United States Department of Education, Office of Special Education Programs (2009))

D. Exiting Special Education (34 CFR 300.305(e))

1. An LEA shall reevaluate a child with a disability before determining that the child is no longer eligible for special education services.

A reevaluation is not required due to a termination of eligibility resulting from graduation with a regular high school diploma or exceeding the State's age eligibility for FAPE. Graduation with a regular diploma constitutes a change of placement requiring prior written notice.  
Note: The IDEA also allows parents to revoke consent for continued special education services which would also result in the student being exited from special education.

The term regular high school diploma does not include an alternative degree that is not fully aligned with the State's academic standards, such as a certificate or a general educational development credential (GED). (300.102 (a)(3)(iv))

The Comments state that the IDEA does not require an LEA to evaluate a student for other agency purposes such as a vocational rehabilitation program, a college or other postsecondary setting. (Page 46644)

**IV. Independent Educational Evaluation (34 CFR 300.502)**

- A. Parents have the right to obtain an Independent Educational Evaluation (IEE). Upon requesting an IEE, the public agency shall provide to the parents information about where an IEE may be obtained and the agency criteria applicable for IEEs.
- B. The IEE is at public expense if the parent disagrees with the district's evaluation unless the district initiates a due process hearing. A parent is entitled to only one independent educational evaluation at public expense each time the agency conducts an evaluation with which the parent disagrees. (300.502 (b)(5))
  - 1. District has the right to initiate a hearing without unnecessary delay to show that its evaluation is appropriate.
- C. The IDEA allows a public agency to ask for (but not require) an explanation by the parent why he/she objects to the agency's evaluation. Such request may not unreasonably delay payment or due process.
- D. The IEE at public expense must meet the same criteria as the district uses for its evaluations.
- E. The independent educational evaluation must be considered by the LEA in any decision made with respect to FAPE if the IEE meets the agency criteria. (300.502 (c)(1))
- F. Independent Educational Evaluation Cases
  - 1. The parent of a student who was diagnosed as having an attachment disorder, oppositional defiant disorder, conduct disorder and histrionic personality, obtained an IEE which concluded that the student required a residential placement. The Court found that the school failed to consider the IEE as the IDEA requires since the team did not have a staff member who had knowledge in the suspected disability. Also, the

team failed to reconcile the inconsistent opinions of the IEE's conclusion with the district's position Seattle School District v. B.S. 24 IDELR 68, 82 F.3d 1493 (United States Court of Appeals, 9<sup>th</sup> Circuit (1996)).

2. When a parent requests an Independent Educational Evaluation (IEE) at public expense, the LEA must "without unnecessary delay" either comply with the request or initiate a due process hearing to show its evaluation is appropriate. The Court held that the district failed to file its due process request "without unnecessary delay" when it took almost three months from the parent's request to the filing of a due process hearing complaint. The unexplained and unnecessary delay in requesting the hearing waived the right of the LEA to contest the IEE Pajaro Valley Unified School District v. J.S. 47 IDELR 12 (United States District Court, Northern District, California (2007)).
3. When a parent requests an independent educational evaluation (IEE), the school must either pay for the IEE or request a due process hearing "without unnecessary delay". The Court held that the district's due process hearing complaint filed two months after the IEE request was timely since the parties were in continued communication trying to resolve their differences during this period and the school's winter break began almost immediately after the request was made. J.P. v. Ripon Unified School District 52 IDELR 125 (United States District Court, Eastern District, California (2009)).
4. A school district limited an independent evaluator's ability to observe the placement proposed by the IEP Team to 20 minutes per observation. The Court held that although it may be a procedural violation there was no evidence presented that the parents' ability to meaningfully participate was significantly impacted. The independent evaluator conceded that she was able to provide the parents with an informed and independent opinion which was introduced as evidence in a due process hearing. L.M. v. Capistrano Unified School District, 50 IDELR 181, 538 F.3d 1261 (United States Court of Appeals, 9<sup>th</sup> Circuit (2008)).

5. The Court held that the parents' right to have an IEE includes the right to have their private evaluator conduct an in school observation of the student. School Board of Manatee County v. L.H. 666 F.Supp.2d 1285, 53 IDELR 149 (United States District Court, Middle District, Florida (2009)).
6. The parents were entitled to payment for an Independent Educational Evaluation (IEE) since the district failed to evaluate the student when there was reason to do so. Even though the parents did not "disagree" with the school's evaluation, as required by the IDEA, since there was no evaluation to disagree with, the Court held that the parents were entitled to reimbursement based on equitable considerations Los Angeles Unified School District v. D.L., 49 IDELR 252, 548 F.Supp. 2d 815 (United States District Court, Central District, California (2008)).

**Note: This outline is intended to provide workshop participants with a summary of selected Federal statutory/regulatory provisions and selected judicial interpretations of the law. The presenter is not, in using this outline, rendering legal advice to the participants. The services of a licensed attorney should be sought in responding to individual student situations.**