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Letter to Thorne

Office of Special Education Programs

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Related Index Numbers

390.015 Independent Educational Evaluations (IEEs)

350.016 In General

160.030 Conflict of Laws

185.045 Parental Participation

Judge / Administrative Officer

Judy A. Schrag, Ed.D., Director

Case Summary

Must parents provide notification of their disagreement with the district's evaluation before obtaining an independent educational evaluation (IEE)?

Neither EHA nor its implementing regulations require a parent to notify the district before obtaining an independent educational evaluation (IEE), and the district may not refuse to pay for an IEE simply because the parent failed to provide prior notice. In accordance with Reg. 300.506, however, the district may initiate due process proceedings to demonstrate the appropriateness of its evaluation and, if it prevails, it is not obligated to pay for the IEE.

Full Text

Appearances:

Dr. Joye H. Thorne

Director

Programs for Children with Learning Disabilities

Aldine Independent School District

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Text of Response

This is in reply to your letter requesting clarification of the Office of Special Education Programs' position on the right of parents to obtain an independent educational evaluation (IEE) at public expense under Part B of the Education of the Handicapped Act (EHA-B), as expressed in our letter of October 5, 1988, to Ms. Jill Gray in the Texas Education Agency. Your questions and this office's responses are discussed below. A similar reply has been sent in response to an inquiry from Congressman Jack Fields.

Q.1. In order to obtain an independent evaluation at public expense, how must the parent notify the IEP committee of a disagreement and request an independent evaluation before seeking the independent evaluation?

A. Under 34 CFR § 300.503(b), "[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." 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 the 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. However, under 34 CFR § 300.503(b), "the public agency may initiate a hearing under 34 CFR § 300.506 of this subpart to show that its evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense." 34 CFR § 300.503(b).

Q.2. Must a parent notify us of the particular area(s) of disagreement so that we may avoid unnecessary or redundant testing at public expense? In other words, if a parent disagrees with the intelligence testing, may we require that only another intelligence test be done at public expense?

A. There is no requirement in the EHA-B statute or regulations that a parent specify areas of disagreement with the public agency's evaluation. 20

U.S.C. 1415(b)(1)(A); 34 CFR § 300.503. Thus, when the parent requests an IEE because of a disagreement with the public agency's evaluation, the public agency is responsible for reimbursement of the entire IEE. While a public agency may request that the parent specify the areas of disagreement, a public agency may not deny IEE reimbursement when a parent has not specified the basis for his/her disagreement with the public agency's evaluation.

However, if the public agency wishes to challenge the parent's request, the public agency may request an impartial due process hearing to show that its evaluation is appropriate. 34 CFR § 300.503(b).

Parents who are unwilling to notify school officials of the nature of their disagreement prior to obtaining an IEE should be aware that the district is free to bring the matter before an impartial hearing officer to demonstrate the appropriateness of the district's evaluation. Where the hearing officer concludes that all but a particular test was appropriate, the hearing officer may limit reimbursement to the cost of the one independent test. However, should the hearing officer be persuaded either that the results of the independent test justified further testing or that the examiner could not verify the reliability of the independent test without repeating the other portions of the evaluation, then the hearing officer would be justified in ordering that the parents be reimbursed for a complete evaluation.

Q.3. When a parent notifies us of a disagreement and requests an independent evaluation, how may a public agency ensure that the fees charged will be reasonable rather than giving a carte blanche to the evaluator?

A. Under 34 CFR § 300.503(e), "[W]hen an independent 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 which the public agency uses when it initiates an evaluation." The public agency may also establish criteria to ensure that the cost of a publicly-funded IEE is reasonable. This has been the

Department's position since the EHA-B regulations were first issued. The Analysis to the Final Regulations stated that: "public agencies should not be asked to bear the costs of unreasonably expensive independent evaluations." Appendix A to 45 CFR Part 121a [the predecessor to 34 CFR Part 300], published at 42 FR 42511 (August 23, 1977).

Recently, the Department has addressed this issue in correspondence to Mr. W.N. Kirby, Commissioner of the Texas Education Agency. The advice provided in our letter dated May 4, 1989, is particularly applicable to this portion of your inquiry and stated in relevant part:

In order to avoid unreasonable charges for IEEs, a district may establish maximum allowable charges for specific tests. If a district does establish maximum allowable charges for specific tests, the maximum cannot simply be an average of the fees customarily charged in the area by professionals who are qualified to conduct the specific test. Rather, the maximum must be established so that it allows parents to choose from among the qualified professionals in the area and only eliminates unreasonably excessive fees. When enforcing reasonable cost containment criteria, the district must allow parents the opportunity to demonstrate that unique circumstances justify an IEE that does not fall within the district's criteria.

If an IEE that falls outside the district's criteria is justified by the child's unique circumstances, that IEE must be publicly-funded.

In addition, it should be noted that if the total cost for an IEE exceeds the district's cost criteria and there is no justification for the excess cost, the cost of the IEE must be publicly-funded to the extent of the district's maximum allowable charge. Where an agency does not adopt cost criteria, parents are free to obtain the services of any qualified evaluator. If, in that circumstance, the public agency believes the fees charged were unreasonable, it has two options: (1) pay the fees charged to the parents, or (2) challenge the right of parents to be reimbursed for the particular fee in a due process hearing, where the agency would have to show that the fee was "unreasonably

expensive."

Q.4. If the parent disagrees with the public agency's evaluation, how many independent evaluations at public expense may a parent seek? When one is performed, may a parent get multiple or yearly independent evaluations without an intervening public agency evaluation? In other words, is a parent entitled to only one publicly funded independent evaluation for each public agency assessment with which the parent disagrees?

A. Federal regulations provide that when a parent disagrees with the results of a public agency evaluation, the parent is entitled to reimbursement from the public agency for only one complete IEE. 34 CFR § 300.503(b). *See also, Hudson v. Wilson*, 828 F.2d 1059, 1065 (4th Cir. 1989). A parent's right to an IEE, however, is available each time the public agency conducts an evaluation. This would include the child's preplacement evaluation, the triennial reevaluation, or more frequent reevaluations conducted at the request of the child's parent or teacher or if conditions warrant. 34 CFR §§ 300.531 and 300.534(b). However, the public agency may always initiate an impartial due process hearing to show that its evaluation is appropriate. 34 CFR § 300.503(b). The regulation at 34 CFR § 300.534(b) requires that a reevaluation "of the child, based on procedures which meet the requirements under § 300.532, is conducted every three years or more frequently if conditions warrant or if the child's parent or teacher requests an evaluation." If a parent believes that a reevaluation is warranted, the parent should request that the public agency conduct a reevaluation.

Q.5. After a parent has received reimbursement for an independent evaluation in year three of a three year evaluation cycle, is the public agency required to pay for parent initiated independent evaluations performed unilaterally and without notice to the IEP Committee and which were performed during years one and two of the evaluation cycle?

A. Under 34 CFR § 300.534(b), a public agency must conduct a reevaluation of the child, in accordance with the requirements of 34 CFR §

300.532 "every three years or more frequently if conditions warrant or if the child's parent or teacher requests an evaluation." If a parent disagrees with the current evaluation, a parent may request a publicly-funded IEE. Your question describes a situation in which a parent receives a complete IEE at public expense at the conclusion of a three year evaluation cycle and also requests reimbursement for complete IEEs performed in two previous years. If these evaluations were not initiated by the parent as a result of public agency evaluation with which the parent disagreed, the parent would not be entitled to reimbursement for these IEEs. As stated earlier, the parent is entitled to one IEE for each evaluation performed by the public agency if the parent disagrees with the public agency evaluation. However, if the parent obtains an IEE at private expense, the results "must be considered by the public agency in any decision made with respect to the provision of a free appropriate public education to the child." 34 CFR § 300.503(c)(1). It appears that in the situation described in your inquiry, the individualized education program (IEP) committee considered the results of these parent initiated evaluations.

Your inquiry indicates, however, that the parent sought an IEE more than two years after the public agency evaluation with which he disagreed. (See question No. 8).

The EHA-B regulations do not establish timelines regarding how long after receiving the results of a child's public agency evaluation a parent can wait to request reimbursement for an IEE. In the situation presented by your inquiry, however, it would not seem unreasonable for the public agency to deny a parent reimbursement for an IEE that was conducted more than two years after the public agency's evaluation. Therefore, it would not be necessary for the public agency to initiate a hearing in this situation.

Q.6. After the parent notifies the IEP Committee of the disagreement and requests an independent evaluation, what procedure is followed in selecting the independent evaluator if the parent does not choose an evaluator from a list of qualified persons

proposed by the public agency? and

Q.7. If a parent requests that the agency contract with an evaluator who is unacceptable to the public agency, what procedure should be followed to ensure that the evaluator be acceptable to both parties?

A. As indicated in response to question 4 above, whenever 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 which the public agency uses when it initiates an evaluation. 34 CFR § 300.503(e). The public agency should have criteria for the minimum qualifications of the persons who conduct evaluations. Listing the names and addresses of evaluators who meet the minimum qualifications of the public agency can be an effective way for agencies to inform parents of how and where they might obtain an IEE. If the child's needs can be appropriately evaluated by the persons identified on the public agency's list *and* the list exhausts the availability of qualified persons within the geographic area specified, then a district can restrict parents to selecting from among those persons on the list. However, when enforcing IEE criteria, the district must allow the parents the opportunity to demonstrate that unique circumstances justify an IEE that does not fall within the district's criteria. If an IEE that falls outside the district's criteria is justified by the child's unique circumstances, that IEE must be publicly funded. If the agency's list does not exhaust the number of persons minimally qualified to evaluate the unique needs of every child in the district, parents are free to select whomever they choose, so long as the evaluator(s) meet the agency's location, qualification, and reasonable cost criteria.

Q.8. What is the maximum amount of time after a public agency evaluation that a parent must notify an IEP Committee of a disagreement and request an independent evaluation at public expense? Must we either call for a hearing or pay for an evaluation if a parent waits more than two (2) years after the public agency evaluation to notify us of a disagreement and request an independent evaluation?

A. See answer to question No. 5.

Q.9. Can a parent disagree with a publicly funded independent evaluation and then receive another one at public expense?

A. As stated in response to question 4 above, 34 CFR § 300.503(b) limits reimbursement for an IEE to a single evaluation. The regulation at 34 CFR § 300.503 does not give the parent the right to an IEE at public expense, if the parent disagrees with a publicly funded IEE.

I hope that the above information is of assistance. If this office can be of further service, please let me know.

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Director

Office of Special Education

Programs

Regulations Cited

34.300.503.B

34.300.506