

Special Education Evaluations: Key Legal Issues To Know and Understand

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WHAT IS THE PURPOSE OF AN IDEA EVALUATION?



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1. Determine whether a student has an IDEA disability and, because of the disability, the student needs special education and related services.

2. Provide information to help the IEP Team identify the specialized instruction and related services the student needs to receive FAPE.



A.W. v. Middletown Area Sch. Dist., 115 LRP 4105 (M.D. Pa. 2015)

A student's evaluation was inappropriate because it was limited to a psychiatric evaluation and lacked information from which the district could develop a positive behavior plan, craft IEP goals, or rule out a specific learning disability. The Court emphasized the importance of a “full and individual” initial evaluation.



In re: Student with a Disability, 115 LRP 4105 (SEA Mont. 2017)

A Montana school district did not deny FAPE to a 6-year-old child with a speech and language impairment by not acquiescing to her parents' request for a 1:1 aide without first re-evaluating/assessing her needs.



A district “must conduct a full and individual initial evaluation” before providing special education and related services to a student.

Reg. 300.301(a).



Initial evaluation – Preplacement evaluation

May be initiated by district or
parent.



**Reevaluation – for students who
are already receiving special
education.**



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**Must the district conduct an
initial evaluation just
because the parent requests
one?**



No. If the district does NOT suspect the student has a disability and needs special education, it may deny the request. But whenever a parent request for any evaluation is denied...



Prior written notice to the parent is required.

- Description of action refused.
- Explanation of why refused.
- Documentation and data used as basis of refusal.
- Other options considered and why rejected.
- Other factors relevant to refusal.
- Copy of procedural safeguards.
- Sources to contact for assistance.

Reg. 300.503.



Parent's IDEA options:

- State complaint.
- Mediation.
- Due process hearing.



WHAT TIMELINES APPLY TO AN INITIAL EVALUATION?



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Timelines Established by Each Respective State

- Montana-60 calendar days of receiving parental consent for the evaluation-Administrative Rules of Montana (ARM) 10.16.3321
- North Dakota-60 calendar days-Guidelines: Evaluation Process - North Dakota State Government



Timelines Established by Each Respective State

- South Dakota-25 school days from parental consent-parent and school administration may agree to different time line.-
South Dakota Administrative Rules: Article 24:05:25:03



CHILD FIND AND THE DUTY TO EVALUATE



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IDEA requires that all children with disabilities... “who are in need of special education services be identified, located and evaluated.”

Reg. 300.311; Utah State Office of Education
Special Education Regulations-Regulation II-A;
*Wiesenberg v. Board of Educ. Salt Lake City
School Dist.*, 181 F. Supp. 2d 1307, 36 IDELR
34 (D. Utah 2002)



Child Find duty is triggered when district has reason to suspect a disability coupled with reason to suspect special education services may be needed to address the disability.

Ridley School District v. MR and JR ex rel. ER,
680 F.3d 260, 58 IDELR 271 (3d Cir. 2012).



Compliance with Child Find – two-part inquiry

1. When did district have reason to suspect presence of disability and need for special education



2. Did district evaluate student within a reasonable time after having notice of circumstances likely to indicate a disability and a need for services?



Harrison School District Two, 57 IDELR 295 (OCR 2011)

- 2008-2009 enrollment form stated student diagnosed ADHD and on medication;
- 2009-2010 enrollment form - same information. Behavior escalated. RtI started. No IEP until June 2010.



- District failed to timely assess – waited 18 months after information where school should have suspected a disability and evaluated.
- RtI may be useful to identify instructional strategies, but it cannot be used to delay or deny evaluation in case of suspected disability.



*In re: Student with a Disability, 116 LRP
35570 (SEA SD 2015)*

Administrative Law Judge determined that school district failure to order an evaluation after referral and request for evaluations by the guardian violated the IDEA and deprived of FAPE. Judge rejected district argument that “their hands were tied regarding a comprehensive evaluation for special services due to the failure of the TAT (RtI) process to be completed.”



Student v. School District, 57 IDELR 240 (SEA TX 2011)

- Year 1 – student identified as learning disabled;
- Year 2 – student began to exhibit significant behavior problems – aggression, work refusal, disrespect of authority.
- Year 3 – November to December – 12 discipline referrals. Spring semester – 19 discipline referrals, 1 day ISS, 6 days OSS.



- Year 3 – fall – FBA done – BIP prepared. Placed in DAEP.
- March Year 3 to November Year 4 – 23 discipline incidents. Police called many times. Absences increased; grades decreased.
- November Year 4 – assessed and found to be ED.

- District failed to timely assess for ED.
- District should have suspected ED as early as Year 2.
- Student entitled to compensatory services.

Do not fail to timely assess a student because the student is engaging in response to intervention strategies.



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Questions and Answers on Response to Intervention and Early Intervening Services, 47 IDELR 196 (OSEP 2007)

RtI is not intended to be a replacement for a comprehensive special education evaluation, but is instead one tool out of many a district can employ to identify eligible students.



*Memorandum to State Directors Re:
Response to Intervention, (OSEP 2011)*

- Use of RtI does not diminish district's obligation to obtain consent and evaluate any time district has reason to suspect a disability and a need for special education.
- Requirement applies regardless of whether district is using, or plans to use, RtI strategies with student.



- RtI cannot be a basis to delay or deny an evaluation.
- District may deny parent request to evaluate if it does not suspect a disability and has given parent prior written notice.
- But participation in RtI should not be the basis for the refusal to evaluate.



In re: Student with a Disability, 114 LRP 27309 (SEA UT 2014)

- An IHO determined that a Utah district committed two procedural violations of the IDEA pertaining to its child find obligations namely, (1) District AP informed parent of student that student would not qualify for an IEP and probably would not qualify for a § 504 plan because of his good grades. A single person employed by a school district should not be making an IDEA eligibility determination; (2) GT program coordinator testified that District staff were "very much guided away from initiating that testing." IHO ruled that District should not be encouraging its staff to avoid special education evaluations if an evaluation is appropriate.
- Although these violations did not directly affect a middle school student or his parents, the IHO ordered the district to provide training to its staff concerning the district's child find obligations under the IDEA.



Screenings by teacher/specialist to determine appropriate instructional strategies for curriculum implementation – NOT an evaluation. Applies to both special education and general education student.

Reg. 300.302.



PARENT CONSENT



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Parent informed consent required for

- Initial evaluation.
- Reevaluation.

Reg. 300.300(a), (c).



District should seek consent promptly. Not acceptable to wait several months after district has reason to suspect a disability and a need for special education.

71 Fed. Reg. 46,540 (2006).



Parent refuses to consent (initial/reevaluation)

- District may file due process hearing to override lack of consent (except private/home school student).
- May, but **IS NOT REQUIRED** to do so.

Reg. 300.300.



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If district declines to pursue evaluation in light of parent refusal to consent, district does not violate obligation regarding child find (Reg. 300.111) and to evaluate and determine eligibility. (Reg. 300.301 – 300.311.)



**Consent to initial evaluation is NOT
consent for initial provision of services.**

Reg. 300.300(a)(1)(ii).



WHAT IS “INFORMED CONSENT”?



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- Parent has been fully informed of all information relevant to the activity.
- Parent understands and agrees in writing to carry out the activity.
- Parent understands consent is voluntary and can be revoked.

Reg. 300.9



WHAT ARE REASONABLE EFFORTS TO OBTAIN INFORMED CONSENT?



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- Telephone calls made/attempted and result.
- Correspondence sent and response.
- Visits to home/place of employment and results.

Reg. 300.322(d)



Consent?

Yes

No

X

School has explained evaluation procedures.

X

I understand the evaluation process.

X

I consent for my child to be evaluated immediately.

----- **NO** -----



*Downey Unified School District,
112 LRP 1261 (SEA CA 2011)*

Attorney representing mother and special education student could not by letter consent to assessment. Assessment was not a contract. Unambiguous parental consent was required.



G.J. v. Muscogee County School District,
58 IDELR 61 (11th Cir. 2012)

Parents of student with autism refused to consent to 3 year reevaluation unless school would consent to their terms such as:

- By a person of their choice;
- Parents to get results before the school;
- Evaluation could not be used by school in litigation.



- School claimed there was no consent.
- Three years of litigation.
- School prevailed.



Circuit Court:

- Parental conditions on reevaluation was really a refusal to consent.
- School was entitled to reevaluate using persons of its choosing.
- Parents cannot force school to rely on their private evaluation.
- Upheld District Court's order for parents to consent to the reevaluation.



- Because the school had never been able to do a 3 year reevaluation, there was no evaluation to disagree with and no right to an IEE.



*Panama – Buena Vista Union School District, 111
LRP 67764 (SEA CA 2011)*

Three year old student had been receiving private speech therapy. Referred to district for IDEA evaluation. During screening for speech and language skills (consented to by parents), student's hyperactivity and family history of autism and learning disabilities was revealed. Student scored very low on all screening instruments.



District proposed IDEA evaluation in all areas, not just speech and language. Details of plan and procedural rights explained to parent. Parent would consent only to a speech and language assessment



District has a duty to assess in all areas of disability. Parents must permit the district to conduct necessary and appropriate assessments if student is to receive IDEA services.



If parent does not consent to an initial assessment, district may but is not required to request a due process hearing to override lack of consent.



Court ruled district could evaluate without parent consent

- District has reason to suspect a disability and need for special education
- There was reason to suspect more than a speech and language disability
- District had given proper notice to parent
- Parent sought special education services and so had to comply with district's reasonable and necessary requests to assess.



Parent consent not required before review
of existing data (initial or reevaluation)

Reg. 300.300

Parent consent not required to administer
test or evaluation administered to all
students.

Reg. 300.300



WHAT ARE THE REQUIREMENTS FOR AN EVALUATION?



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- A variety of assessment tools and strategies.
- That gather relevant functional, developmental and academic information about the student.
- Includes information from the parent.



- May NOT consist of a single measure or instrument only;
- Technically sound;
- Not racially or culturally biased;
- Provided and administered in native language/mode of communication unless clearly not feasible to do so.

Salt Lake City (UT) Sch. Dist., 116 LRP 52359
(OCR 2016)

School district will required to overhaul its evaluation policies after OCR discovered that it may have "over-identified" ELs as students with disabilities under the IDEA and Section 504. Noting that the district failed to properly analyze EL students' language and cultural barriers prior to placing them in special education. Agreed resolution included



Salt Lake City (UT) Sch. Dist., 116 LRP 52359 (OCR 2016)

Resolution included District agreement to:

- Implement special education identification, Child Study Team pre-referral, and special education (SPED) referral processes that consistently take into consideration the linguistic and cultural background of students;
- Delete the one or two year requirement before an EL student can be referred for a special education evaluation;
- Ensure that current objective assessments of proficiency in English and the primary or home language are available prior to or upon referral of students with a primary or home language other than English (PHLOTE students) for testing, evaluation, or placement in special education services. The procedures will ensure that consideration of language proficiency is documented



Salt Lake City (UT) Sch. Dist., 116 LRP 52359

(OCR 2016)

- Require testing or evaluation using only the language modalities in which the student is objectively known to be proficient, if feasible; and develop criteria for determining when a bilingual diagnostician will conduct the evaluation of EL students with potential disabilities;
- Provide for testing or evaluation by staff persons who are qualified to administer special education tests in the languages required (whenever appropriate). Establish objective criteria by which the District determines which staff members are qualified to administer special education testing and evaluations in languages other than English.
- Require that any group of persons making diagnostic or placement decisions includes at least one person who is knowledgeable about the student's culture and language, discusses and understands the effects of language and culture on the evaluation , and considers the validity and reliability determinations noted in the diagnostic report.



Salt Lake City (UT) Sch. Dist., 116 LRP 52359 (OCR 2016)

- Require that diagnostic reports for EL students include: (1) analysis of the effect of linguistic and cultural factors on educational history and learning, (2) whether (and how) diagnostic instruments or procedures were altered for the student; (3) documentation of the use of translation or interpretation in the administration of diagnostic instruments or procedures, and the effect on the validity and reliability of the results; (4) evaluation of the validity and reliability of test results, considering the effect of differences in criteria related to language proficiency; and (5) cross-validation of formal diagnostic measures with other data available about the student.
- Require that placement decisions are based on a variety of information, such as a review of existing records, the results of pre-referral interventions and curricular adaptations, work samples, formal and informal assessments, and observations.



- Will most likely provide accurate information on what student knows and can do academically, developmentally and functionally;
- Valid and reliable instruments;
- Administered by trained/knowledgeable personnel;
- Include information related to involvement and progress in the general curriculum.



- Administered in accordance with producer's instructions.
- Not just cognitive assessment.
- Evaluates what it is meant to evaluate rather than being skewed by sensory, manual or speaking problems.



- Assessed in all areas of suspected disability.
- Health, vision, hearing, social & emotional, general intelligence, academic performance, communication and motor abilities.



- Sufficiently comprehensive to identify all special education and related services needs, whether or not commonly linked to student's disability.
- Provide relevant information to determine educational needs of student.

Reg. 300.304.



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Fort Osage R-1 School District v. B.S., 56 IDELR 282 (8th Cir 2011)

Student diagnosed at birth with Down's Syndrome. At 3 years old, district evaluated and qualified as OHI. Private evaluation at 9 years old identified student autistic. Then district evaluation identified as OHI and autistic. Parent sued claiming lack of FAPE because of incorrect eligibility.



Focus at every level was not whether he should have been labeled autistic, but the nature of his IEP



Each year, IEP focused on current educational status, had meaningful goals and many resources to help student. He had progressed. Negative behaviors had stopped after first FBA & BIP.



“Given the IDEA’s strong emphasis on identifying a disabled child’s specific needs and addressing them, we believe that the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantially immaterial because the IEP will be tailored to the child’s specific needs.



Consequently, while the IDEA intends that the IEPs contain accurate disability diagnoses, we will not automatically set aside an IEP for failing to include a specific disability diagnosis or containing an incorrect diagnosis.



Instead, as with an other purported procedural defect, the party challenging the IEP must show that the failure to include a proper disability diagnosis compromised the pupil's right to an appropriate education, seriously hampered the parent's opportunity to participate in the formulation process, or caused a deprivation of educational benefits.”



**Goal for every initial
evaluation/reevaluation should
be that it is sufficient to withstand
an IEE challenge.**



REEVALUATIONS



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Reevaluation addresses changing needs:

- Every 3 years, unless district and school agree it is unnecessary; and
- Parent/teacher requests reevaluation;
- District determines reevaluation is needed.
- Not more than 1 per year, unless parent and district agree.

Reg. 300.303



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Three Phases of a reevaluation

1. An initial review of existing assessment data;
2. Administration of any needed assessments;
3. Interpretation of results and determination of eligibility and education needs.



Same requirements for procedures, test instruments and administration apply but:

- Individualized to address current needs.
- Review of existing evaluation data may indicate no additional data is needed to determine whether student continues to have a disability and to determine educational needs;
- If so, notify parent of right to request an assessment.

Reg. 300.305



When is a Full Reevaluation Recommended?

1. A substantial change in the student's academic performance or disabling condition;
2. A change in placement, particularly when the new placement is a more restrictive environment;
3. Prior to determining that a child is no longer a child with a disability.



What about an IEE presented by the Parent?

An IEE is a potential source of additional information that the public agency and parent could consider in determining whether the educational or related services needs of the child warrant a reevaluation, but it would not be considered a reevaluation.

71 Fed. Reg. 46,641 (2006).



Does a special education student who withdraws from public school to go to a private school have a right to a reevaluation?



Student v. McKinney ISD, No. 107-SE-110 (Tex SEA 2010)

- Parentally placed private school children have no right to FAPE, only to be considered for proportionate share services;
- School has Child Find duty to all children in its boundaries including those in private schools.



- Once special education student withdrew and began to attend private school, he became a parentally placed private school student.
- District was required to reevaluate student at least every 3 years as part of its ongoing Child Find duties.

Who Chooses the evaluators?



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Andress v. Cleveland Independent School District, 64 F.3rd 176 (5th Cir. 1995)

A parent who wants student to continue to receive special education services must allow the district to reevaluate the student using its own personnel even if the parent claims the reevaluation will pose a mental health risk. District did not have to accept parent's evaluation. If parent does not allow reevaluation, student will no longer be eligible for services after reevaluation is due.



Tustin Unified School District,
110 LRP 24125 (SEA CA April 2010)

Even though IEP documents stated the assessor who performed the three year reevaluations the last two times would also perform the next one, the district was free to choose another qualified person to perform the reevaluation. The district did not have to accept and rely on the parent's evaluation.



*Shelby S. v. Conroe Independent
School District, 454 F.2d 450
(5th Cir. 2006)*

District could require medically fragile student to be reevaluated by doctor of its choice to determine nature of her condition and the specific accommodations she required.



Evaluation was not a violation of her right to privacy. Student is free to decline special education rather than submit to evaluation.



EVALUATIONS TO END SERVICES



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***What if the District Suspects
a student no longer has a
disability?***



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Before determining a child is no longer a child with a disability, the district must evaluate the student.

Reg. 300.305(e)



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Under IDEA regulations, there is no requirement for an FIE before graduation.



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LESSONS LEARNED



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1. Train ALL staff to be sensitive to circumstances which may indicate a need for a special education evaluation:
 - Struggling academically despite reasonable efforts on student's part
 - Student receiving RtI and having discipline problems
 - RtI starts to look like specialized instruction

- Parent reports diagnosis of a disability whether there is a medical report or not
- Social isolation and withdrawal
- Extreme emotional meltdowns and outbursts
- Student is placed in a mental health facility



2. Be aware of two key issues:

1. When did district have reason to suspect student may have a disability and, because of it, need special education and related services?



2. Did district begin the evaluation process within a reasonable time after there is reason to suspect a disability and need for special education?



3. Once there is reason to suspect a disability and a need for special education, do not delay the evaluation process while student participates in RtI services.



4. Every evaluation and reevaluation should comply with IDEA requirements for evaluation procedures, evaluation instruments and evaluation administration. It may be cheaper to pay for an IEE but every evaluation should be good enough to give the district the option to ask for a hearing to show it is appropriate.



5. If district timely seeks consent for initial evaluation, this begins the evaluation process and satisfies the district's child find duty



6. If parent refuses consent for initial evaluation, should district request due process hearing to override lack of consent?

-Yes- But parent may still refuse special education services after the evaluation

-No- District will not be out of compliance with Child Find and evaluation requirements of IDEA

-Must decide on a case-by-case basis



7. Parent cannot control the nature or extent of an initial evaluation, or the persons who perform it, through selective consent. Selective consent is not consent. District may request due process to override lack of consent to fully evaluate.



8. During any evaluation, if circumstances indicate additional areas that should be evaluated than originally planned, district should seek consent for more testing so that all areas of suspected disability are evaluated. Be careful on fully relying upon outside assessment and REED decisions from outside the District.



9. Parent refuses consent for reevaluation, or gives only selective consent, District may, but is not required to, use due process hearing to override lack of consent and fully evaluate.



10. District can refuse parent request for evaluation at any time, but district must provide full and complete prior written notice.



11. When in doubt—call your
school attorney! 😊



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THANK YOU!
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