

EVALUATION AND ELIGIBILITY

OVERVIEW FOR IDEA HEARING OFFICERS

STUDENT HEARING OFFICE HEARING OFFICER TRAINING
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I. INTRODUCTION

- A. In 2004, Congress reauthorized the Individuals with Disabilities Education Act as the Individuals with Disabilities Education Improvement Act.¹ Implementing regulations followed in August 2006.²
- B. An evaluation is the initial step in the provision of special education and related services to a child with a disability. The IDEA sets forth several procedures that local educational agencies (“LEA”) must adhere to ensure a legally compliant evaluation process.³ A full and individual initial evaluation, in accordance with 34 C.F.R. § 300.305 and 34 C.F.R. § 300.306, is required before the initial provision of special education and related services to a child with a disability.⁴
- C. The purpose of the evaluation is to detect the existence of the child’s disability (or disabilities) and the nature and extent of the special education and related services that the child needs.⁵

¹ See Pub. L. No. 108-446, 118 Stat. 2647 (Dec. 3, 2004), effective July 1, 2005. The amendments provide that the short title of the reauthorized and amended provisions remains the Individuals with Disabilities Education Act (“IDEA”). See Pub. L. 108-446, § 101, 118 Stat. at 2647; 20 U.S.C. § 1400 (2006) (“This chapter may be cited as the ‘Individuals with Disabilities Education Act.’”).

² See 34 C.F.R. Part 300 (August 14, 2006).

³ See 34 C.F.R. §§ 300.304 – 300.311.

⁴ 34 C.F.R. § 300.301(a).

- D. A parent of a child or an LEA may initiate a request for an initial evaluation to determine if the child is a child with a disability.⁶ Parental informed consent for an initial evaluation is required.⁷
- E. The LEA must provide notice to the parent(s) of a child with a disability, in accordance with § 300.503 (prior written notice), that describes any evaluation procedures the LEA proposes or refuses to conduct.⁸

II. EVALUATION PROCEDURES

- A. Definition. An evaluation means procedures used in accordance with §§ 300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.⁹ A reevaluation means an evaluation conducted after the initial evaluation.¹⁰
- B. Conduct of Evaluation. In conducting the evaluation, the LEA must use a variety of tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, to determine whether the child is eligible and, if so, the content of the child's IEP.¹¹

⁵ 34 C.F.R. § 330.15.

⁶ 34 C.F.R. § 300.301(b).

⁷ 34 C.F.R. § 300.300.

⁸ 34 C.F.R. § 300.304(a).

⁹ 34 C.F.R. § 300.15. In the District of Columbia, an evaluation is defined to include the process of reviewing at a meeting of the IEP team information from parents; existing data; and results of assessment procedures used to determine the child's present level of performance, educational needs and whether a child has a disability, and the nature and extent of the special education and related services that the child needs. D.C. Mun. Reg. tit. 5-E § 3001.1.

¹⁰ D.C. Mun. Reg. tit. 5-E § 3001.1.

¹¹ 34 C.F.R. § 300.304(b)(1). In the District of Columbia, the IEP team is tasked with implementing the IDEA procedures for determining eligibility when conducting an evaluation even though the procedures under the IDEA (*see* discussion in paragraph IV.D., *infra*) are intended for use when interpreting evaluation data. D.C. Mun. Reg. tit. 5-E § 3005.3.

- C. The evaluation must be sufficiently comprehensive.¹² The LEA cannot use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child.¹³ The evaluation must identify all of the child's special education and related services needs, whether or not commonly linked to the disability category.¹⁴
- D. Timeline. Under IDEA, an initial evaluation must be conducted within 60 calendar days of receiving parental consent for the evaluation *unless* the State establishes a different timeframe.¹⁵

Note, however, that in the District of Columbia, DCPS shall assess or evaluate a child who may have a disability and who may require special education services within 120 calendar days from the date that the child was *referred* for an evaluation or assessment.¹⁶ The 120 calendar days runs from referral, not consent.¹⁷

- E. Initial Evaluation versus Reevaluation. An initial evaluation of a child is the first complete assessment of a child to determine if the child has a disability under the IDEA, and the nature and extent of special education and related services required. Once a child has

¹² 34 C.F.R. § 300.304(c)(6). Qualified evaluators, under the direction of the IEP team, shall administer tests and other assessments procedures as may be needed to determine: (1) whether the child has a particular category of disability or, in the case of a reevaluation of a child, whether the child continues to have such a disability; (2) the present levels of performance and educational needs of the child; (3) whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and (4) whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general curriculum. D.C. Mun. Reg. tit. 5-E § 3005.5.

¹³ 34 C.F.R. § 300.304(b)(2). The LEA is required to use assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child. 34 C.F.R. § 300.304(c)(7).

¹⁴ 34 C.F.R. § 300.304(c)(6).

¹⁵ 34 C.F.R. § 300.301(c).

¹⁶ D.C. Code § 38-2561.02(a). A question arises as to the application of § 38-2561.02(a) to all District of Columbia students.

¹⁷ Note that there is an inconsistency between the D.C. Code and D.C. Municipal Regulations. Section 3005.2 of the D.C. Municipal Regulations require the IEP team to conduct an initial evaluation of a child *within a reasonable time of receiving a written referral and parental consent* to proceed and within timelines consistent with Federal law and D.C. Code § 38-2501(a). DCMR 3005.2 (emphasis added). D.C. Code § 38-2501(a) has been repealed.

been fully evaluated, a decision has been rendered that a child is eligible for services under the IDEA, and the required services have been determined, any subsequent evaluation of a child would constitute a reevaluation.¹⁸

- F. Existing Evaluation Data. The evaluation process includes the review of existing evaluation data as part of an initial evaluation (if appropriate¹⁹) or any reevaluation to identify what additional data is needed, if any, to determine eligibility (or continued eligibility) and the educational needs of the child.²⁰

The review is to be made by the IEP team and other qualified professionals, as appropriate.²¹ “Other qualified professionals” include other professionals who may not be a part of the child’s IEP team in the group that determines if additional data are needed to make an eligibility determination and determine the child’s educational needs.²²

The review of existing evaluation data does not have to take place in

¹⁸ *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46640 (August 14, 2006).

¹⁹ In limited circumstances an LEA can conduct an initial evaluation only through review of existing data on the child. In most instances, review of existing data on the child generally would be insufficient for a team to determine whether a child qualifies as a child with a disability and the nature and extent of the child’s educational needs. *Letter to Copenhaver*, 108 LRP 16368 (OSEP 2007).

In the District of Columbia, following a referral, an IEP team shall meet to review exiting data, information from the parent, pre-referral interventions and strategies, current classroom-based assessments, and observations by teachers and related service providers. D.C. Mun. Reg. tit. 5-E § 3004.1(e)(1) – (5).

²⁰ 34 C.F.R. § 300.305(a). *See also* D.C. Mun. Reg. tit. 5-E § 3005.4 for a list of existing evaluation data on the child that the IEP team, including other qualified professionals, must review to determine: (1) whether the child has a particular category of disability or, in the case of a reevaluation of a child, whether the child continues to have such a disability; (2) the present levels of performance and educational needs of the child; (3) whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and (4) whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general curriculum.

²¹ *Id.*

²² *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46644 (August 14, 2006).

a meeting.²³ Should the IEP team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability, and to determine the child's educational needs, the LEA must notify the child's parent(s) of its determination and the reasons for the determination.²⁴

The parent(s) must also be advised of the right to request an assessment to determine whether the child continues to be a child with a disability, and to determine the child's educational needs.²⁵ The LEA, however, is not required to conduct an assessment unless requested to do so by the parent(s).²⁶ There is no requirement that a reason for the reevaluation be given by the parent(s) and the reevaluation cannot be conditioned on the parent(s) providing a reason for requesting a reevaluation.²⁷

Should the IEP team and other qualified professionals, as appropriate, determine that no additional data are needed, and a request for an assessment has not been made by the parent(s), then the review of the existing data may constitute the reevaluation.²⁸ Conversely, should additional data are needed, the LEA must administer such assessments and other evaluation measures as may be needed.²⁹

G. Checklist.

1. An LEA cannot use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child.³⁰
2. An LEA must use technically sound instruments that may assess the relative contribution of cognitive and behavioral

²³ 34 C.F.R. § 300.305(b).

²⁴ 34 C.F.R. § 300.305(d).

²⁵ 34 C.F.R. § 300.305(d)(1)(ii).

²⁶ 34 C.F.R. § 300.305(d)(2). The parent must always be given the opportunity to request further assessment even if the LEA determines that no additional evaluation data are needed. *Letter to Copenhaver*, 108 LRP 16368 (OSEP 2007).

²⁷ *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46640 (August 14, 2006).

²⁸ *Letter to Anonymous*, 48 IDELR 136 (OSEP 2007).

²⁹ 34 C.F.R. § 300.305(c).

³⁰ 34 C.F.R. § 300.304(b)(2).

factors, in addition to physical or developmental factors.³¹

3. Selected assessments and other evaluation materials use to assess a child must not discriminate on a racial or cultural basis.³²
4. Selected assessments and other evaluation materials must be administered in the child's native language or other mode of communication (e.g., sign language) and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible.³³
5. Selected assessments and other evaluation materials are to be used for the purposes for which the assessments or measures are valid and reliable and administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the assessments.³⁴
6. An LEA must also assess specific areas of educational need and not merely administer assessments that are designed to provide a single general intelligence quotient.³⁵
7. For children with impaired sensory, manual, or speaking skills, the assessments selected and administered must accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills unless those skills are the factors that the test purports to measure.³⁶
8. The LEA must assess the child in all areas related to the suspected disability including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.³⁷
9. The LEA complies with the additional procedures for identifying children with specific learning disabilities set

³¹ 34 C.F.R. § 300.304(b)(3).

³² 34 C.F.R. § 300.304(c)(1)(i).

³³ 34 C.F.R. § 300.304(c)(1)(ii).

³⁴ 34 C.F.R. §§ 300.304(c)(1)(iii) – (v).

³⁵ 34 C.F.R. § 300.304(c)(2).

³⁶ 34 C.F.R. § 300.304(c)(3).

³⁷ 34 C.F.R. § 300.304(c)(4).

forth in 34 C.F.R. §§ 300.307 – 300.311, including conducting an observation of the child in the child’s learning environment (including the regular classroom setting) to document the child’s academic performance and behavior in the areas of difficulty.³⁸

H. Consent.

1. Notice. An LEA proposing to conduct an initial evaluation to determine if a child qualifies as a child with a disability under § 300.8 must first provide written notice to the parent(s) consistent with §§ 300.503 and 300.503.³⁹ The notice must -
 - i. be written in language understandable to the general public and provided in the native language of the parent(s) or other mode of communication, unless it is clearly not feasible to do so;⁴⁰
 - ii. describe the action proposed or refused by the LEA;⁴¹
 - iii. explain why the LEA has proposed or refused to take the action;⁴²
 - iv. describe other options that the IEP team considered and the reasons why those options were rejected;⁴³
 - v. describe each evaluation procedure, assessment, record, or report the LEA used as a basis for the proposed or refused action;⁴⁴
 - vi. explain how the procedural safeguards can be obtained;⁴⁵ and
 - vii. list resources available to the parent(s) to assist the parent(s) with understanding the written notice.⁴⁶

³⁸ 34 C.F.R. § 300.310(a).

³⁹ 34 C.F.R. § 300.300(a).

⁴⁰ 34 C.F.R. §§ 300.503(c)(1)(i) and (ii).

⁴¹ 34 C.F.R. § 300.503(b)(1).

⁴² 34 C.F.R. § 300.503(b)(2).

⁴³ 34 C.F.R. § 300.503(b)(6).

⁴⁴ 34 C.F.R. § 300.503(b)(3).

⁴⁵ 34 C.F.R. § 300.503(b)(4); 34 C.F.R. § 300.504(a)(1).

⁴⁶ 34 C.F.R. § 300.503(b)(5).

2. Informed Consent. The IDEA requires parental consent for an initial evaluation.⁴⁷
 - i. Consent means that –
 - a. the parent(s) has been fully informed of all information relevant to the activity for which consent is sought, in the parent's(s') native language, or other mode of communication;⁴⁸
 - b. the parent(s) understand(s) and agree(s) in writing to carry out the activity for which consent is sought, and the consent describes the activity;⁴⁹ and
 - c. the parent(s) understand(s) that consent is voluntary and may be revoked at any time.⁵⁰
 - ii. Revocation of Consent. A parent may revoke consent at anytime, but said revocation is prospective only.⁵¹ Upon revocation of consent for special education and related services, the LEA must provide the parent with prior written notice before ceasing the provision of special education and related services. A parent, however, maintains the right to subsequently request an evaluation to determine if the child is a child with a disability and any later requests that his or her child receive special education and related services must be treated as a request for an initial evaluation rather than a reevaluation.⁵²
 - iii. Consent Not Required To Review Existing Data. Parental consent is not required before reviewing existing data or administering a test or other evaluation that is administered to all children, unless consent is required of parents of all children.⁵³

⁴⁷ 34 C.F.R. § 300.300(a).

⁴⁸ 34 C.F.R. § 300.9(a).

⁴⁹ 34 C.F.R. § 300.9(b).

⁵⁰ 34 C.F.R. § 300.9(c)(1). Should consent be revoked, it does not negate an action that has occurred after the consent was given and before the consent was revoked. 34 C.F.R. § 300.9(c)(2).

⁵¹ 34 C.F.R. §§ 300.9(c)(1), 300.9(c)(2).

⁵² *Letter to Cox*, 54 IDELR 60 (OSEP 2009).

⁵³ 34 C.F.R. § 300.300(d).

- iv. Screenings. Consent is not required when a teacher or specialist screens the student to determine appropriate instructional strategies because screening is not considered to be an evaluation.⁵⁴ However, an LEA cannot use a screening process as a reason for delaying an initial evaluation.⁵⁵
- v. Refusal to Consent. Unless State law says otherwise, an LEA may use mediation and the due process hearing procedures to pursue an initial evaluation of a child when the parent refuses to consent or fails to respond to a request for consent.⁵⁶
 - a. The LEA, however, is not required to pursue an initial evaluation of a child suspected of having a disability if the parent does not provide consent for the initial evaluation. The LEA is in the best position to determine whether, in a particular case, an initial evaluation should be pursued.⁵⁷
 - b. The override procedures are not available for children who are home-schooled or placed by their parents in private school.⁵⁸
 - c. An LEA is required to make reasonable efforts to obtain informed consent from the parent of a child who is a ward of the state for an initial evaluation to determine whether the child is a child with a disability. However, informed consent is not required if the parent cannot be found, parental rights have been terminated, or a judge has appointed an individual who has been granted educational

⁵⁴ 34 C.F.R. § 300.302.

⁵⁵ *Letter to Torres*, 53 IDELR 333 (OSEP 2009).

⁵⁶ 34 C.F.R. § 300.300(a)(3).

⁵⁷ *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46632 (August 14, 2006); see also *Questions and Answers on IEPs, Evaluations, and Reevaluations*, 111 LRP 63322, Question D-2 (OSERS 2011). Informal methods may be attempted before the LEA opts for mediation and the due process hearing procedures. Such measures include parent conferences. *Letter to Williams*, 18 IDELR 534 (OSEP 1991).

⁵⁸ *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46653 (August 14, 2006).

decision-making authority.⁵⁹

I. Reevaluations.

1. Trigger and Frequency. A reevaluation of a child with a disability must occur when conditions warrant⁶⁰ or if the parent or teacher requests a reevaluation. The reevaluation must occur at least once every three years, unless the parent and the LEA agree that a reevaluation is unnecessary.⁶¹ Additionally, the reevaluation is limited to one per year, unless the parent and the LEA agree otherwise.⁶²
2. Consent Required. The LEA must obtain informed parental consent prior to conducting any reevaluation of a child with a disability.⁶³ However, the LEA may proceed with the reevaluation without informed parental consent if the LEA has taken reasonable measures to obtain consent and the *parent has not responded*.⁶⁴ The LEA, however, must

⁵⁹ 34 C.F.R. §§ 300.300(a)(2)(i) – 300.300(a)(2)(iii). A child is not a ward of the state if s/he has a foster parent. *See* 34 C.F.R. § 300.30(a)(2).

⁶⁰ A substantial change in the student's academic performance or disabling condition may warrant a reevaluation of the student.

⁶¹ 34 C.F.R. §§ 300.303(a)(b)(2). IDEA does not require that the LEA document agreements with parents that a reevaluation is unnecessary. *Letter to Anonymous*, 48 IDELR 136 (OSEP 2007). An agreement between the parent and the LEA is not the same as parental consent in § 300.9. Rather, an agreement refers to an understanding between a parent and the LEA and does not need to meet the requirements for parental consent in § 300.9. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46641 (August 14, 2006).

⁶² 34 C.F.R. § 300.303(b)(1). When the parent requests a reevaluation more than once per year but the LEA is not in agreement, the LEA must provide the parent with prior written notice of its refusal to conduct the reevaluation. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46640 (August 14, 2006). Note, however, that the District of Columbia Municipal Regulations does not limit the parent to one reevaluation per year. *See* D.C. Mun. Reg. tit. 5-E § 3005.7.

⁶³ 34 C.F.R. § 300.300(c)(1)(i).

⁶⁴ 34 C.F.R. § 300.300(c)(2); *see also Questions and Answers on IEPs, Evaluations, and Reevaluations*, 111 LRP 63322, Question D-3 (OSERS 2011). Should the LEA opt not to use the consent override provision, the LEA does not need to continue to provide FAPE if it has determined based on existing data that the student is no longer eligible for special education and related services. The LEA, however, must provide the parent with written prior notice of its proposal to discontinue the provision of FAPE. *Questions and Answers on IEPs, Evaluations, and Reevaluations*, 111 LRP 63322, Question D-2 (OSERS 2011).

document its attempts to obtain parent consent using the procedures in § 300.322(d).⁶⁵ If the *parent has refused* to consent, the LEA may, but is not required to, pursue the reevaluation by using the consent override procedures.⁶⁶

3. Change In Eligibility. An LEA must reevaluate a child with a disability before determining that the child is no longer a child with a disability.⁶⁷ A reevaluation is not required before the termination of a child's eligibility due to graduation⁶⁸ with a *regular high school diploma*⁶⁹ or the child exceeding the age eligibility for FAPE under State law.⁷⁰

J. Judicial Decisions / Federal Policy/Guidance.

1. The failure to complete an evaluation before the end of the State's statutory timeline to conduct an initial evaluation is not a denial of FAPE and the due process complaint may be dismissed as premature. *See, e.g., Jones v. District of Columbia*, 53 IDELR 47 (D.D.C. 2009).
2. An LEA's need to reevaluate the student justified its delay in developing a new IEP. The filing of a due process complaint just one month after an IEP meeting was deemed premature despite the parent having reason to be concerned about her daughter's lack of progress. *M.M. v. District of Columbia*, 52

⁶⁵ These procedures include detailed records of telephone calls made or attempted and the results of those calls, copies of correspondence sent to the parent and any responses received, and detailed records of visits made to the parent's home or place of employment and the results of those visits. 34 C.F.R. § 300.322(d).

⁶⁶ 34 C.F.R. § 300.300(c)(1)(ii). Should the LEA elect not to pursue the reevaluation by using the consent override procedures, the LEA is not required to continue to provide a free and appropriate public education to child if a review of the existing data indicates that the child is no longer eligible. The LEA, however, must provide the parent with prior written notice of its proposal to discontinue special education and related services. *Questions and Answers on IEPs, Evaluations, and Reevaluations*, 111 LRP 63322, Question D-4 (OSERS 2011).

⁶⁷ 34 C.F.R. § 300.305(e)(1).

⁶⁸ Graduation from high school with a regular high school diploma constitutes a change in placement, requiring written prior notice. 34 C.F.R. § 300.102(a)(3)(iii).

⁶⁹ 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"). 34 C.F.R. § 300.102(a)(3)(iv).

⁷⁰ 34 C.F.R. § 300.305(e)(2).

IDELR 128 (D.D.C. 2009).

3. The “clearly warranted” standard for reevaluation does not apply when the child’s parent or teacher requests a reevaluation. *Cartwright v. District of Columbia*, 39 IDELR 94 (D.D.C. 2003).
4. Reevaluations should be conducted in a reasonable period of time or without undue delay as determined in each individual case. Under the circumstances, a four-month reevaluation delay did not violate the IDEA. *Herbin v. District of Columbia*, 43 IDELR 110 (D.D.C. 2005).
5. The failure to include the parent in a discussion between the various district experts concerning the child’s assessment report was deemed harmless because the parent took an active role in the IEP meeting, at which the final determination of eligibility was made.

Evaluators may confer prior to the IEP team meeting and come to the meetings with opinions provided “they are willing to listen to the parents and the parents have the opportunity to make objections and suggestions.” *N.L. v. Knox Cty. Schools*, 38 IDELR 62 (6th Cir. 2003).

6. The Fifth Circuit affirmed a hearing officer decision that held that the LEA was within its right to conduct a medical evaluation of the student despite the parent’s refusal to consent. Where the LEA articulates reasonable grounds for its necessity to conduct a medical reevaluation of a student, a lack of parental consent will not bar it from doing so because the parent is free to decline special education for the student rather than submit to the LEA’s medical evaluation. *Shelby S. v. Conroe Independent Sch. Dist.*, 45 IDELR 269 (5th Cir. 2006).
7. An LEA cannot abdicate its affirmative duties under the IDEA, including its obligation to evaluate the student in all areas of suspected of disability. *N.B. v. Hellgate Elementary Sch. Dist.*, 50 IDELR 241 (9th Cir. 2008). *Cf. Richardson v. District of Columbia*, 50 IDELR 6 (D.D.C. 2008) (finding that the LEA had no obligation to conduct its own evaluation when the information it needed to determine the student’s eligibility was available from his private psychiatrist).
8. The failure of the LEA to conduct a required classroom observation was deemed harmless because the student’s

evaluation was “broad and thorough.” *Parker v. Friendship Edison Pub. Charter Sch.*, 51 IDELR 39 (D.D.C. 2008).

9. Just because an out-of-state LEA may have child find responsibilities of its own and just because the student is currently enrolled in school in the out-of-state LEA does not relieve the LEA of residence from having to fulfill its own responsibilities as the LEA of residence to evaluate the student and make FAPE available. *District of Columbia v. Abramson*, 48 IDELR 96 (D.D.C. 2007).
10. An LEA cannot evaluate a student suspected of a disability when the biological parents, both of which have legal authority to make educational decisions, disagree on whether the child should undergo an initial evaluation. When one parent consents but the other submits written refusal to consent, the parents may need to litigate their respective right to make educational decisions for the student but, in the meantime, the LEA cannot evaluate the student. *J.H. v. Northfield Public Sch. Dist.*, 52 IDELR 165 (D. Minn. 2009) (unpublished). *See also Zeichner v. Mamaroneck Union Free Sch. Dist.*, 52 IDELR 264 (N.Y. Sup. Ct. 2009) (finding that it was the LEA’s obligation to fulfill its statutory duty to obtain a hearing to address the father’s opposition to his son being evaluated over the objection of the mother who shared educational decision making authority with the father).
11. No additional consent is required if a child with an IEP transfers from one LEA to another, either in the same state or another state, and the child never exited special education, unless the new LEA determines that an evaluation is necessary to determine whether the child is eligible for special education and related services and the child’s needs. *Letter to Champagne* 53 IDELR 198 (OSEP 2008).
12. Because revocation is not retroactive, it was appropriate for the LEA to consider the raw data from the BASC form gathered from his teacher and mother before the parents revoked their consent. *Hooker v. Dallas Indep. Sch. Dist.*, 56 IDELR 232 (N.D. Tex. 2011).

III. INDEPENDENT EDUCATIONAL EVALUATION

- A. An independent educational evaluation (“IEE”) is a procedural safeguard available under the IDEA that provides the parents with the opportunity to obtain their own private evaluation of their

child.⁷¹ When the parent disagrees with an evaluation obtained by the LEA, the parent has the right to an IEE at public expense.⁷²

- B. Upon request, the LEA must provide the parent information about where an IEE may be obtained, and the criteria applicable for IEEs.⁷³
- C. An IEE means an evaluation conducted by a qualified examiner who is not employed by the LEA responsible for the education of the child in question.⁷⁴ The IEE must be at public expense, which means that the LEA either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent.⁷⁵
- D. Because the parent has a right to an IEE at public expense, upon request⁷⁶, the LEA must, without unnecessary delay, either:
 - 1. File a due process complaint to request a hearing to show that its evaluation is appropriate;⁷⁷ or
 - 2. Ensure that an IEE is provided at public expense⁷⁸, unless the LEA demonstrates in a hearing that the evaluation obtained by the parent did not meet the LEA's criteria.⁷⁹
- E. If the LEA files a due process complaint notice to request a hearing and the final decision is that the LEA's evaluation is appropriate,

⁷¹ See, generally, 34 C.F.R. § 300.502.

⁷² 34 C.F.R. § 300.502(b)(1).

⁷³ 34 C.F.R. § 300.502(a)(2). The location of the evaluation and the qualifications of the independent examiner must be the same as the criteria that the LEA uses when it initiates an evaluation. 34 C.F.R. § 300.502(e)(1). However, if the parent demonstrates that unique circumstances necessitate the selection of an evaluator who does not meet the LEA's criteria, the IEE must be publicly funded. *Letter to Anonymous*, 20 IDELR 1219 (OSEP 1993).

⁷⁴ 34 C.F.R. § 300.502(a)(3)(i).

⁷⁵ 34 C.F.R. § 300.502(a)(3)(ii).

⁷⁶ If a parent requests an IEE, the LEA may ask the parent's reason why s/he objects to the LEA evaluation. However, the LEA may not require the parent to provide an explanation and may not unreasonably delay either providing the IEE at public expense or filing a due process complaint to request a hearing to defend the LEA's evaluation. 34 C.F.R. § 300.502(b)(4).

⁷⁷ 34 C.F.R. § 300.502(b)(2)(i).

⁷⁸ The LEA may not impose conditions or timelines related to obtaining an IEE at public expense. 34 C.F.R. § 300.502(e)(2).

⁷⁹ 34 C.F.R. § 300.502(b)(2)(ii).

the parent still has the right to an IEE, but not at public expense.⁸⁰

- F. A parent is entitled to only one IEE at public expense each time the LEA conducts an evaluation with which the parent disagrees.⁸¹
- G. Should a hearing officer request an IEE as part of a hearing on a due process complaint the cost must be at public expense.⁸²
- H. An IEE at public expense, or an IEE obtained at private expense, must be considered by the LEA in any decision made with respect to the provision of FAPE to the child, provided the IEE meets agency criteria.⁸³ However, although the LEA must consider the evaluation, there is no corresponding obligation to accept the IEE or its recommendations.⁸⁴
- I. An IEE may be presented by any party as evidence at a hearing on a due process complaint.⁸⁵
- J. Judicial Decisions / Federal Policy/Guidance.
 - 1. Reimbursement for a private evaluation may be an equitable remedy when the LEA fails to evaluate a student upon parental request and who is exhibiting maladaptive behaviors. *See, e.g., Los Angeles Unified Sch. Dist. v. D.L.*, 49 IDELR 252 (C.D. Cal. 2008).
 - 2. Payment for an IEE is an equitable remedy for the failure of the LEA to evaluate the student within the 120-day timeline. *See, e.g., Integrated Design and Electronics Academy Pub. Charter Sch. V. McKinley*, 50 IDELR 244 (D.D.C. 2008).
 - 3. A three-month delay in filing for a due process hearing on the appropriateness of the initial evaluation can be an “unnecessary delay” when there is no explanation for the delay. *See, e.g., Pajaro Valley Unified Sch. Dist. v. J.S.*, 47 IDELR 12 (N.D. Cal. 2006). *Cf. J.P. v. Ripon Unified Sch. Dist.*, 52 IDELR 125 (E.D. Cal. 2009) (An LEA’s efforts to reach an agreement with the parent regarding an IEE excused a more than two-month filing delay.).

⁸⁰ 34 C.F.R. § 300.502(b)(3).

⁸¹ 34 C.F.R. § 300.502(b)(5).

⁸² 34 C.F.R. § 300.502(d).

⁸³ 34 C.F.R. § 300.502(c)(1).

⁸⁴ *S.S. v. Bd. of Educ., Town of Ridgefield*, 20 IDELR 889 (2d Cir. 1993).

⁸⁵ 34 C.F.R. § 300.502(c)(2).

4. The parents were not denied an opportunity to meaningfully participate in the placement decision when the LEA limited the independent psychologist's observations of the proposed placement to 20 minute increments because said limitation did not prevent the psychologist from forming an opinion about the appropriateness of the placement. *L.M. v. Capistrano Unified Sch. Dist.*, 50 IDELR 181 (9th Cir. 2008) *cert. denied* 109 LRP 62533 (2009).
5. Parents are not required to give prior notice of intent to obtain an IEE and to specify why they disagreed with the school's evaluation. *Angie C. v. Jefferson Cty. Bd. of Educ.*, 57 IDELR 97 (N.D. Ala. 2011).

IV. ELIGIBILITY

- A. Definition. A child with a disability means a child evaluated in accordance with §§ 300.304 through 300.311 as having one or more of the thirteen enumerated disabilities⁸⁶ that adversely affects educational performance and who, by reason thereof, needs special education and related services.⁸⁷

A child that has one of the disabilities but only needs a related service and not special education is not a child with a disability.⁸⁸

- B. Group of Qualified Professionals and Evaluation Report. Upon completion of the assessments and other evaluation measures, a group of qualified professionals and the parent(s) of the child determines whether the child is a child with a disability (as defined in § 300.8) and the educational needs of the child.⁸⁹

A copy of the evaluation report and the documentation of determination of eligibility are to be provided by the LEA to the parent(s) at no cost.⁹⁰ Each assessment report must include –

⁸⁶ The list of disabling conditions in § 300.8 is exhaustive. However, the list of specific impairments included within each disabling condition is not mean to be exhaustive. *See Letter to Fazio*, 21 IDELR 572 (OSEP 1994); *Letter to Anonymous*, 21 IDELR 64 (OSEP 1994).

⁸⁷ *See, generally*, 34 C.F.R. § 300.8.

⁸⁸ 34 C.F.R. § 300.8(a)(2)(i); D.C. Mun. Reg. tit. 5-E § 3001.1. However, if the State considers the related service as special education rather than a related service, the child would be determined to be a child with a disability. 34 C.F.R. § 300.8(a)(2)(ii).

⁸⁹ 34 C.F.R. § 300.306(a)(1).

⁹⁰ 34 C.F.R. § 300.306(a)(2); D.C. Mun. Reg. tit. 5-E § 3006.7.

1. the date of assessment and the date of the report;
2. a description of the child's performance in each area assessed, including specific strengths and weaknesses;
3. information relevant to –
 - i. whether the child has a particular category of disability or, in the case of a reevaluation of a child, whether the child continues to have such a disability;
 - ii. the present levels of performance and educational needs of the child;
 - iii. whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and
 - iv. whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general curriculum;
4. instructional implications for the child's participation in the general curriculum;
5. if an assessment is not conducted under standard conditions, a description of the extent to which it varied from standard conditions; and
6. the signature and title of the qualified examiner(s) who administered the assessment procedure and who wrote the report.⁹¹

C. Special Rule. A child is not a child with a disability if the determinant factor for determining the child as a child with a disability is –

1. lack of appropriate instruction in reading;
2. lack of appropriate instruction in math; or

⁹¹ D.C. Mun. Reg. tit. 5-E § 3006.2(a) – (f).

3. Limited English proficiency; and
 4. the child does not otherwise meet the eligibility criteria under § 300.8(a).⁹²
- D. Procedures for Determining Eligibility. In interpreting evaluation data to determine if a child is a child with a disability, and the educational needs of the child, the LEA must draw information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child’s physical condition, social or cultural background, and adaptive behavior.⁹³ This information must be documented and carefully considered.⁹⁴
- E. Timing. IDEA does not set forth a specific timeline by when the LEA must make its eligibility determination. However, the Office of Special Education Programs has opined that the eligibility determination must be made “within a reasonable period of time after the [initial] evaluation has been conducted” to ensure an eligible child with a disability receives a FAPE “without undue delay.”⁹⁵
- F. IEP. Should it be determined that a child has a disability and needs special education and related services, an IEP must be developed for the child in accordance with §§ 300.320 through 300.324.⁹⁶
- G. Judicial Decisions / Federal Policy/Guidance.
1. There cannot be any denial of FAPE when the child is ineligible for special education services in spite of any procedural errors. *R.B. v. Napa Valley Unified Sch. Dist.*, 48 IDELR 60 (9th Cir. 2007).

⁹² 34 C.F.R. §§ 300.306(b)(1) – (2); D.C. Mun. Reg. tit. 5-E § 3006.6.

⁹³ 34 C.F.R. § 300.306(c)(1)(i).

⁹⁴ 34 C.F.R. § 300.306(c)(1)(ii).

⁹⁵ *Letter to Weinberg*, 55 IDELR 50 (OSEP 2009). Although there is no statutory time limit by when the LEA must make the eligibility determination, in the District of Columbia, at least on district court has suggested that the LEA must both evaluate and determine eligibility within the 120-day period. *See D.L. v. District of Columbia*, 57 IDELR 279 (D.D.C. 2011) (“Nevertheless, the District has never achieved 100% timely eligibility determinations within 120 days.”). The 120 days is also interpreted by OSSE as including eligibility. *See Briggs, Ph.D, Kerri L. Memorandum to Chancellor, District of Columbia, et. al, Office of the State Superintendent of Education, Washington, D.C. 22 March 2010.*

⁹⁶ 34 C.F.R. § 300.306(c)(2).

2. The Court determined that the hearing officer properly considered the student's absences from school when ruling that the student qualified for special education services. The school environment aggravated the student's symptoms resulting in frequent absences because the student was not able to cope well with the usual stresses in an ordinary classroom. *Bd. of Educ., Montgomery Cty. v. S.G.*, 47 IDELR 285 (4th Cir. 2007) (unpublished).
3. Although the student was diagnosed with depression, the court did not find any direct link between the student's depression and his poor academic performance. Truancy and drug use were partially responsible for the student's educational performance. *Nguyen v. District of Columbia*, 54 IDELR 18 (D.D.C. 2010).
4. The IDEA does not require an LEA to undertake the responsibility of, for instance, forcing a child physically to attend school when the child is neither unable to attend nor impeded by an emotional condition to a marked degree in following through on his ability to attend. *W.G. v. New York City Dept. of Educ.*, 56 IDELR 260 (S.D.N.Y. 2011).
5. The student's intermittent, maladaptive behaviors did not interfere with the student's ability to learn given that the student had a strong academic record and successfully progressed from grade to grade. *C.J. v. Indian River Cty. Sch. Bd.*, 41 IDELR 120 (11th Cir. 2004) (unpublished); *accord Mr. and Mrs. N.C. v. Bedford Cent. Sch. Dist.*, 51 IDELR 149 (2d Cir. 2008) (unpublished) (finding that the student's emotional and behavioral problems did not appear to negatively impact his educational performance since the student continued to earn passing grades); *C.B. v. Dept. of Educ., City of New York*, 52 IDELR 121 (2d Cir. 2009) (unpublished) (finding student was not eligible for special education in spite of having AD/HD and bipolar disorder because the student continuously performed well). *Cf. L.I. v. Maine Sch. Admin. Dist. No. 55*, 47 IDELR 121 (1st Cir. 2007) (finding that a well-behaved student with good grades and Asperger Syndrome was eligible for special education services because the disability adversely affected the student's ability to communicate and interact with peers).
6. The Court held that the lower court had applied the wrong legal standard to determine eligibility. The standard "is not whether something, when considered in the abstract, *can* adversely affect a student's educational performance, but

whether in reality it *does*.”

A physician’s diagnosis and input on a child’s medical condition is important and must be considered by the IEP team. However, a physician cannot “prescribe” special education. *Marshall Joint Sch. Dist. No. 2 v. C.D.*, 54 IDELR 307 (7th Cir. 2010).

7. Adverse effect on educational performance is limited to academic progress. *A.J. v. Bd. of Educ., East Islip Union Free Sch. Dist.*, 53 IDELR 327 (E.D.N.Y. 2010); accord *Maus v. Wappingers Central Sch. Dist.*, 54 IDELR 10 (S.D.N.Y. 2010) (“No court applying New York’s implementing regulations has held that a student who has excelled academically nonetheless has a right to special education services under the IDEA.”).
8. Inflated grades and test scores resulting from accommodations should not be considered in determining eligibility for special education. *See, e.g., W.H. v. Clovis Unified Sch. Dist.*, 52 IDELR 258 (E.D. Cal. 2009); accord *State of Hawaii, Dept. of Educ. v. Zachary B.*, 52 IDELR 213 (D. Haw. 2009) (affirming the hearing officer’s findings that the student was eligible for special education services despite average scores on some standardized tests since the student took those tests in a one-to-one setting). *Cf. Ashli v. State of Hawaii, Dept. of Educ.*, 47 IDELR 65 (D. Haw. 2007) (finding that the LEA had no obligation to provide special education or related services to a third-grader with AD/HD and average achievement even though the student’s average academic performance was due in large part to his teacher’s use of differentiated instruction).

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