

TIPS FOR ENSURING LEGAL COMPLIANCE IN THE EVALUATION PROCESS

Julie J. Weatherly
Resolutions in Special Education, Inc.
6420 Tokeneak Trail
Mobile, AL 36695
251-607-7377
JJWesq@aol.com
Website: www.specialresolutions.com

Utah Institute on Special Education Law

August 8, 2018

Extensive evaluation requirements exist under the IDEA for determining eligibility for special education services and identifying the individual needs of a student in order to ensure the provision of FAPE. This session will provide tips for avoiding legal issues in the special education evaluation process—from making appropriate and timely referrals for evaluations to conducting appropriate, full and individual evaluations and reevaluations.

I. CHILD-FIND/IDENTIFICATION TIPS

1. **TRAIN** all school personnel to take the “Problem Solving Team” process seriously and to understand that the role of these Teams is not to “get a student into special ed.”
 - ❖ To prevent disproportionality/overrepresentation based upon race or ethnicity.
 - ❖ To prevent over-identification of students in special education generally.
 - ❖ To ensure that students are provided with appropriate instruction prior to consideration for special education services.

2. **TRAIN** all school personnel (including, *importantly*, regular education teachers and those who serve on Problem Solving Teams) on the overall legal requirements applicable to the identification and education of students with disabilities.
 - ❖ Individuals with Disabilities Education Act (IDEA)
 - ❖ Americans with Disabilities Act (ADA)
 - ❖ Section 504 of the Rehabilitation Act of 1973 (Section 504)
 - ❖ Family Educational Rights and Privacy Act (FERPA)
 - ❖ Every Student Succeeds Act (ESSA) (formerly No Child Left Behind (NCLB)/ESEA)
 - ❖ Relevant state law requirements that differ from federal

3. **ENSURE** that if/when developing and implementing an RTI approach to child-find and identification, a parental request for an evaluation is not met with: “I’m sorry, but we can’t do an evaluation right now because your child has not completed RTI.”

Memo to State Directors of Special Education, 56 IDELR 50 (OSEP 2011). States and LEAs have an obligation to ensure that evaluations of children suspected of having a disability are not delayed or denied because of implementation of an RTI strategy. The use of RTI strategies cannot be used to delay or deny the provision of a full and individual evaluation. It would be inconsistent with the evaluation provision of the IDEA for an LEA to reject a referral and delay an initial evaluation on the basis that a child has not participated in an RTI framework.

Letter to Ferrara, 60 IDELR 46 (OSEP 2012). While districts cannot use RTI as a reason for failing to evaluate a student, a Texas regulation advising districts to consider RTI before referring a student is not inconsistent with the IDEA's child-find requirement. While it is inconsistent with the IDEA for an LEA to wait until the completion of RTI activities before responding to a parent's request for an initial evaluation by either refusing to conduct it (because it does not suspect that the student has a disability) and providing written notice of the refusal or conducting it in accordance with IDEA's timelines, the Texas regulation does not prohibit a district or a child's parent from referring a child prior to completion of RTI. Rather, it merely states that RTI "should be considered" before referral. If a parent believes that RTI is being used to delay or deny an evaluation, the parent may seek redress through a due process complaint.

Letter to State Directors of Special Education, 61 IDELR 202 (OSEP 2013). School districts cannot use RTI as a reason to expand the timeline for completing an initial evaluation of a transfer student who was in the process of being evaluated by the former district. Districts must complete evaluations for such students, including highly mobile students, without undue delay and, preferably, on an expedited basis. When a highly mobile child changes districts after the prior district has begun but not completed an evaluation, the new district may not postpone the evaluation until its own RTI process has been completed. While the new district may choose to provide interventions while it is in the process of completing its evaluation, it is inconsistent with IDEA to delay completing it because a child has not participated in an RTI process in the new district.

- 4. REMEMBER** that school personnel cannot require a student to participate in the RTI process prior to conducting an evaluation where the student has been placed in a private school setting and RTI data are not generated or do not otherwise exist.

Letter to Zirkel, 56 IDELR 140 (OSEP 2011). If a private school located within a district's jurisdiction does not use RtI, the district is neither required to implement it with the private school student, nor entitled to deny or delay a referral for an evaluation because the private school did not use RtI. In addition and regardless of whether the private school has used RtI, unless the district believes that there is no reason to suspect that the child is eligible, it must respond to a referral from the private school or parent by conducting an evaluation within 60 days or according to the state-imposed deadline. "If an RtI process is not used in a private school, the group making the eligibility determination for a private school child may need to rely on other information, such as any assessment data collected by the private school that would permit a determination of how well a child responds to appropriate instruction, or identify what additional data are needed to determine whether the child has a disability."

The same goes for referrals of students in programs operated by an outside agency, such as Head Start. A school district cannot require the outside agency to implement RtI before making a referral for an initial evaluation.

Letter to Brekken, 56 IDELR 80 (OSEP 2010). School districts cannot require outside agencies, such as Head Start, to implement RtI before referring a child for an initial evaluation. Once a district receives a child-find referral, it must initiate the evaluation process in accordance with the IDEA. The IDEA neither requires nor encourages districts to monitor a child’s progress under RtI prior to referring the child for an evaluation, or as part of an eligibility determination. Rather, it requires states to allow districts to use RtI in the process of determining whether a student has an SLD.

5. **STRESS** the importance and affirmative nature of the law’s child-find requirements.
 - ❖ The duty to refer a student for an evaluation under IDEA and Section 504 is triggered when there is “reason to suspect” or “reason to believe” that the student may be a child with a disability and in need of special education services.
6. **WATCH OUT** for “referral red flags.”

There have been many court and agency decisions regarding the failure to timely refer a student for an evaluation pursuant to the child find duty under IDEA and Section 504. Based upon existing case law and agency opinions issued over the years, I have developed a running checklist of “referral red flags” that courts/agencies could find, in combination, sufficient to constitute a “reason to suspect” a disability and need for services that would trigger the IDEA’s or 504’s child find duty to refer a student for an evaluation.

Important Notes: When using this list, it is very important to remember that not one of these triggers alone (or even several together) would typically be sufficient to trigger the child find duty to refer a student for an evaluation under Section 504 or IDEA. However, the more of them that exist in a particular situation, the more likely it is that the duty would be triggered.

It is also important to note that it is more likely that the child find duty will be triggered under Section 504 before it would be under the IDEA, because the definition of disability is much broader and all-encompassing than it is under IDEA. Under the IDEA, it is rare that a court has found it sufficient to trigger the duty to evaluate if there are no referral red flags in the area of academic concerns. However, OCR is likely to find that the 504 duty to evaluate has been triggered, even in the absence of any academic or learning concerns.

Referral Red Flags Checklist

a. Academic Concerns in School

- Failing or noticeably declining grades
- Retention
- Poor or noticeably declining progress on standardized assessments

- Student negatively “stands out” academically from his/her same-age peers
- Student has been in the Problem Solving/RTI process and progress monitoring data indicate little academic progress or positive response to interventions
- For IDEA child find purposes, student already has a 504 Plan and accommodations have provided little academic benefit

b. Behavioral/Social/Emotional Concerns in School

- Numerous or increasing disciplinary referrals for violations of the student code of conduct
- Signs of depression, withdrawal, inattention/distraction, organizational issues, anxiety, mental illness or mental health issues
- Truancy problems, increased/chronic absences or skipping class
- Student negatively “stands out” behaviorally/socially/emotionally from his/her same-age peers
- Student has been in the Problem Solving/RTI process and progress monitoring data indicate little behavioral progress or positive response to interventions
- For IDEA child find purposes, student has a 504 Plan and/or BIP and accommodations or strategies have provided little behavioral/social/emotional benefit

c. Outside Information Provided

- Information that the student has been hospitalized (particularly for mental health reasons, chronic health issues, etc.)
- Information that the student has received a DSM-5 diagnosis (ADHD, ODD, OCD, etc.)
- Information that the student is taking medication
- Information that the student is seeing an outside counselor, therapist, physician, etc.
- Private evaluator/therapist/service provider suggests the need for an evaluation or special services

d. Internal Information from School Personnel

- Teacher or other school service provider requests or suggests a need for an evaluation or special services or special education under 504 or IDEA

e. Parent Request for an Evaluation or Services

- Parent requests an evaluation or services and other listed item(s) above is/are present

7. DO NOT WAIT for parents to initiate a referral for an evaluation.

Jana K. v. Annville Cleona Sch. Dist., 63 IDELR 278 (M.D. Pa. 2014). The parent’s failure to notify the district that a physician had diagnosed his daughter with depression did not excuse the district’s failure to conduct an IDEA evaluation. The duty to conduct an evaluation exists regardless of whether a parent requests an evaluation or shares information about a private assessment. Here, the district had sufficient information to suspect that the student had an

emotional disturbance and might be in need of special education services. The student had poor relationships with peers and a tendency to report inoffensive conduct as “bullying;” she visited the school nurse on at least 54 occasions for injuries, hunger; anxiety or a need for “moral support;” the student’s grades, which has been poor to average in previous school years, plummeted when she began 7th grade; and the district was aware of at least one on-campus act of self-harm where she swallowed a metal instrument after using it to cut herself. This “mosaic of evidence” clearly portrayed a student who was in need of a special education evaluation.

Compton Unified Sch. Dist. v. Addison, 54 IDELR 71, 598 F.3d 1181 (9th Cir. 2010), cert. denied, (2012). Where failing 10th grade student was referred by the school to a mental health counselor (who ultimately recommended an evaluation), her teachers indicated that her work was “gibberish and incomprehensible,” she played with dolls in class and urinated on herself, district cannot avoid a child-find claim based upon an argument that it did not take any affirmative action in response to high schooler’s academic and emotional difficulties because the parent did not request an evaluation. Where the district argued that the IDEA’s written notice requirement applies only to proposals or refusals to initiate a change in a student’s identification, evaluation or placement and its decision to do nothing did not qualify as an affirmative refusal to act, the argument is rejected. The Court will not interpret a statute in a manner that produces “absurd” results and the IDEA’s provision addressing the right to file a due process complaint is separate from the written notice requirement. “Section 1415(b)(6)(A) states that a party may present a complaint ‘with respect to any matter relating to the identification, evaluation, or educational placement of the child,’” and the IDEA’s written notice requirement does not limit the scope of the due process complaint provision. By alleging that the district failed to take any action with regard to the student’s disabilities, the parent pleaded a viable IDEA claim. (Note: The dissent in this case noted that determining that a “refusal” to identify or evaluate requires purposeful action by the district and the parent did not have the right to bring a child-find claim without a request and a “refusal” on the part of the district).

8. SERIOUSLY CONSIDER parent and/or staff referrals or requests for evaluation.

❖ When there’s debate, evaluate!

Charlotte-Mecklenburg Bd. of Educ. v. B.H., 51 IDELR 71 (W.D. N.C. 2008). District’s alleged failure to identify and evaluate a child ultimately found to have a fatal neurological condition is more than a mere FAPE violation. The parents’ complaint suggests that the district acted in bad faith or with gross misjudgment when it failed to take any action in response to the kindergarten teacher’s IDEA referral and when he was sent to the kindergarten classroom when unable to complete work in first grade. Thus, the parents have sufficiently stated a claim under Section 504.

9. REMEMBER that the concept of “continuous progress monitoring” is always applicable--regardless of whether an overall RTI approach for identification is used--in order to ensure that a student’s difficulties are not due to an overall lack of “appropriate” (scientific/research/evidence-based) instruction.

Letter to Zirkel, 50 IDELR 49 (OSEP 2008). When asked to clarify whether an SLD evaluation team must consider continuous progress monitoring, regardless of whether the approach used is RtI, OSEP responded that the eligibility group must consider data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child’s parents, in order to ensure that underachievement in a child suspected of having a SLD is not due to lack of appropriate instruction in reading or math. “The regulation does not use the term ‘continuous progress monitoring.’” “‘A critical hallmark of appropriate instruction is that data documenting a child’s progress are systematically collected and analyzed and that parents are kept informed of the child’s progress.’ We believe that this information is necessary to ensure that a child’s underachievement is not due to lack of appropriate instruction.”

10. **REFRAIN** from diagnosing medical conditions or suggesting medication without the credentials for doing so.

Unfortunately, there have been cases where teachers or other school personnel have made their own diagnosis of a particular medical condition without being qualified to do so. A proper referral for an evaluation must be made rather than statements to parents as to what school personnel believe to be a disability. The IDEA provides that the State Educational Agency shall prohibit State and LEA personnel from requiring a child to obtain a prescription for a substance covered by the Controlled Substances Act as a condition of attending school, receiving an evaluation or receiving services under this title. However, the law notes further that nothing in this paragraph “shall be construed to create a Federal prohibition against teachers and other school personnel consulting or sharing classroom-based observations with parents or guardians regarding a student’s academic and functional performance, or behavior in the classroom or school, or regarding the need for evaluation for special education or related services....”

W.B. v. Matula, 67 F.3d 484 (3d Cir. 1995). An action for damages can be brought under IDEA, Section 504 or Section 1983 for failure to timely identify a student as disabled. But see, Barnes v. Gorman, 122 S. Ct. 2097 (2002)(overturning Gorman v. Easley, 257 F.3d 738 (8th Cir. 2001)). Because punitive damages may not be awarded in private suits brought under Title VI of the Civil Rights Act of 1964, such damages are not available under the ADA or Section 504. Title VI and other constitutional Spending Clause legislation (such as ADA and Section 504) is “much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions.” [Note: The Third Circuit revised its position on damages for violations of the IDEA and aligned with other circuit courts in finding that money damages are not available for IDEA claims. See, Chambers v. School Dist. of Philadelphia Bd. of Educ., 53 IDELR 139, 587 F.3d 176 (3d Cir. 2009).

Letter to Hoekstra, 34 IDELR 204 (OSERS 2000). It is not the role of educators to diagnose ADD or ADHD or to make recommendations for treatment. That responsibility belongs to physicians and family. School officials may provide input at parents’ request and with their consent about a student’s behavior that may aid medical professionals in making diagnosis.

11. **REMEMBER** to refer a student back to the Problem Solving Team process if a determination is made that the student will not be referred for an evaluation and send prior written notice of any refusal to refer/evaluate.

II. EVALUATION/REEVALUATION TIPS

12. **EXERCISE** the right to conduct independent evaluations, particularly in potentially adversarial situations, by professionals/experts of the school system's choosing, for purposes of determining eligibility.

Independent Sch. Dist. No. 701 v. J.T., 2006 WL 517648, 45 IDELR 92 (D.C. Minn. 2006). Where district agreed to use former district's evaluation when it prepared IEP, when parent asked for IEE and was able to prove former district's evaluation was inappropriate, new district required to fund IEE.

Shelby S. v. Kathleen T., 45 IDELR 269 (5th Cir. 2006). School district has justifiable reasons for obtaining a medical evaluation of the student over her guardian's refusal to consent. If the parents of a student with a disability want the student to receive special education services under the IDEA, they are obliged to permit the district to conduct an evaluation.

M.T.V. v. DeKalb County Sch. Dist., 45 IDELR 177, 446 F.3d 1153 (11th Cir. 2006). Where there is question about continued eligibility and parent asserts claims against District, District has right to conduct reevaluation by expert of its choosing.

G.J. v. Muscogee Co. Sch. Dist., 58 IDELR 61, 668 F.3d 1258 (11th Cir. 2012). Parents did not show a denial of FAPE to their child with autism and a brain injury based upon a failure to reevaluate his special education needs during his kindergarten year. Here, the parents effectively denied consent for the district's proposed reevaluation when they imposed significant conditions upon their consent for reevaluation. Rather than signing the consent form the district provided, the parents wrote a seven-point addendum which stated that the district would use the parents' chosen evaluator, that the parents would have the right to discuss the assessment with the evaluator prior to its consideration by the IEP team, and that the evaluation results would be confidential. The district court was correct when it held that the parents effectively withheld their consent for the reevaluation. Clearly, the parents' conditions "vitiating any rights the school district had under the IDEA for the reevaluation process, such as who is to conduct the interview, the presence of the parents during the evaluation, not permitting the evaluation to be used in litigation against [the parents] and whether the parents received the information prior to the school district." In addition, the lack of an underlying evaluation prevented the parents from obtaining an IEE at public expense.

13. **SHARE** fully all relevant evaluative and other educational information about the child with the parents and be sure to request all evaluative information that the parents have obtained.

M.M. v. Lafayette Sch. Dist., 64 IDELR 31 (9th Cir. 2014). District committed a procedural violation that denied FAPE when it did not share over a year's worth of RTI data with the child's

parents during the eligibility meeting, even though it does not use the RTI model for determining LD eligibility. The duty to share RTI data does not apply only when a district uses an RTI model to determine a student's IDEA eligibility. This procedural violation was not harmless where the other members of the IEP team were familiar with the RTI data but the parents were not and, therefore, did not have complete information about their child's needs. "Without the RTI data, the parents were struggling to decipher his unique deficits, unaware of the extent to which he was not meaningfully benefitting from the [initial offer of special education services], and thus unable to properly advocate for changes to his IEP."

Amanda J. v. Clark County Sch. Dist., 160 F.3d 1106 (9th Cir. 2001). Because of the district's "egregious" procedural violations, parents of student with autism are entitled to reimbursement for independent assessments and the cost of an in-home program funded by them between April 1 and July 1, 1996, as well as compensation for inappropriate language services during the student's time within the district. Where the district failed to timely disclose student's records to her parents, including records which indicated that student possibly suffered from autism, parents were not provided sufficient notice of condition and, therefore, were denied meaningful participation in the IEP process. There is no need to address whether the IEPs proposed by the district were reasonably calculated to enable the student to receive educational benefit because the procedural violations themselves were a denial of FAPE.

14. **REFRAIN** from suggesting to parents that they are ultimately responsible for obtaining educationally-relevant evaluations, including medical evaluations for diagnostic/evaluative purposes.

N.B. v. Hellgate Elementary Sch. Dist., 50 IDELR 241, 541 F.3d 1202 (9th Cir. 2008). Where the parents had disclosed that the student had once been privately diagnosed with autism, but school district staff suggested that the parents arrange for an autism evaluation, the school district committed a procedural violation that denied FAPE to the student. The school district clearly failed to meet its obligation to evaluate the student in all areas of suspected disabilities after becoming aware of the medical diagnosis.

15. **USE** a variety of assessments when evaluating for the existence of a disability and do not use a single assessment to identify a disability.

Under the IDEA and once appropriate informed written parental consent is obtained, a school agency is required to conduct a "full and individual" evaluation before the initial provision of special education and related services to a child with a disability. 34 C.F.R. § 300.301(a). The evaluation must consist of procedures to determine if the child is a disability (under the definitions and timelines provided under federal and more specific state laws/guidelines) and to determine the educational needs of the child. 34 C.F.R. § 3003.301(c).

Specific evaluation procedures must also be in place under the IDEA and written notice to the parents must be provided that describes any evaluation procedures the agency proposes to conduct. 34 C.F.R. § 300.304(a). In conducting the evaluation, the school agency must:

- (1) Use a variety of assessment tools and strategies to gather relevant functional, developmental and academic information about the child, including information provided by the parent that may assist in determining whether the child is a child with a disability and the content of the child's IEP (including information related to enabling the child to be involved in and progress in the general curriculum (or for a preschool child, to participate in appropriate activities;
- (2) Not 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; and
- (3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

34 C.F.R. § 300.304(b). In addition, school agencies must ensure that:

- (1) Assessments and other evaluation materials used to assess a child are selected and administered so as not to be discriminatory on a racial or cultural basis; are provided or administered in the child's native language or other mode of communication 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 clearly not feasible to so provide or administer; are used for the purposes for which the assessments or measures are valid and reliable; are administered by trained and knowledgeable personnel; and are administered in accordance with any instructions provided by the producer of the assessments;
- (2) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient;
- (3) Assessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual or speaking skills, the assessment results 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);
- (4) The child is assessed 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;
- (5) Assessments of children with disabilities who transfer from one public agency to another public agency in the same school year are coordinated with those children's prior and subsequent schools, as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations;

- (6) In evaluating each child with a disability, the evaluation is sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category with which the child has been classified; and
- (7) Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

34 C.F.R. § 300.304(c).

Section 504's evaluation requirements are not nearly as specific or detailed. In conducting a "504 evaluation," the 504 regulations set out the following requirements:

A school agency shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that:

- i. Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producers;
- ii. Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and
- iii. Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual or speaking skills (except where those skills are the factors that the test purports to measure).

34 C.F.R. § 104.35(b). Further, in interpreting evaluation data and in making placement decisions, the 504 regulations require that school agencies (i) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; and (ii) establish procedures to ensure that information obtained from all such sources is documented and carefully considered. 34 C.F.R. § 104.35(c). Under Section 504, collecting all of this information may be sufficient to constitute an appropriate "evaluation."

Draper v. Atlanta Indep. Sch. Sys., 49 IDELR 211, 518 F.3d 1275 (11th Cir. 2008). Where the district failed to identify the student's SLD for five years and had determined that he was eligible for services as a mildly intellectually disabled student based upon just one assessment, the school district denied FAPE. The district court did not abuse its discretion in ordering the school district to pay up to \$38,000 per year until 2011 for private placement as a remedy. The relief awarded was not disproportionate to the IDEA violations, as the district failed to identify the student's SLD for five years and transferred him from a self-contained class to a regular

education program without considering his severe reading deficiencies. In addition, the district continued to use an ineffective reading program for three years, despite the student’s clear lack of progress.

16. REMEMBER that an “evaluation” may not always include formal assessment.

Though it is rare under the IDEA, it is clear that as part of an initial evaluation (if appropriate), a “review of existing data” could be sufficient to constitute an evaluation to determine whether the child is a child with a disability and the educational needs of the child without the administration of additional formal assessments. 34 C.F.R. § 300.305(a). According to the IDEA regulations, such “existing data” for review includes evaluations and information provided by the parents; current classroom-based, local or State assessments and classroom-based observations; and observations by teachers and related service providers. 34 C.F.R. § 300.305(a)(1). Based upon the review of existing data, the IEP team and other qualified professionals determine what additional data, if any, are needed to determine IDEA eligibility and the educational needs of the child. 34 C.F.R. § 300.305(a)(2). If none are needed, it is conceivable that an IDEA “evaluation” could consist of a review of all existing data. However, as stated previously, it is rare that additional formal assessment would not be required as part of an initial evaluation under the IDEA.

Under Section 504, it is less likely that formal tests or assessments are needed to conduct an “evaluation” of whether the student at issue has a disability—i.e., whether the student has a physical or mental impairment that substantially limits a major life activity. However, if “tests” are administered as part of a 504 evaluation, they must comply with the 504 regulatory requirements set forth above.

17. CONDUCT comprehensive evaluations and evaluate in all suspected areas of need, not just disability.

The IDEA regulations require, among other things that:

In evaluating each child with a disability, the district must ensure that the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.

34 C.F.R. § 300.304 (emphasis added).

Timothy O. v. Paso Robles Unif. Sch. Dist., 822 F.3d 1105, 67 IDELR 227 (9th Cir. 2016). When a district has reason to suspect that a child has a disability, it must conduct a full and individual initial evaluation that ensures the child is assessed in all areas of suspected disability using a variety of reliable and technically sound instruments. Here, the district was aware that the student displayed signs of autistic behavior at the time of the initial evaluation. However, the district chose not to formally assess him for autism because a psychologist, who observed the student for 30 to 40 minutes, concluded that the student merely had an expressive language delay and that he could not diagnose the student with autism “off the top of my head.” As a result, the district was unable to design an IEP that addressed the student’s needs and, therefore, denied

FAPE to the student. The district's fundamental procedural violations in this regard deprived the IEP team of critical evaluative information about the student's developmental disabilities as a child with autism and it was impossible for the team to consider and recommend appropriate services necessary to address his individual needs. Thus, the district deprived the student of critical educational opportunities and substantially impaired his parents' ability to fully participate in the IEP process.

A.W. v. Middletown Area Sch. Dist., 65 IDELR 16 (M.D. Pa. 2015). District's delay in comprehensively evaluating teenager with an anxiety disorder is a denial of FAPE and entitles the student to compensatory education. The IDEA requires districts to conduct a "full and individual" initial evaluation of a student who is suspected of having a disability and districts must use a variety of assessment tools and strategies to gather relevant information about the student's functional, developmental and academic needs. Here, the district sought parental consent only to conduct a psychiatric evaluation of the student. The evaluation information did not include information from which the district could develop a positive behavior plan or IEP goals or to rule out SLD. From the outset, the district knew that the psychiatric evaluation would not address educational matters and should have known that it would need to conduct additional assessments to determine the full scope of the student's needs. In addition, the district did not convene the IEP team until 13 months after it first had reason to suspect that the student had a qualifying disability and the student went without appropriate services in the interim.

D.B. v. Bedford County Sch. Bd., 54 IDELR 190 (W.D. Va. 2010). Student with ADHD and found eligible for services as OHI was denied FAPE where district did not properly consider and evaluate for possible SLD. Despite the fact that the evidence strongly suggested the student was SLD, the IEP team failed to assess for SLD or even discuss SLD. In addition and contrary to the hearing officer's finding, the student's services might well have changed had he been fully evaluated in *all areas of suspected disability*. "Although the [hearing officer] observed that [student] was promoted a grade every year...this token advancement documents, at best, a sad case of social promotion" where, after four years, the student is unable to read near grade level. Thus, the parents are entitled to reimbursement for private schooling.

Compton Unified Sch. Dist. v. A.F., 54 IDELR 225 (C.D. Cal. 2010). Where student displayed violent and disruptive behaviors and his grandparents requested a functional analysis assessment (FAA), FAPE was denied when the district failed to assess the 6-year-old in all areas of suspected disability. While the school psychologist completed an initial psychoeducational assessment, the district's failure to conduct an FAA prevented the IEP team from developing an appropriate IEP and making an offer of placement that provided FAPE. An FAA would have enabled the Team to consider strategies to address the behavioral issues that impeded the student's learning.

18. MAKE appropriate and thorough decisions regarding the need to conduct reevaluations and presume that a reevaluation is needed rather than presuming that it is not.

❖ When there's debate, reevaluate!

Phyllene W. v. Huntsville City Bd. of Educ., 66 IDELR 179 (11th Cir. 2015) (unpublished). Case is reversed and remanded to the district court to determine an appropriate remedy where school district did not reevaluate an SLD student when it clearly had reason to suspect that the student might have a hearing impairment. The district was aware that the student had undergone 7 ear surgeries, was being fitted for a hearing aid and had difficulty communicating with others. Although the parent did not ask the district to evaluate the student's hearing, the IDEA does not require parents to ask for evaluations of suspected disabilities. Rather, districts have a continuing obligation to evaluate all students suspected of needing IDEA services and there was good reason to suspect that this student might have a hearing impairment. Notification by the parent that the student was being fitted for a hearing aid alone should have raised a red flag that an evaluation was necessary to determine whether she had a hearing impairment necessitating further services.

Student R.A. v. West Contra Costa Unif. Sch. Dist., 66 IDELR 36 (N.D. Cal. 2015). District made numerous attempts to schedule reevaluation of 11 year-old with autism and it had no obligation to accept the mother's demand for an evaluation location to be identified with a one-way mirror that would allow her to see and hear the assessments. In addition, the parent failed to respond to an email from the district stating that it would interpret the mother's lack of contact as a refusal to make the student available for reevaluation. The mother's request to observe the assessment was unreasonable, given the district's longstanding policy of precluding parental observations in an effort to prevent an alteration of the testing environment that might skew results. In addition, neither the IDEA nor its regulations give parents the right to observe an evaluation.

Brock v. New York City Dept. of Educ., 65 IDELR 135 (S.D. N.Y. 2015). Existing evaluative data did not support the IEP team's recommendation that the student be placed in a public 12:1+1 public school program. The failure to conduct a reevaluation in the previous six years resulted in substantive harm, as the district's reliance upon information from the student's private school was misplaced. Not only did the student's progress reports use broad grading criteria and "rudimentary grading differentials," the private school's data did not include any educational testing or standardized assessments that supported the district's proposed change in placement. Thus, these were insufficient substitutes for the mandatory triennial reevaluation where the existing data did not indicate how the student might perform in a public school setting. Where the district did not challenge the appropriateness of the private placement or argue that the equities in the case would preclude reimbursement for the private placement, the district is ordered to reimburse the mother and grandmother for private school tuition costs.

West-Linn Wilsonville Sch. Dist. v. Student, 63 IDELR 251 (D. Ore. 2014). School district should have re-evaluated a student's behavioral needs and convene an IEP meeting before changing his educational placement. When the student began punching, shoving and using threatening gestures during his third-grade year, the district should have evaluated the student rather than discontinuing his participation in a mainstream music class, removing him from an inclusion PE class with others in his self-contained autism program and delivering his one-to-one instruction in a room next to the principal's office. Clearly, the district had notice of the need for a reevaluation by April 6, 2011, when the principal informed the director of student services that the special education teacher felt unsafe around the child. Although the district argued that it

was merely implementing short-term solutions to accommodate the child until the end of the school year, its response “essentially turned the reevaluation process on its head.” Thus, the district is ordered to reevaluate the student, convene an IEP meeting and identify an appropriate placement for the upcoming school year. The ALJ’s award of tuition reimbursement, however, is denied based upon the parents’ failure to provide the 10-day notice of private school placement to the district and their lack of cooperation with the district’s efforts to develop an IEP for the child’s 4th grade year.

S.D. v. Portland Pub. Schs., 64 IDELR 74 (D. Me. 2014). School district must fund private school tuition for a 6th grader with a variety of reading and anxiety disorders based upon its failure to reevaluate the student. When the student’s IEP team drafted his IEP, it was with the understanding that he was reading at level 7 in the Wilson Reading System. However, the student’s new Wilson-certified instructor discovered early in the school year that the student was actually reading at a level 2. This discovery should have triggered a reevaluation of the student’s IEP, rather than simply to continue instruction at a lower level. The district’s failure to determine whether the student’s decline stemmed from his previous teacher’s failure to follow the Wilson program, a memory retention deficit, flawed proficiency assessments or some other reason amounted to a denial of FAPE.

19. CONSIDER results of independent or private evaluations that parents present.

Marc M. v. Department of Educ., 56 IDELR 9 (D. Haw. 2011). Although parents of a teenager with ADHD waited until the very last moment of an IEP meeting to provide the team with a private school progress report, that was no basis for the team to disregard it. The Education Department procedurally violated the IDEA and denied FAPE when it declined to review the private report because it contained vital information about the student’s present levels of academic achievement and functional performance. The document, which showed that the student had progressed in his current private school, contradicted the information placed in the IEP, but the care coordinator who received the document did not share it with the rest of the team, because the team had just completed the new IEP. Where the new IEP proposed that the student attend public school for the upcoming school year, the parents reenrolled the student in private school and sought reimbursement. Where the IDEA requires districts to consider private evaluations presented by parents in any decision with respect to the provision of FAPE, the coordinator's contention that because the document was provided at the end of the meeting, the team could not have considered and incorporated it into the new IEP is rejected. As a result of failing to consider the private report, the IEP contained inaccurate information about the student’s current levels of performance, such that these procedural errors "were sufficiently grave" to support a finding that the student was denied FAPE.

T.S. v. Ridgefield Bd. of Educ., 808 F. Supp. 926 (D. Conn. 1992). The requirement for IEP team to take into consideration an IEE presented by the parent was satisfied when a district psychologist read portions of the independent psychological report and summarized it at the IEP meeting.

DiBuo v. Board of Educ. of Worcester County, 309 F.3d 184 (4th Cir. 2002). Even though school district procedurally erred when it failed to consider the evaluations by the child’s

physician relating to the need for ESY services, this failure did not necessarily deny FAPE to the child. A violation of a procedural requirement of IDEA must actually interfere with the provision of FAPE before the child and/or his parents are entitled to reimbursement for private services. Thus, the district court must determine whether it accepts or rejects the ALJ's finding that the student did not need ESY in order to receive FAPE.

20. **REMEMBER** that parents have the right to request an Independent Educational Evaluation at public expense (IEE) when they disagree with the evaluation completed by and/or obtained by the school system and **RESPOND** appropriately to such requests.

Avila v. Spokane Sch. Dist. 81, 69 IDELR 204 (9th Cir. 2017) (unpublished). District has shown that its reevaluation of student for SLD was appropriate and parents' request for an IEE is rejected. The fact that the school district's reevaluation of the student with autism did not specifically evaluate for dyslexia and dysgraphia did not make it inappropriate. The reading and writing assessments conducted covered a variety of disorders in addition to SLDs and satisfied the district's duty to evaluate the student in all areas of suspected disability. The district did not refer to specific reading and writing disorders but, instead, evaluated for "specific learning disabilities," which covers a number of reading and writing difficulties.

Haddon Township Sch. Dist. v. New Jersey Dept. of Educ., 67 IDELR 44 (N.J. Sup'r Ct. 2016) (unpublished). Where reevaluation consisted of review of existing data only, and parent disagreed with the failure to conduct additional assessments, they are entitled to an independent FBA of a 6th grade OHI student. District's review of existing data qualified as an evaluation with which the parent disagreed, triggering the right to an IEE.

Letter to Baus, 65 IDELR 81 (OSEP 2015). If a parent disagrees with a district's evaluation based upon the district's failure to assess the child in a specific area of need, the parent has the right to request an IEE at public expense in that area to determine whether the child has a disability and the nature and extent of the special education and related services the child needs. At that point, the district is required to either request a due process hearing to show that its evaluation is appropriate or provide the requested IEE at its expense.

Letter to Carroll, 68 IDELR 279 (OSEP 2016). The question posed to OSEP was whether, once a district's evaluation is complete and the parent then communicates a desire for a child to be assessed in a particular area in which the parent has not previously expressed concern, would the district have the opportunity to conduct an evaluation in the given area before a parent invokes the right to an IEE? A parent has the right to invoke the right to an IEE even if the reason for the parent's disagreement is that the district did not assess the child in all areas related to the child's disability. Once a parent requests an IEE, a district must either defend its evaluation in a due process hearing or fund an IEE (assuming the IEE meets agency criteria). There is no third option that allows the district to simply conduct the missing assessments. Thus, it would be inconsistent with IDEA to allow the public agency to conduct an assessment in an area that was not part of the initial evaluation or reevaluation before either granting the parents' request for an IEE or filing a due process complaint to show that its evaluation was appropriate.

21. **MAINTAIN** and update a district list of qualified independent evaluators and applicable criteria for independent evaluators.

Seth B. v. Orleans Parish Sch. Bd., 67 IDELR 2 (5th Cir. 2016). In a case of first impression, a “substantial compliance” standard applies to the question of whether parents are entitled to reimbursement for an IEE. While the IDEA provides that a district is not required to pay for an IEE if it can demonstrate at a hearing that it does not “meet agency criteria,” it does not define this phrase. Since a “substantial compliance” standard as already been applied in other FAPE disputes, such as those involving IEP implementation, it should apply to IEE instances as well. The adoption of such a standard would safeguard parental rights to participate in the IEP process, especially in states that have adopted complex evaluation criteria. If districts are allowed to deny reimbursement based upon ambiguities or inconsequential nonconformities with such criteria, they will be effectively able to treat the parental right to an IEE as a privilege to be granted at their discretion. While the district’s concern that some judges or hearing officers might adopt an “unreasonably low standard” for substantial compliance is recognized, that risk is acceptable given the strong interest in preserving the parental right to an IEE. Thus, the case is remanded to the district court for a determination of whether the parents’ privately-obtained IEE substantially complied with Louisiana’s evaluation requirements. However, the possible amount of reimbursement is limited to \$3,000, based upon the parents’ failure to request an exemption from the district’s reasonable cost criteria. (Note: The dissenting opinion notes that the substantial compliance standard usurps regulatory authority and invites courts and hearing officers to participate in arbitrary decision-making).

M.V. v. Shenendehowa Cent. Sch. Dist., 60 IDELR 213 (N.D. N.Y. 2013). As an initial matter, the parent does not have the right to an IEE at public expense, because she did not disagree with the district’s evaluation. Rather, she requested an IEE because she was dissatisfied with the IEP proposed for her son. Even if she had the right to an IEE, however, she failed to show that the district’s \$1,800 cap on IEEs was unreasonable. Between July 14, 2010 and August 18, 2010, at least 6 public and private clinics in the parent’s geographic area were willing to conduct an IEE for \$1,800. Although the district was willing to exceed the \$1,800 cap if the parent demonstrated the need for an exception, the parent’s wish to use a particular neuropsychologist did not amount to “unique circumstances” that would warrant the excess cost. Parent’s failure to contact any of the psychologists or neuropsychologists on the list of qualified evaluators supplied by the school district defeated her challenge to the \$1,800 cap.

22. **REMEMBER** the responsibility to conduct a FAPE evaluation, even of a student placed by the parent in a private school located in another jurisdiction.

Letter to Eig, 52 IDELR 136 (OSEP 2009). The home district must evaluate a parentally placed private school student for FAPE upon parental request. If a parent asks the home district to evaluate a private school student’s eligibility for IDEA services (rather than eligibility for “equitable services”), the home district cannot refuse to do so on the grounds that the student attends private school in another LEA.

23. **COMPLY** with applicable evaluation timelines and appropriately document compliance with them!

- ❖ days to completion of initial evaluation.
- ❖ days from completion of initial evaluation to eligibility determination.
- ❖ days from eligibility determination to IEP development.

Letter to Weinberg, 55 IDELR 50 (OSEP 2009). While there is no set timeframe for making an eligibility determination under the IDEA, it must occur within a “reasonable period of time” after the initial evaluation. While the IDEA does require an initial evaluation to be conducted within 60 days of receiving parental consent for the evaluation (or within a state’s timeframe), the IDEA does not require that a district make an eligibility determination within a specific number of days after a parent requests an evaluation, after the district receives consent for it, or after the evaluation is completed. However, consistent with its child-find duties, a public agency must make an eligibility determination within a reasonable period of time after the evaluation is conducted to ensure the receipt of FAPE without undue delay. In addition, a parent who believes that the district is unreasonably delaying an eligibility decision may address the matter through the IDEA’s dispute resolution procedures.