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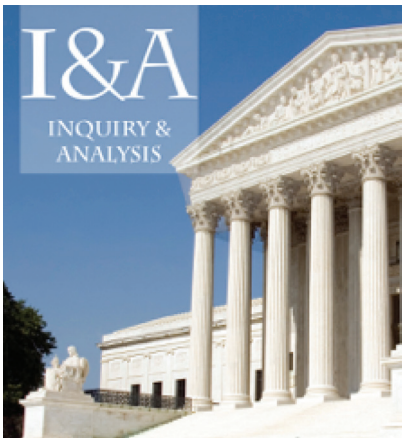

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Formed in 1967, the NSBA Council of School Attorneys provides information and practical assistance to attorneys who represent public school districts. It offers legal education, specialized publications, and a forum for exchange of information, and it supports the legal advocacy efforts of the National School Boards Association.

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Independent Educational Evaluations: Your Top 10 Questions Answered!

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Evaluations are a foundational tool by which students are determined (or not) to be eligible for special education and related services under the under the Individuals with Disabilities Education Act ("IDEA"). If eligibility is established, the underlying evaluations often play a critical role in determining the scope and content of such services. Accordingly, in situations where parents disagree with the evaluation conducted by the school, it is no surprise that the IDEA's procedural safeguards include "an opportunity … to obtain an independent educational evaluation ["IEE"] of the child."[1]

An IEE is defined as "an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question."[2] The IDEA regulations contemplate three categories of IEEs: (1) those obtained by the parents at their own, private expense; and (2) those obtained, pursuant to parent request, at public expense—i.e., the expense of the school; and (3) those ordered by a hearing officer in the context of a due process hearing.

With regard to privately-obtained IEEs, parents always have the right to obtain an IEE at their own expense.[3] If they do so and share the results with the school, the school is obligated to "consider" the results of such an IEE in any decision made with respect to provision of FAPE to the child—so long as the IEE "meets agency [*i.e.*, the school's] criteria."[4] Parents are also entitled to present the results of private IEEs in any due process hearing related to the child.[5] IEEs ordered by a hearing officer as part of a due process complaint hearing "must be at public expense."[6]

The focus of the present analysis, however, is on issues surrounding IEEs that are requested or obtained by parents and for which they request payment or reimbursement at public expense. Subject to certain conditions fleshed out below, "a parent has a right to an [IEE] at public expense if the parent disagrees with an evaluation obtained by the public agency."[7]

1. What prerequisites must be met in order for a parent to obtain an IEE at public expense?

Three conditions must be present in order to invoke a parent's right to an IEE at public expense under 34 C.F.R. § 300.502. First, the IEE request must be preceded by an evaluation conducted by the school. Second, the parent must disagree with the school's evaluation. Third, the parent's request for public funding of the IEE must be presented in a timely manner.

a. Preceding Agency Evaluation:

A parent may not "pre-emptively" request an IEE at public expense. If the school has not yet conducted an evaluation, an IEE request at public expense is premature.[8] When parents present the school with a premature IEE request, the school may simply deny the request and has no affirmative obligation to file for a due process hearing to defend its decision: "[W]hen a parent requests reimbursement for an IEE prior to the completion of the district's evaluation, the school district may deny the request for reimbursement without filing for a due process hearing."[9]

In some cases, the dispute revolves around whether the school has, in fact, completed an "evaluation," such that a right to an IEE request is triggered. For example, progress monitoring, or a basic review of existing data does not typically qualify as an "evaluation" that would trigger a right to request an IEE. *F.C. v. Montgomery County Public Schools*, 68 IDELR 6, 2016 WL 3570604 (D. Md. 2016) (district's examination of child's report cards, prior evaluation, and teacher observations not sufficient to trigger right to seek a publicly funded IEE); *but see Haddon Township School District v. New Jersey Department of Education*, 67 IDELR 44, 2016 WL 416531 (N.J. Super. Ct. App. Div. 2016, unpublished) (holding that district's review of existing data and determination that new assessments were unnecessary qualified as an evaluation and the parents were entitled to an IEE at public expense).

Similarly, "[t]he screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation …." 34 C.F.R. § 300.302.

A parent's objection to the school's use of response to intervention (RTI) as part of its evaluation does not prompt the right to request an IEE at public expense. 71Fed. Reg. 46689 (Aug. 14, 2006) ("The parent … would not have the right to obtain an IEE at public expense before the public agency completes its evaluation simply because the parent disagrees with the public agency's decision to use data from a child's response to intervention as part of its evaluation to determine if the child is a child with a disability and the educational needs of the child.").

On the other hand, a functional behavioral assessment (FBA) is generally considered an "evaluation" that triggers parents' right to request an IEE at public expense. *E.g., Cobb Cty Sch. Dist. v. D.B.*, 66 IDELR 134, 2015 WL 5691136 (N.D. Cal. 2015) ("An FBA is an 'educational evaluation' under IDEA."); *Harris v. D.C.,* 561 F. Supp. 2d 63, 67 (D.D.C. 2008) (rejecting the argument that an FBA "is merely a tool to help students with behavioral, not educational, problems," and holding: "an FBA is an 'educational evaluation' for purposes of [IDEA].").

b. Disagreement with the Agency Evaluation:

"The right of a parent to obtain an IEE is triggered if the parent disagrees with a public initiated evaluation." 64 Fed. Reg. 12411, 12608 (Mar. 12, 1999). Notably, parents do not need to disagree with an eligibility finding or with any part of the child's IEP; disagreement with the school evaluation is all that is required. *K.B. v. Haledon Bd. of Educ.*, 2010 WL 2079713, at *4 (D.N.J. May 24, 2010). Parents' obligation to establish disagreement with the school's evaluation generally presents a low hurdle to clear. As discussed more fully in response to Question #6, parents are simply required to disagree; they are not required to articulate the substantive bases of their disagreement. 34 C.F.R. § 300.502(b)(4). Thus, questions in this area tend to focus on what indicia of "disagreement" are sufficient to satisfy this prerequisite.

Of course, an explicit and direct statement, advising the school of the parents' disagreement with a public evaluation, clearly satisfies the requirement. *K.B. v. Haledon Bd. of Educ.*, 54 IDELR 230, 2010 WL 2079713 (D. N.J. 2010). In addition, however, even implied and indirect expressions of disagreement will generally suffice. *E.g.*, *Genn v. New Haven Board of Education*, 2016 WL 7015610, 69 IDELR 35 (D. Conn. 2016) (holding that a parent's request for reading assessments during an IEP team discussion of her daughter's psychoeducational evaluation was sufficient to express her disagreement with the district's testing, and thus triggered parent's right to an IEE); *Id.* ("[T]he Court is not persuaded that a parent must announce in a formalistic manner, 'I, Parent, disagree with this assessment!' to be found to have disagreed in substance with the assessment.").

Indeed, the disagreement need not be verbalized at all; the mere fact of obtaining an IEE in itself may be considered a declaration of disagreement. The IDEA regulations seem to contemplate the possibility of such "disagreement by conduct" in providing that schools may seek a hearing to contest payment for IEEs that have already been "obtained by the parent." 34 C.F.R. § 300.502(b)(2)(ii); *see also Hudson v. Wilson*, 828 F.2d 1059, 1065 (4th Cir. 1987) (rejecting the argument that parents must expressly register their disagreement prior to obtaining an IEE as a "strained reading of the regulation," and instead noting that the "plain thrust" of the regulation provides schools with an opportunity to challenge reimbursement for IEEs already obtained); *Raymond S. v. Ramirez*, 918 F. Supp. 1280 (N.D. Iowa 1996) (same); *Warren G. v. Cumberland County Sch. Dist.*, 190 F.3d 80, 87 (3d Cir. 1999) ("[T]he parents' failure to express disagreement with the District's evaluations prior to obtaining their own does not foreclose their right to reimbursement.").

Although the disagreement hurdle is low, the complete absence of any indicia of disagreement forecloses a request for an IEE at public expense. Thus, for example, parents' desire to simply obtain an additional source of information about their child, in the absence of disagreement with the school's evaluation, does not qualify for reimbursement of an IEE at public expense. *Tyler V. v. St. Vrain Valley Sch. Dist.*, 54 IDELR 118, 2011 WL 1045434 (D. Colo. 2011). *R.L. v. Plainville Bd. Of Educ.*, 363 F. Supp. 2d 222 (D. Conn. 2005). Likewise, where parents do not challenge or oppose the school's evaluation but obtain an IEE for the purpose of comparing the child's current status against her condition at an earlier time, IEE reimburse-

ment is inappropriate. *Derek B. v. Donegal Sch. Dist.*, 47 IDELR 34, 2007 WL 136670 (E.D. Pa. 2007).

Finally, while a parent's failure to express *disagreement* does not necessarily preclude a subsequent request for reimbursement of an IEE at public expense, at least one court has held that the parents' prior expression of affirmative *agreement* with the school's evaluation precludes a later request for an IEE at public expense. *Lauren W. v. DeFlaminis*, 47 IDELR 183, 480 F.3d 259, 275 (3d Cir. 2007) (holding that reimbursement of IEE at public expense was precluded when parents had earlier checked "yes" on the notice form accompanying the district's evaluation, indicating their approval); *Id.* (stating: it would be "judicial alchemy" to interpret the term "disagree" to encompass "agree").[10]

In short, while the "disagreement requirement" may be met by explicit/direct disagreement, or implied/indirect disagreement—or even failure to express disagreement, it may not be met in the face of affirmative prior agreement with the school's evaluation, or when the IEE is sought simply as an additional source of information.

c. Notice / Timely Request for IEE Payment:

Consistent with the low "disagreement hurdle" and the concept of "disagreement by conduct," the school may not require parents to provide advance notice, or mandate that they obtain the school's prior consent/approval, to pursue an IEE: "[A] public agency may not require that a parent provide notification of the parent's intent to obtain an IEE at public expense as a precondition for public payment for an IEE."[11]

Even if no advance notice is provided prior to obtaining the IEE, at some point, a request for *payment* will be made. At that point, the school retains its option to contest payment by seeking a due process hearing to defend its own evaluation, or to establish that the IEE obtained by the parent did not meet the school's criteria. 34 C.F.R. § 300.502(b)(2).

Parents who wait too long to request reimbursement for an IEE may waive their right to an IEE at public expense. *Student with a Disability*, 113 LRP 52623 (SEA NY 11/20/13) (denying a request for several publicly funded IEEs because the parent failed to object to the district's reevaluation until an impartial hearing); *Atlanta Pub. Schs.*, 51 IDELR 29 (SEA GA 2008) (holding that a request for a publicly funded IEE in response to an evaluation conducted more than three years earlier was untimely).

Although IDEA regulations do not establish specific timelines for how long a parent can wait before requesting public reimbursement for an IEE, "it would not seem unreasonable for the public agency to deny a parent reimbursement for an IEE that was conducted more than two years after the public agency's evaluation." *Letter to Thorne*, 16 IDELR 606 (OSEP Feb. 5, 1990). Importantly, in such a situation, OSEP concludes that the school may simply deny the reimbursement request without filing for a due process hearing. *Id.* ("[I]t would not be necessary for the public agency to initiate a hearing in this situation."). This analysis is consistent with the general two-year statute of limitations applicable claims under the IDEA. 34 C.F.R. § 300.507(a)(2); *see also T.P. v. Bryan County Sch. Dist.*, 63 IDELR 45, 9 F. Supp. 3d 1397, (S.D. Ga. 2014), *vacated and remanded on other grounds*, 65 IDELR 254, 792 F.3d 1284 (11th Cir. 2015) (applying IDEA's two-year statute of limitations to summarily deny parent's request for IEE at public expense, where the earliest date parents requested an IEE was more than two years after the completion of school's evaluations).[12]

2. What are the school's options when a parent requests an IEE?

On receipt of a request for an IEE at public expense, the school has two options: (1) Ensure an IEE is provided at public expense—aka, "fund," or (2) file for due process to defend the appropriateness of the school's evaluation—aka, "file" (for a due process hearing). 34 C.F.R. § 300.502(b)(2). The school must elect between these two fund-or-file options "without unnecessary delay." 34 C.F.R. § 300.502(b)(2); 34 C.F.R. § 300.502(b)(4) (stating alternatively that the school may not "unreasonably delay" its decision). Unacceptable responses to an IEE request include: (1) ignoring the request, (2) unreasonably delaying a response to the request, or (3) proposing to cure alleged deficiencies in the school's evaluation or to reevaluate the student. *Fullerton Sch. Dist.*, 58 IDELR 177 (SEA CA 2012); *see also* Question #7 and related discussion, below). These seemingly straightforward options mask a thicket of legal nuances.

a. Due Process—aka the "File"— Option.

The procedure for resolving disputes surrounding publicly-funded IEEs is unique under the IDEA. In most other IDEA contexts, when a disagreement is not resolved by consensus, the school makes a decision, issues a prior written notice, and then it is up to the parents to seek a due process hearing, if they so choose.

When it comes to IEEs, the filing obligation is reversed. A school may not simply deny a parent's IEE request and then wait around to see if the parent challenges that decision in a due process hearing. Rather, the onus is on the school to affirmatively file a request for a due process hearing to "show" that its evaluation is appropriate, in order to avoid paying for an IEE. 34 C.F.R. § 300.502(b)(2); *see also Letter to Saperstone*, 21 IDELR 1127 (OSEP July 28, 1994) ("[T]he burden is on the public agency to initiate a due process hearing if it does not wish to pay for the IEE.").

i. Burden of proof

One of the stickier issues that arise in due process hearings concerning publicly funded IEEs is: who bears the burden of proof?

In considering a non-IEE case, the Supreme Court has generally held that the burden of proof in administrative hearings under the IDEA falls on "the party seeking relief." *Schaffer v. Weast*, 44 IDELR 150, 546 U.S. 49, 57-58 (2005) (noting that the IDEA "is silent on the allocation of the burden of persuasion," and thus, "[a]bsent some reason to believe Congress intended otherwise, … we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief.").

While this "ordinary default rule" recognizes that "plaintiffs bear the risk of failing to prove their claim," *Shaffer*, 44 IDELR at 153, 546 U.S. at 56, it is complicated in the IEE context by a unique finger-pointing exercise about whether the parent or the school is "the party seeking relief." On the one hand, the parent is, of course, "seeking" relief in the form of an IEE. On the other hand, the regulations place the onus on the school to file the due process complaint—thus casting the school in the "plaintiff/petitioner" role on paper, even though its substantive position is one of "defending" its own evaluation.

The issue is further compounded because, despite the school's obligation to file, parents are not required to "wait" for the school to do so. According to OSEP, if a parent believes the school "is no longer proceeding in good faith" and is unreasonably delaying acting upon an IEE request, the parent may: (1) proceed to obtain the IEE and then seek to compel compensation "through any of the dispute resolution mechanisms allowed by the IDEA, including mediation, filing a State complaint, or by filing a due process complaint"; or (2) proactively invoke any of the dispute resolution mechanisms, without proceeding to have the IEE conducted. *Letter to Anonymous*, 56 IDELR 175 (OSEP Aug. 13, 2010). Thus, in such situations, the parents, as the filing parties, are in the "plaintiff/petitioner" role.

Is the school's evaluation "presumed guilty" (aka "inappropriate"), until proven otherwise? That doesn't seem right. Likewise, there is some inherent unfairness in placing the burden on the school when the parents have no obligation to explain—or even disclose—the basis for their objection to the school's evaluation, leaving the school to engage in essentially a shadowboxing exercise. 34 C.F.R. § 300.502(b)(4) ("[T]he public agency cannot require the parent to provide an explanation" as to "why he or she objects to the public evaluation.").

On the other hand, parents do not generally have (and are not expected to have) the sophistication to point out specific flaws in the school's evaluation—particularly when the parents lack the resources to, or otherwise have not been able to secure an IEE at their own expense, during the pendency of a due process fight over payment/reimbursement.

Given these procedural gymnastics, it is perhaps not surprising that authorities are split on who bears the burden. In *Cobb Cty Sch. Dist. v. D.B.*, 66 IDELR 134, 2015 WL 5691136 (N.D. Cal. 2015), the court held that, in the context of a due process hearing filed by the school district under the IDEA's IEE regulations, "the school district has the burden of proof to show that its assessment is adequate." (citing *Schaffer*, 44 IDELR at 156, 546 U.S. at 62 ("The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.")). Yet, relying on the exact same citation to *Schafer*, the court in *E.P. v. Howard County Pub. Sch. Sys.*, 70 IDELR 176, 2017 WL 3608180 (D. Md. 2017)

concluded that, notwithstanding the fact that the district filed the due process complaint contesting parents' IEE request, it was the parents who "were required to carry the burden of proof …. as they are the party seeking relief." (citing *Schaffer*, 44 IDELR at 156, 546 U.S. at 62)). Other cases are similarly muddled:

- Parents file; School Bears Burden: Dudley v. Lower Merion Sch. Dist, 58 IDELR 12, 2011 WL 5942120 (E.D. Pa. 2011) (concluding, in a due process case filed by the parents, that it was nevertheless the school's burden to demonstrate that its evaluation was appropriate);
- School Files; Parents Bear Burden: Abarca v. Goleta Union Sch. Dist., 69 IDELR 156, 2017 WL, 700082 (C.D. Cal. 2017) (noting that, despite school's having filed the due process complaint concerning the IEE request, "[parent] bore the burden of demonstrating that his 'unique circumstances' justified a departure from the District's reasonable cost cap on independent evaluations.");
- Both file; Parents Bear Burden: Holmes v. Millcreek Twp. Sch. Dist., 32 IDELR 1, 205 F.3d 583, 590 (3d Cir. 2000) (noting in the context of a dispute regarding reimbursement for IEE expenses, "[t]he crucial issue is … whether [parents] demonstrated that the School District's evaluation of their daughter was inappropriate.");

ii. Establishing an "Appropriate" Evaluation.

Although the IDEA does not specifically state what must be shown to establish that the school's evaluation was appropriate, schools will likely succeed in establishing appropriateness by showing that their own assessments were comprehensive, nondiscriminatory, and otherwise complied with the requirements of the IDEA with respect to evaluations. *E.g., H.D. v. Cent. Bucks Sch. Dist.*, 902 F. Supp. 2d 614, 627 (E.D. Pa. 2012) (concluding that school satisfied its burden to show its functional behavioral assessment was appropriate, as it satisfied the evaluation requirements of the IDEA); *Jack B. v. Council Rock Sch. Dist.*, 2008 WL 4489793, at *9 (E.D. Pa. Oct. 3, 2008) (same, noting: "IDEA simply gives Plaintiffs the right to an appropriate evaluation—not diagnoses with which they agree"); *see also* 34 C.F.R. § 300.304-311 (setting forth the requirements for evaluations).

Notably, the school need not show that its evaluation was superior to the IEE obtained or proposed by the parents. *Cobb Cty Sch. Dist. v. D.B.*, 66 IDELR 134, 2015 WL 5691136 (N.D. Cal. 2015) ("The Court agrees that the relevant question here is not whether Dr. Mueller's FA was a superior evaluation."); *Kerkam v. McKenzie,* 441 IDELR 311, 862 F.2d 884, 886 (D.C. Cir. 1988) ("[P]roof that loving parents can craft a better program than a state offers does not, alone, entitle them to prevail under the Act"); *Judith S. v. Bd. of Educ. of Cmty. Unit Sch. Dist. No. 200,* No. 97-C-2899, 1998 WL 409416 (N.D. Ill. July 15, 1998) ("The fact that the parents were able to retain an educational consultant to provide a more complete battery of exams than the school district cannot, by itself, imply that the district's evaluation was insufficient.").

b. Ensuring IEE at Public Request—aka the "Fund" Option.

Of course, in contrast to fighting the IEE request, the school may simply agree to fund the IEE request at public expense—whether because it is concerned about vulnerabilities in its own evaluation, or simply because it has determined that the financial and emotional cost of litigation are not worth it. 34 C.F.R. § 300.502(b)(2)(ii).

But even when the school agrees in principle to fund the IEE request, there remain several issues on which a dispute may nevertheless arise. As discussed more fully below, in response to Question 9, the school may object that the parent's selected IEE evaluator does not meet the school's qualifications, or is outside the relevant geographic area, or charges an exorbitant amount, or otherwise does not meet the school's IEE criteria. Each of these scenarios presents the possibility of a "mini-fight," in which the school must generally choose to either accede to the parent's request, or file a due process hearing request—albeit not to defend the school's evaluation, but to contest more narrowly the parent's compliance with, or legitimacy of a proposed exemption from, relevant IEE criteria.

c. Ignoring the IEE request is NOT an Option—Potential Waiver.

In clarifying the binary "fund-or-file" options outlined in the IDEA regulations, the Department of Education stated in its comments to the 1999 amendments: "The purpose of requiring the public agency to either initiate

a due process hearing … or otherwise to provide an IEE at public expense, is *to require public agencies to respond to IEE requests* ….” 64 Fed. Reg. 12406, 12607 (Mar. 12, 1999) (emphasis added). The Department saw no need to specify a corresponding right for parents to affirmatively initiate a due process hearing request in such circumstances because “if a public agency does not do so it must provide the IEE at public expense.” *Id.*

Underscoring the importance of electing either to fund or file, courts and hearing officers have concluded that “failure to act on a request for an independent evaluation is certainly not a mere procedural inadequacy; indeed, such inaction jeopardizes the whole of Congress’ objectives in enacting the IDEA.” *Harris v. D.C.*, 561 F. Supp. 2d 63, 69 (D.D.C. 2008) (noting “the intransigence of [the school], as exhibited in its failure to respond quickly to plaintiff’s simple request,” and ordering the school to fund parent’s IEE request); *see also Regional Sch. Unit #61*, 111 LRP 48320 (SEA ME 04/27/11) (concluding that under no circumstances is it permissible for a district to take no action once a parent has requested an IEE); *Baldwin County Bd. of Educ.*, 21 IDELR 311 (SEA AL 1994) (“The [district] … cannot simply ignore the parent’s request for a legitimate evaluation in the face of a disagreement over an area of suspected disability”); *District of Columbia Pub. Schs.*, 117 LRP 8291 (SEA DC 01/22/17) (“A district cannot simply ignore a request for an IEE.”); *but see Taylor v. D.C.*, 770 F. Supp. 2d 105, 109 (D.D.C. 2011) (concluding that a school’s failure to timely respond to a request for an independent evaluation is procedural violation).

Schools that ignore an IEE request run the risk that they will be held to have waived their right to establish that the school’s evaluation was appropriate, and thus their right to contest funding the IEE at public expense. *Evans v. Dist. No. 17 of Douglas County, Neb.*, 841 F.2d 824, 830 (8th Cir. 1988) (“[School] never initiated a hearing as required by [IDEA regulations] to show the inappropriateness of the [IEE], or to ‘show that its evaluation [was] appropriate.’ Therefore, the parents had a right to an ‘independent educational evaluation at public expense.’”); *Jefferson County Bd. of Educ. v. Lolita S.*, 64 IDELR 34, 581 Fed. Appx. 760, 765 (11th Cir. 2014) (upholding hearing officer’s determination that parent “was entitled to reimbursement because the school system did not file a due process request to defend its evaluation or challenge the IEE”).

Yet, other courts seem almost ambivalent when a school fails to affirmatively file for due process, and instead simply offers to defend its evaluation in a hearing filed by the parents. For example, the 6th Circuit has suggested that the school’s failure to affirmatively file its own due process request does not waive its right to contest payment of an IEE. *See P.R. v. Woodmore Local Sch. Dist.*, 49 IDELR 31 , 256 Fed. Appx. 751, 755, (6th Cir. 2007). In *P.R.*, the parents—not the school—filed for due process and raised the IEE reimbursement issue. Parents claimed that the school’s failure to file for due process waive their right to contest payment, arguing: “the School District [was required] to reimburse the cost of their IEE because it failed to initiate the due process hearing where the appropriateness of its Evaluation was tested and confirmed.” Rejecting this argument, the court concluded that it doesn’t matter who initiates the due process hearing; the object of the regulations’ review requirement is “to afford Parents an opportunity to challenge and the School District to defend the appropriateness of its Evaluation in an impartial hearing.” Thus, “[a]s long as the object of the regulations is accomplished, there is no reason to exalt form over substance.” *Id.* Similarly, in *Dudley v. Lower Merion Sch. Dist, 58 IDELR 12,* 2011 WL 5942120 (E.D. Pa. 2011), the court rejected parents’ argument that school should be responsible for reimbursing IEE costs because the school never filed a due process complaint to defend its evaluation. Concluding that this argument was “without merit,” the court noted that parent’s due process filing included a claim for reimbursement of IEE expenses and thus, “[t]here was no reason to require the School District to file a separate due process complaint when the same issue was already being litigated in front of the hearing officer.” *Id.* at *6.

In other cases, both the parent and the school file separate due process complaints raising IEE reimbursement issues. For example, the court in *Ms. H. v. Montgomery County Bd. of Educ.*, 2011 WL 666033, at *20 (M.D. Ala. Feb. 14, 2011) excused the school’s failure to file its due process request to defend its IEE until three weeks after parent filed a due process request, contesting denial of reimbursement for an IEE. Labeling the school’s delay in filing as essentially harmless, the court stated: “At this point, it made little sense for MPS to rush to file its own due process complaint contesting the same exact thing that would be disputed in Ms. H’s complaint.” *Id.*

As the above cases illustrate, the fact that schools are procedurally obligated to "fund or file," does not preclude a parent from proactively exercising his or her right to initiate a due process hearing when the school is unresponsive: "If a parent of a child with a disability requests and IEE and believes that the delay in the LEA's handling of their request effectively denies them a meaningful IEE, the parent may request a due process hearing or file a [state] complaint." *Letter to Anonymous*, 30 IDELR 821 (OSEP Aug. 14, 1998); *Lyons v. Lower Merrion Sch. Dist.*, 2010 WL 8913276 IE.D. Pa. 2010) (rejecting hearing officer's conclusion that IDEA does not authorize due process proceeding by parents seeking an IEE, and concluding that the IDEA plainly authorizes parents to file for due process on any matter concerning the "evaluation" of their child).

Given the inconsistency in rulings on whether a school's defense of a public evaluation in a due process hearing requested by the parents satisfies the school's obligation to request a due process hearing to demonstrate that its evaluation was appropriate, schools would be well advised to request their own due process hearings (and to do so without unnecessary delay), even when a parent has filed a due process complaint that encompasses the issue of IEE payment/reimbursement.

d. Unnecessary/Unreasonable Delay in Responding is NOT an Option—Potential Waiver.

The IDEA does not impose a hard-and-fast deadline for responding to an IEE request.[13] Rather, schools are simply required to act "without unnecessary [or "unreasonable"] delay, neither of which are defined in the IDEA. 34 C.F.R. § 300.502(b)(2), (4); *Letter to Anonymous*, 23 IDELR 719 (July 7, 1995) ("[N]either the statutory nor regulatory provisions under Part B provide for a specific response time to a request for an IEE."); *id.* ("[T]he public agency should respond within a reasonable period of time."); *Letter to Anonymous*, 21 IDELR 1185 (OSEP Sept. 15, 1994) ("Part B imposes no time limitations on the right of the school district to request a hearing to show that its evaluation is appropriate.… Similarly, Part B imposes no timelines on how long a school district can wait before providing parents payment for an IEE."); *Letter to Anonymous*, 17 IDELR 355 (OSEP Nov. 9, 1990) ("The EHA-B does not compel school districts to request a hearing within a specified time period when a parent requests a publicly-funded IEE.").

Although the regulations have steadfastly refused to impose a specific "deadline," OSEP has stated that the concept of "without unnecessary delay" "permits … a reasonably flexible, though normally brief, period of time that could accommodate good faith discussions and negotiations between the parties over the need for, and arrangements for, an IEE." *Letter to Anonymous*, 56 IDELR 175 (OSEP Aug. 13, 2010). However, "a public agency may not delay its decision to seek a due process hearing or provide a publicly-funded IEE so long as essentially to eliminate a parent's right to an IEE." *Letter to Anonymous*, 21 IDELR 1185 (OSEP Sept. 15, 1994); *Letter to Katzerman*, 28 IDELR 310 (OSEP Sept. 27, 1997) ("[A] public agency should not delay either in providing public funding or initiating a due process hearing so long as essentially to deny the parent the right to a publicly-funded IEE.").

Thus, absent a definition provided under state law/regulation,[14] what constitutes unnecessary/unreasonable delay generally depends on the specific facts of the case. *L.S. v. Abington Sch. Dist.*, 2007 WL 2851268 at *9 (E.D. Pa. 2007) (noting that "[c]ase law varies greatly in interpreting the term 'unnecessary delay.'"). Accordingly, rulings on whether a particular response time is permissible have varied widely, as noted in the following examples:

- 41-day delay = ok. *C.W. v. Capistrano Unified Sch. Dist.*, 59 IDELR 163, 2012 WL 3217696, at *6 (C.D. Cal. Aug. 3, 2012) (concluding: "[I]f there was any delay, it was necessitated by Mother's vague letter stating she 'disagree[d]' with the Disputed Report but failing to identify any basis for the disagreement…. As District notes, without any specific objection, District was required to reevaluate the entire Disputed Report. Such detailed review obviously takes time and money. Mother could have reduced this time and money by identifying her specific objections to the Disputed Report. Her failure to do so reflects poorly on her, not on District."). [15]

- 6-week delay = ok. *L.S. v. Abington Sch. Dist.*, 48 IDELR 244 , 2007 WL 2851268, (E.D. Pa. 2007) (holding that a six-week delay in filing due process was not a per se violation of the IDEA's "without unnecessary delay" requirement, as the district attempted to resolve the matter through emails and a resolution session, and notified the parents within twenty-seven days that the IEE request would be denied).[16]

- 7-week delay = ok. *Los Angeles Unified Sch. Dist.*, 57 IDELR 55 (SEA CA 2011) (holding that a seven-week response time was reasonable, given that request was received just before a 24-day winter break; very few school employees were allowed to work during the break; and, "[a]fter the request for the IEE was made, the District needed to determine whether its assessments were appropriate, and if so, whether it wanted to file a request for due process").

- 7-week delay = ok. *Ms. H. v. Montgomery County Bd. of Educ.*, 2011 WL 666033, at *20 (M.D. Ala. Feb. 14, 2011) (concluding that a seven-week delay between IEE request and the school's due process filing "was not unnecessary," and noting that "much happened in between these dates," including: prompt acknowledgment of the IEE request by the school; ongoing correspondence between school and parent regarding the basis for disagreement; upon being apprised of parent's having obtained IEEs, school responded within ten days, informing parent that it would contest reimbursement; parent filed due process request three days later, raising the IEE issue); *Id.* at 20 (noting that while school did not file its own due process request until three weeks after parent's filing: "At this point, it made little sense for MPS to rush to file its own due process complaint contesting the same exact thing that would be disputed in Ms. H's complaint.").

- 2-month delay = ok. *Santa Monica-Malibu Unified Sch. Dist.*, 62 IDELR 279 (SEA CA 2013) (concluding that a two-month delay in filing for due process was not unreasonable where the school sent parents prior written notice of its disagreement within ten days of the IEE request; acknowledged its obligation to file for due process; but indicated that it would wait to file for a few weeks in order to provide Parents time to consult with their attorney and withdraw their IEE request prior to filing).

- 2-month delay = ok. *J.P. v. Ripon Unified School District*, 52 IDELR 125, 2009 WL 1034993, (E.D. Ca. 2009) (holding that a two-month delay in filing due process was reasonable, as the parties were communicating regarding the request for the IEE in the interim, and the school filed for a due process hearing less than three weeks after the parties reached a "final impasse").

- 10-week delay = violation. *Los Angeles Unified Sch. Dist.*, 48 IDELR 293 (SEA CA 2007) (74-day delay in filing due process request was unnecessary and unreasonably where school waited for the parents to file a due process hearing, and then attempted to defend the appropriateness of its evaluations during that proceeding, and filed no due process complaint itself until the day of the pre-trial hearing).

- 11-week delay = violation. *Pajaro Valley Unified School District v. J.S.*, 47 IDELR 12 , 2006 WL 3734289 at *3, (N.D. Cal. 2006) (holding that "the District's unexplained and unnecessary delay in filing for a due process hearing waived its right to contest Student's request for an independent educational evaluation at public expense …," when: the school waited three weeks to respond to IEE request; its response then demanded that parent reconfirm it still wanted an IEE; and, after parent promptly reconfirmed the IEE request, the school delayed an additional eight weeks before filing a due process hearing request); *Id.* ("The District has not explained why it took it almost three months from the time Student first requested an independent educational assessment at public expense for the District to file its due process complaint, much less why that delay was somehow 'necessary.'").

- 3-month delay = violation. *Los Angeles Unified Sch. Dist.*, 111 LRP 48178 (SEA CA July 7, 2011) (failure to respond to request for a publicly funded IEE until after *parent* filed due process complaint three months later was unreasonable given the district's failure to communicate with the parents during that time or explain the reason for the delay).[17]

- 4-month delay = violation. *Taylor v. D.C.*, 770 F. Supp. 2d 105, 109 (D.D.C. 2011) (holding that school's unjustified failure to respond to parents' IEE request was a procedural violation).

- 5-month delay = violation. *Capistrano Unified Sch. Dist.*, 114 LRP 38493 (SEA CA 2014) (holding that the school waived its right to contest funding of IEE by failing to take action on the parents' IEE request for more than five months upon the mistaken belief the child was no longer in special education).

While determinations regarding unnecessary/unreasonable delay are fact specific, courts and hearing officers appear to be more lenient on the timeframe where the evidence demonstrates that: (a) the school promptly acknowledges the request; (b) the school actively engages in informal efforts to resolve disputes (e.g., verifying

whether proposed evaluators meet the school's qualification criteria; negotiating with proposed evaluators regarding charges that fall outside the school's cost-containment criteria; considering parent efforts to demonstrate unique circumstances necessitating a waiver of school criteria; etc.); (c) the school scrutinizes its own evaluation in determining whether to fund or file—which in the absence of a clear explanation of the basis for parents' disagreement, may justify longer delay; and/or (d) the delay is, at least in part, attributable to factors outside the school's control—e.g., intervening winter break.[18]

Finally, consistent with the split of authority on the consequence (or lack thereof) in cases where the school ignores an IEE request and simply defends its evaluations when challenged in a due process proceeding filed by parents, there is a similar split of authority in cases where the school belatedly files for due process.

For example, the court in *Ms. H. v. Montgomery County Bd. of Educ.*, 2011 WL 666033, at *20 (M.D. Ala. Feb. 14, 2011) excused the school's failure to file its due process request to defend its IEE until three weeks after parent filed a due process request, contesting denial of reimbursement for an IEE. The court excused the delay in filing as harmless: "At this point, it made little sense for MPS to rush to file its own due process complaint contesting the same exact thing that would be disputed in Ms. H's complaint." *Id.*; *see also*

In contrast, in *Los Angeles Unified Sch. Dist.*, 48 IDELR 293 (SEA CA 2007), the administrative law judge ordered school to pay IEE costs where the school chose to simply "defend" its evaluation in response to a due process complaint filed by the parent, and then untimely filed its own, affirmative due process request on the day of the pre-trial hearing.

e. Proposing to "Cure" Alleged Defects in School's Evaluation is Not an Option.

As discussed in more detail in response to Question #7, below, schools may not deny or delay a request for an IEE at public expense by responding with an offer to cure the alleged defect in the school's evaluation through additional testing, or by conducting evaluating in an area that was allegedly "missed," or by offering a full re-evaluation by school evaluators. *E.g., Letter to Carroll*, 68 IDELR 279 (OSEP Oct. 22, 2016) ("The IDEA affords a parent the right to an IEE at public expense and does not condition that right on a public agency's ability to cure the defects of the evaluation it conducted prior to granting the parent's request for an IEE.").

3. What does it mean to provide an IEE "at public expense"?

The IDEA regulations provide that, subject to certain conditions, "[a] parent has a right to an independent educational evaluation at public expense." 300 C.F.R. § 300.502(b). "[A]t public expense" is further defined to mean that the school must pay the "full cost" of the evaluation, or ensure that the evaluation is otherwise provided "at no cost to the parent." 34 C.F.R. § 300.502(a)(3)(ii).

a. Authority to Impose Public Expense Requirement

The IDEA itself is silent as to who should bear the expense of an IEE. 20 U.S.C. § 1415(b)(1) (stating only that the procedural safeguards include "an opportunity … to obtain an independent educational evaluation ["IEE"] of the child"). The requirement that a proper IEE request be provided "at public expense" is a gloss included in the regulations only. 34 C.F.R. § 300.502(b)(1).

Given the statutory silence on allocation of costs for IEEs, legal challenges to the "public expense" gloss argued that: (a) Congress intended to reserve payment issues to the individual states to decide, and thus (b) the Department of Education's gloss exceeded its regulatory authority. In rejecting this position, courts have concluded that the congressional silence militates in favor of the *opposite* conclusion: in the absence of clear congressional direction to the contrary, the Department of Education had discretion to impose a "public expense" obligation. *Phillip C. ex rel. A.C. v. Jefferson County Bd. of Educ.*, 60 IDELR 30, 701 F.3d 691, 695 (11th Cir. 2012), *cert. denied,* 134 S. Ct. 64 (2013) (rejecting the contention that Congress implicitly delegated to the states the right to decide whether to reimburse parents for the cost of an IEE when it required state and local agencies to "establish and maintain procedures ... to ensure ... procedural safeguards," *see* 20 U.S.C. § 1415(a), and instead concluding that public financing of a parent's IEE is consistent with the intent of Congress since the IDEA specifically required the Department to preserve regulations in effect as of July 20, 1983, 20 U.S.C.

§ 1406(b)(2) —one of which expressly provided for IEEs at public expense.[19]); *see also Phillip v. Jefferson Cty. Bd. of Ed.*, 57 IDELR 97, 2001 WL 13176070 at *6-7 (N.D. Ala. Aug, 17, 2011) ("If Congress explicitly leaves a gap in a statute for an agency to fill, 'there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.'") (citations omitted).

b. Cash Advance vs. Reimbursement:

"Since the manner of payment, either as reimbursement or advance funding is not addressed by Part B, it is within the public agency's discretion to determine whether the parent is entitled to a cash advance." *Letter to Heldman* 20 IDELR 621 (OSEP July 1, 1993); *see also Letter to Petska* 35 IDELR 191 (OSEP Sept. 10, 2001) ("The IDEA does not address whether funding should be paid as reimbursement or as a cash advance."); *Letter to Katzerman*, 28 IDELR 310 (OSEP Sept. 27, 1997) ("Part B does not address whether parents should be able to obtain public funding for an IEE before the IEE is performed or seek reimbursement after the evaluation.").

"If the parent requests advance funding …, but the public agency denies that request, the parent could request a due process hearing … if the parent believes that denial of advance funding would effectively deny the parent the right to a publicly-funded IEE of their child." *Letter to Heldman* 20 IDELR 621 (OSEP July 1, 1993) (emphasis added); *see also Letter to Petska* 35 IDELR 191 (OSEP Sept. 10, 2001) (same); *Letter to Anonymous*, 17 IDELR 1113 (OSEP June 17, 1991) (same).

c. Parents' Insurance

In *Raymond S. v. Ramirez*, 918 F. Supp. 1280, 1292 (N.D. Iowa 1996), the court held that schools may not reduce their liability for IEE expense by taking advantage of parents' insurance coverage, where doing so would reduce the parents' lifetime cap on coverage. *Id.* at 1293-94 ("[T]he parents of a disabled child may not be required to look to their private insurance for coverage where to do so would result in a financial loss not incurred by similarly situated parents of a non-disabled child."). In reaching its conclusion, the court relied on Department of Education interpretive guidance, noting that "free" in FAPE, means:

> [A]n agency may not compel parents to file an insurance claim when filing the claim would pose a realistic threat that the parents of handicapped children would suffer a financial loss not incurred by similarly situated parents of non-handicapped children. Financial losses include, but are not limited to, the following: (1) A decrease in available lifetime coverage or any other benefit under an insurance policy; (2) An increase in premiums or the discontinuation of the policy; or (3) An out-of-pocket expense such as the payment of a deductible amount incurred in filing a claim."

Id. at 1293 (quoting 45 Fed. Reg. 86,390 (Dec. 30, 1980)).[20] The court thus ordered the school to reimburse payments made by parents' insurance carrier for the IEE.[21] *Id.* at 1297; *cf. River Forest Sch. Dist. No. 90 v. Illinois State Bd. of Educ.*, 24 IDELR 36, 1996 WL 189279 at *20 (N.D. Ill. Apr. 17, 1996) (concluding in a non-IEE context construing the same Department of Education guidance that "[i]f there is no limit on benefits and [parent] is not paying out-of-pocket expenses for the insurance coverage, the school district may require [student's] health insurance to pay for [student's] services. Even if [parent] incurred out-of-pocket expenses, the school district could reimburse … her expenses …."); 34 C.F.R. § 300.154(e) ("With regard to services required to provide FAPE to an eligible child under this part, a public agency may access the parents' private insurance proceeds only if the parents provide consent.").

d. Travel Costs (Lodging, Meals, Gas)

"If it is necessary for a child to be evaluated at a location out-of-district, the district may be required to pay for the expenses incurred by the parent for travel or other related costs." *Letter to Petska*, 35 IDELR 191 (OSEP Sept. 10, 2001); *Letter to Heldman*, 20 IDELR 621 (OSEP July 1, 1993) (concluding that, if unique circumstances require out-of-district IEE, "the IEE must be publicly-funded. This would include the funding for the expenses incurred by the parent for travel, meals and lodging if an overnight trip is necessary."). Notably, this obligation is not dependent on the financial resources of the parent. *Letter to Heldman*, 20 IDELR 621 (OSEP July 1, 1993).

In *M.S. v. Utah Sch. for the Deaf & Blind*, 2014 WL 4216027 (D. Utah Aug. 25, 2014), *vacated and remanded* on other grounds, 822 F.3d 1128 (10th Cir. 2016), the court found that a Utah-based school was obligated to reimburse

parent $1,198.80 in travel-related expenses incurred in accompanying her daughter to Massachusetts to undergo a deafblind IEE. In reaching this conclusion, the court found that there were no specialists in Utah who were qualified to conduct the IEE, and that the school itself had utilized the Massachusetts-based evaluator to conduct the school's own triennial evaluation. According, the court required reimbursement of parent's out-of-pocket expenses incurred in obtaining student's IEE, including "reasonable and justifiable" travel expenses. *Id.* at *9-10.

e. IEE Evaluator's Attendance at MET/IEP Meeting

In *B.B. v. Perry Twp. Sch. Corp.*, the court held that paying the "full cost" of an independent evaluation under 34 C.F.R. § 300.502(a)(3)(ii) does not include paying for the parents' chosen independent evaluators to attend MET/IEP meetings to explain their findings and recommendations. 2008 WL 2745094 at *11 (S.D. Ind. July 11, 2008). The court noted nothing in the IDEA regulations that "requires independent evaluators to be present at the meetings." Accordingly, if parents wished to have their IEE evaluators at meetings, "parents could invite the specialists to attend … meetings at the parents' expense." *Id.* at *12-13 (citing parents' right under 34 C.F.R. § 300.321(a)(6) to invite to IEP meetings "other individuals who have knowledge or special expertise regarding the child"); *but see M.M. v. Lafayette Sch. Dist.*, 58 IDELR 132, 2012 WL 398773, at *11 (N.D. Cal. Feb. 7, 2012), *aff'd in part, rev'd in part and remanded on other grounds,* 767 F.3d 842 (9th Cir. 2014), *as amended* (Oct. 1, 2014) (concluding that school's obligation to pay the "full cost" of the IEE included the cost of IEE evaluator to attend IEP meeting and discuss her evaluation).

4. What information must the school provide to a parent who requests an IEE?

Upon receipt of an IEE request, the school must provide: (a) "information about where an [IEE] may be obtained," and (b) "the agency criteria applicable for [IEEs]." 34 C.F.R. §300.502(a)(2). Again, the IDEA imposes an affirmative obligation on schools to point parents in the right direction, and to equip them with the required school criteria so as to enable parents to select an appropriate IEE evaluator.

"[L]isting the names and addresses of evaluators who meet the minimum qualifications can be an effective way for agencies to inform parents of where and how they might obtain an IEE." *Letter to Young*, 39 IDELR 98 (OSEP Mar. 20. 2003) (noting also: "There is nothing in the IDEA that would prohibit a public agency from publishing a list of examiners that meet the agency criteria …"); *Letter to Fields*, 213 IDELR 233 (OSEP Sept. 15, 1989).

5. How often can a parent request an IEE?

Parents are entitled to only one IEE at public expense "each time the public agency conducts an evaluation with which the parent disagrees." 34 C.F.R. § 300.502(b)(5); *see also Seattle Sch. Dist.*, 52 IDELR 30 (SEA WA 2008) (Because the district funded an IEE the parent requested in response to the child's most recent evaluation, the parent was not entitled to another IEE until the district conducted a new assessment); *Educational Serv. Distr.*, 115 LRP 16924 (SEA WA 12/19/14) (The district complied with all state requirements in its provision to the parent of an IEE at public expense after she disagreed with its 2014 evaluation, and it had not conducted any further evaluation since); and *Olentangy Local Sch. Dist.*, 115 LRP 9484 (SEA OH 02/06/15) (A district did not violate the IDEA by refusing to conduct additional assessments of a student deemed ineligible for special education after it funded an IEE).

The Department of Education "clarified" this limitation by adding 34 C.F.R. § 300.502(b)(5) among its 2006 amendment to the IDEA regulations, stating: "[A] parent is not entitled to more than one IEE at public expense when the parent disagrees with a specific evaluation or reevaluation conducted or obtained by the public agency." 71 Fed. Reg. 46540, 46690 (Aug. 14, 2006); *id.* at 46544. Note that the one-IEE limitation does not mean that schools may limit parents to only one examiner when the student's disability (or suspected disability) requires assessment in multiple areas. *In re: Student with a Disability v. Wisconsin State Educ. Agency*, 70 IDELR 215 (SEA WI 2017) (noting that "while the [school's IEE] procedures correctly limit parents to requesting one IEE per school district evaluation, the evaluation may not be limited to one outside examiner when multiple components of the student's disabilities need to be assessed").

6. Can the school require a parent to provide the basis for their disagreement with the school's evaluation as a prerequisite to granting an IEE request?

No. Although schools are permitted to ask why the parents disagree, they cannot demand a response or explanation for the disagreement. 34 C.F.R. § 300.502(b)(4) ("[T]he public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide and explanation …."); *Jefferson Cty. Bd. of Educ. v. Lolita S.*, 64 IDELR 34, 581 Fed. Appx. 760 (11th Cir. 2014).

Likewise, the school may not use parents' failure or refusal to explain their disagreement to justify "unreasonable delay" in its decision to either provide the IEE or file for due process. 34 C.F.R. § 300.502(b)(4). That said, the parent's refusal to disclose the basis of his/her disagreement may justify some "reasonable" delay in the school's response, as the lack of specificity requires the school to expend more time conducting a detailed review of its own evaluation to determine whether to fund the IEE or file for due process. *C.W. v. Capistrano Unified Sch. Dist.*, 2012 WL 3217696, at *6 (C.D. Cal. Aug. 3, 2012) (noting that, absent knowledge of parent's specific objection, "District was required to reevaluate the entire Disputed Report. Such detailed review obviously takes time and money. Mother could have reduced this time and money by identifying her specific objections to the Disputed Report.").

In adding this provision among the 1999 amendments to the IDEA regulations, the Department of Education noted: "[W]hile it would be helpful for parents to explain their disagreement over a public evaluation, there is nothing in the statute which prevents parents from obtaining an IEE if they did not express their concerns first." 64 Fed. Reg. 12406, 12608 (Mar. 12, 1999).)

7. Can the school insist on an opportunity to "cure" any alleged defects in its evaluation before allowing parents to obtain and IEE at public expense?

No. "The IDEA affords a parent the right to an IEE at public expense and does not condition that right on a public agency's ability to cure the defects of the evaluation it conducted prior to granting the parent's request for an IEE." *Letter to Carroll*, 68 IDELR 279 (OSEP Oct. 22, 2016) (stating that parents' right to an IEE obtains "even if the reason for the parent's disagreement is that the public agency's evaluation did not assess the child in all areas related to the suspected disability").

It is the public agency's responsibility to ensure that its evaluation is "sufficiently comprehensive to assess the child in all areas related to the suspected disability." *Letter to Baus*, 65 IDELR 81 (OSEP Feb. 23, 2015) (citing 34 C.F.R. §§ 300.304-306); 34 C.F.R. § 300.304(c)(4) ("Each public agency must ensure that … the child is assessed in *all areas* related to the suspected disability ….") (emphasis added). This responsibility obliges the school to take a proactive and thorough approach on the front end, rather a "react-and-cure" approach on the back end. *M.Z. v. Bethlehem Area Sch. Dist.*, 60 IDELR 273, 521 Fed Appx. 74, (3rd Cir. 2013) (unpublished) (rejecting hearing officer's conclusion that the inappropriateness of the school's evaluation could be rectified by supplemental information and holding: "Once the Hearing Officer determined that the reevaluation was inappropriate, M.Z. was entitled to an independent educational evaluation at public expense."); *Fullerton Sch. Dist.*, 58 IDELR 177 (SEA CA 2012) (holding that a district cannot respond to a parent's request for a publicly funded IEE by proposing to reevaluate a student).

OSEP has repeatedly confirmed its position that a school cannot reserve the right to supplement or cure its evaluation before allowing parents to obtain an IEE at public expense. *Letter to Carroll*, 68 IDELR 279 (OSEP Oct. 22, 2016); *Letter to Baus*, 65 IDELR 81 (OSEP Feb. 23, 2015) ("When … parent disagrees with the evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area …."); *Letter to McDonald*, 113 LRP 49958 (OSEP Mar. 28, 2012) ("OSEP's assessment is that [New Jersey regulation] limits the parents' rights to an IEE by giving the public agency an opportunity to conduct an assessment in an area not covered by the initial evaluation or reevaluation before the parents are granted an IEE."); *see also Letter to Gray*, 213 IDELR 183 (OSEP Oct. 5, 1988) ("[S]chool district cannot impose as a precondition to seeking a publicly-funded IEE a 30-day period after the parents disagree with an evaluation to allow the school district to cure any defects in its evaluation.").

That said, if the parent agrees, in a resolution session to allow the school to conduct an allegedly missing evaluation, at least one court has ruled that, in the context of a subsequent IEE request, parent would bear the burden of proving the inadequacy of such school-conducted

evaluations. *A.L. v. Chicago Pub. Sch. Dist. No. 299*, 57 IDELR 276, 2011 WL 5828209, at *10 (N.D. Ill. Nov. 18, 2011) ("[I]n their resolution session, the Parent had relinquished her request for independent evaluations in assistive technology and speech and language, and instead, had agreed to allow the District to conduct those evaluations. Thus, to the extent that the Parent intended to assert that CPS' AT and speech evaluations were inadequate, the burden of proof had shifted back to her.").

8. Can the school require the parents to choose from a list of evaluators compiled by the school?

Yes, but only if the list is exhaustive. An implicit assumption in this question—and yet one that bears explicit emphasis—"it is ***the parent***, not the district, who has the right to choose which evaluator on the list will conduct the IEE." *Letter to Parker* 41 IDELR 155 (OSEP Feb. 20, 2004) (emphasis added); *Letter to Fields*, 213 IDELR 233 (OSEP Sept. 15, 1989) ("[P]arents are free to select whomever they choose, so long as the evaluator(s) meet the agency's location, qualification, and reasonable cost criteria."). Accordingly, a school cannot simply select the independent evaluator from its approved list and force the parent to obtain his or her IEE through the school-selected evaluator. *Id.*

a. Approved-Evaluator Lists:

Although schools may not select the independent evaluator, they are not required to give parents carte blanche in the selection process, either. According to OSEP, "IDEA permits a district to maintain, and require parents to use, a list of all qualified examiners in the area that meet the same criteria that the public agency uses when it initiates an evaluation …." *Letter to Anonymous,* 56 IDELR 175 (OSEP Aug. 13, 2010); *see also Letter to Young* (OSEP Mar. 20, 2003); *Letter to Parker* (OSEP Feb. 20, 2004).

However, OSEP then further adds a significant caveat: "[I]f the child's needs can be appropriately evaluated by the persons on the list *and* the list exhausts the availability of qualified people within the geographic area specified, then an agency can restrict parents to selecting from among those persons on the list." *Letter to Anonymous*, 56 IDELR 175 (OSEP Aug. 13, 2010) (emphasis added). If the list does not include "every qualified evaluator who meets the agency's criteria," the school must allow parents the opportunity to select an evaluator who is not on the list but who meets the school's criteria. *Letter to Parker*, 41 IDELR 155 (OSEP Feb. 20, 2004); *Letter to Imber*, 19 IDELR 352 (OSEP Aug. 18, 1992) ("If the agency's list does not exhaust the number of persons minimally-qualified to evaluate the unique need of every child in the district, parents are free to select whomever they choose, so long as the evaluator meets the agency's criteria.").

That said, schools are welcome to maintain such lists and encourage their use, as optional choices and exemplars of providers who comply with the school's evaluation criteria.

b. Unique Circumstances Exception re Selection from List:

"If such a list is maintained and parents are required to use it, the LEA must include in its policy that parents have the opportunity to demonstrate that unique circumstances justify selection of an IEE examiner who does not meet the agency's qualification criteria and does not appear on the agency's list of examiners." *Letter to Anonymous*, 56 IDELR 175 (OSEP Aug. 13, 2010); *Letter to Parker*, 41 IDELR 155 (OSEP Feb. 20, 2004); *Letter to Young* (OSEP Mar. 20, 2003).

c. Disputes re Parent Selection—aka, "Mini-Fight":

If the school disputes the parent's evaluator selection—i.e., because the evaluator does not meet agency criteria and the parent has failed to demonstrate unique circumstances justifying an exception to such criteria, the school may initiate a due process hearing demonstrate the inappropriateness of the parent's selection. *Letter to Parker*, 41 IDELR 155 (OSEP Feb. 20, 2004). If the school chooses not to initiate a due process hearing, it must ensure that the parent is reimbursed for the evaluation; it may not simply refuse to pay. *Letter to Parker*, 41 IDELR 155 (OSEP Feb. 20, 2004).

9. What "criteria" can the school impose on any evaluator selected to perform an IEE? Are there any exceptions?

Under the IDEA regulations, agency criteria "*includ[e]* … the location of the evaluation and the qualifications of the examiner." 34 C.F.R. § 300.502(e) (emphasis added). Use of the term "include" implies that the specifically enumerated criteria are not exclusive, and schools may adopt

other criteria "to the extent those criteria are consisted with the parent's right to an independent educational evaluation." *Id.*; *see also* 34 C.F.R. § 300.20 ("*Include* means that the items names are not all of the possible items that are covered, whether like or unlike the ones named."); *Letter to LoDolce*, 50 IDELR 106 (OSEP, Dec. 21, 2007) (confirming that section 300.502 contains "examples of agency criteria" and "not necessarily the only criteria").

For example, the Department of Education and courts have consistently recognized schools' ability to adopt criteria relating cost containment/maximum fee criteria "to avoid unreasonable charges for IEEs." *Letter to Anonymous*, 103 LRP 22731 (OSEP Oct. 9, 2002); *see also Letter to Anonymous*, 22 IDELR 637 (OSEP Feb. 2, 1995); *Letter to Parker*, 41 IDELR 155 (OSEP Feb. 20, 2004). Likewise, the Department of Education has recognized schools' ability to adopt criteria to preclude evaluators from making recommendations regarding specific methodologies or materials. *See Letter to LoDolce*, 50 IDELR 106 (OSEP, Dec. 21, 2007) (pointing out that if such criteria are adopted, they must be applied equally to school evaluators and IEE evaluators, alike).

"[T]he criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same … criteria that the public agency uses when it initiates an evaluation," so long as such criteria are "consistent with the parent's right to an independent educational evaluation." 34 C.F.R. § 300.502(e). The regulations do not enumerate all potential criteria but do specifically mention two: "the location of the evaluation" and "the qualifications of the examiner."

Location of the evaluation: "The district may impose limitations on the number of miles an evaluation can be conducted away from the district, as long as this does not prevent the parent from getting the appropriate evaluation." *Letter to Bluhm*, 211IDELR 227A (OSEP July 2, 1980); *A.L. v. Jackson Cty. Sch. Bd.*, 635 Fed.Appx. 774 (11th Cir. 2015) (holding that school was not required to pay for an evaluation more than 200 miles from the school district when there were qualified providers within the school's geographic criteria). See also Question #3 above, relating to travel costs.

Qualifications of the Examiner: In general, qualification criteria may include a licensure requirement: "[I]t would be appropriate for a public agency to require an IEE examiner to hold, or be eligible to hold, a particular license when a public agency requires the same licensure for personnel who conduct the same types of evaluations for the agency." 71 Fed. Reg. 46540, 46689 (Aug. 14, 2006) (noting, however, that schools cannot impose such criteria "if only individuals employed by a public agency may obtain a license."); *Letter to Bluhm*, 211IDELR 227A (OSEP July 2, 1980) ("The district may impose minimum requirements for the qualifications of evaluators (such as 'licensure'), based upon State standards."); *Letter to Petska*, 35 IDELR 191 (OSEP Sept. 10, 2001) ("A public agency may establish a qualification that requires a IEE examiner to either hold or be eligible to hold a particular license when a public agency requires the same licensure for its own staff who conduct evaluations.") However, schools may not universally require licensure, as there may be instances in which the most appropriate individuals to conduct the evaluation may not be licensed—*e.g.*, "because such licensure does not exist or is not required by State law at the time." *Letter to Petska*, 35 IDELR 191 (OSEP Sept. 10, 2001) (referring to rehabilitation engineers or sensory deprivation therapists, as potential examples).

Cost-Containment Criteria: Not surprisingly, issues concerning the cost of an IEE are the subject of frequent debate, meriting a separate discussion on their own. *See* Question #10, below.

Other Criteria: Given the non-exclusive list of criteria in the IDEA regulations, OSEP has acknowledged that schools may adopt other, non-enumerated criteria. Examples of such additional criteria include:

- *Prohibition against recommending specific methodologies/materials*: In *Letter to LaDolce*, OSEP opined that schools may prohibit IEE evaluators from providing recommendations regarding specific methodologies/materials, but only if the school similarly prohibits its own evaluators from doing so. 50 IDELR 106 (OSEP Dec. 12, 2007) ("If a public agency precludes its own evaluators from making recommendations, it may preclude an independent evaluator from making a recommendation. The converse is also true.").[22]
- *Observation of student:* Likewise, schools have discretion on whether to require observation of the student.

Letter to Wessels, 16 IDELR 735 (OSEP Mar. 9, 1990) ("[IDEA] neither requires nor precludes observation of child in the regular classroom setting by an independent evaluator…. If a public agency observed a child in conducting its evaluation, or if its assessment procedures make it permissible to have in-class observation of a child, the independent evaluator has the right to do so."); *see also G.J. v. Muscogee Cty. Sch. Dist.*, 668 F.3d 1258, 1267 (11th Cir. 2012) ("[N] either the statute nor the regulations implementing the IDEA provide a general entitlement for parents of children with disabilities, or their professional representatives, to observe their children in any current classroom or proposed educational placement.") (quoting *Letter to Mammas*, 42 IDELR 10 (OSEP, May 26, 2004)).

- *Obligation to produce entire IEE report*: OSEP has opined that parents may be obligated to provide private IEEs to schools in advance of scheduling IEP meetings, stating: "[I]t would be reasonable for a public agency to establish criteria, including a requirement that it receive the entire evaluation report and not just the scaled scores by a certain time, to give the public agency the opportunity to review the report prior to scheduling an IEP Team meeting to discuss that evaluation." Letter to Anonymous, 58 IDELR 19 (OSEP Jan. 19, 2011)

- *Parental consent to exchange information with IEE evaluator, including results of IEE and explanation of test protocols*: "If written [parental] consent is required for the independent examiner to provide the results of the IEE to the district and the parent refuses to provide consent, thereby denying the district access to information in the IEE, it is not inconsistent with IDEA for the district to deny reimbursement for the IEE since it will be unable to consider the results of the IEE." *Letter to Anonymous*, 55 IDELR 106 (OSEP Jan. 4, 2010). Similarly, "[i]f the district is not familiar with the test and needs to review the test protocols to determine if the IEE meets agency criteria, it can require that the independent evaluator provide an explanation of the test protocols." *Letter to Anonymous*, 55 IDELR 106 (OSEP Jan. 4, 2010).

- *Obligation to share test protocols*: In *Letter to Anonymous*, 55 IDELR 106 (OSEP Jan. 4, 2010), OSEP considered an IEE Policy that required, as a condition of reimbursement, that the examiner provide to the school copies of all test protocols—i.e., the "written instructions on how a test must be administered and the questions." OSEP noted that such protocols may be protected under applicable copyright and/or trademark laws. Nevertheless, OSEP concluded: "If the district is not familiar with the test and needs to review the test protocols to determine if the IEE meets agency criteria, it can require that the independent evaluator provide an explanation of the test protocols." It is the independent evaluator's obligation to his/her rights with respect to copyright and trademark issues. *Id.*

<u>*Impermissible Criteria*</u>: While certain, additional criteria may be permissible beyond the items specifically mentioned in 34 C.F.R. § 300.502(e), OSEP has conversely opined that other criteria would not be "consistent with the parent's right to an independent educational evaluation," and are thus prohibited. *Id.* Examples of impermissible criteria include:

- *Bias Criteria*: Schools <u>cannot</u> adopt qualification criteria, based on perceived biases of evaluators, as such, qualifications are "unrelated to an examiners' ability to conduct an educational evaluation and undermine the parent's ability to obtain an independent evaluation." *Letter to Petska*, 35 IDELR 191 (OSEP Sept. 10, 2001) (explaining further: "Criteria prohibiting an IEE examiner's association with private schools, organizations that advocate the interests of parents, organizations that advocate particular instructional approaches in the area of educating children with disabilities and a history of consistently acting as an expert witness against public schools are not qualification necessary to perform an evaluation.").

- *School experience criteria*: Schools <u>cannot</u> adopt qualification criteria, requiring that IEE evaluators have "recent and extensive experience in the public schools": "This qualification is unrelated to an examiners' ability to conduct an educational evaluation and may undermine the parent's ability to obtain an independent evaluation." *Letter to Petska*, 35 IDELR 191 (OSEP Sept. 10, 2001). OSEP states that such criteria are "too narrow" and may preclude qualified examiners whose expertise is needed for a full evaluation but is not tied to experience in public schools (*e.g.*, assistive technology evaluations for wheelchair seating and positioning). *Id.*

Prohibition of age/grade level scores: Schools may not set blanket criteria that preclude independent evaluators from including age and grade-level scores in evaluation reports, as such information may assist in determining the content of a child's IEP, including how to enable the child to participate in the general education curriculum. *Letter to LoDolce*, 50 IDELR 106 (OSEP, Dec. 21, 2007). Additionally, for children suspected of having a specific learning disability, age/grade level scores may be necessary to meet the evaluation criteria under 34 C.F.R. § 300.311(a)(5), concerning the child's ability to achieve relative to age and State-approved grade-level standards. *Id*. Accordingly, because schools must allow their own evaluators to use age/grade level scores, they may not preclude independent evaluators from doing so. *Id.*

IEE evaluator's attendance at IEP meetings: "[W]hile the district could request (and pay for) the examiner's participation [in an IEP meeting], such participation cannot be required as a condition of considering the results of the evaluation …." *Letter to Anonymous*, 55 IDELR 106 (OSEP Jan. 4, 2010) (emphasis added). On the flipside, as noted in response to Question #3, above, schools are generally not obligated to pay for an IEE evaluator's attendance at an IEP meeting, so long as the IEP team includes, as required at 34 C.F.R. § 300.321(a)(5), an "individual who can interpret the instructional implications of evaluation results." *See B.B. v. Perry Twp. Sch. Corp.*, 2008 WL 2745094 at *11 (S.D. Ind. July 11, 2008) (noting that nothing in the IDEA regulations "requires independent evaluators to be present at the meetings."); *but see M.M. v. Lafayette Sch. Dist.*, 58 IDELR 132, 2012 WL 398773, at *11 (N.D. Cal. Feb. 7, 2012), *aff'd in part, rev'd in part and remanded on other grounds*, 767 F.3d 842 (9th Cir. 2014), as amended (Oct. 1, 2014) (concluding that school's obligation to pay the "full cost" of the IEE included the cost of IEE evaluator to attend IEP meeting and discuss her evaluation).

Substantial Compliance: Some courts have held that parents need only show "substantial compliance" with the school's criteria in order to qualify for an IEE at public expense. *Seth B. v. Orleans Par. Sch. Bd.*, 67 IDELR 2, 810 F.3d 961, 979 (5th Cir. 2016). The court's ruling in this case was based on a concern that strict compliance would allow schools "to find ambiguities or inconsequential nonconformities in any IEE" and thus deny reimbursement and "effectively … treat parents' right to an IEE as a privilege to be granted at their discretion." *Id.* at 978-79. The court defined "substantial compliance" as meaning that "insignificant or trivial deviations from the letter of agency criteria may be acceptable as long as there is substantive compliance with all material provisions of the agency criteria and the IEE provides detailed, rigorously produced and accessibly presented data." *Id.* at 979. While recognizing that its ruling presented the possibility of a "slippery slope," the *Seth B.* court found such a risk acceptable. *Id.* at 979.

Unique Circumstances Exception re Qualification Criteria: According to OSEP, schools must also permit parents an opportunity to demonstrate unique circumstances that would justify waiving school criteria in a particular case. *Letter to Anonymous*, 20 IDELR 2383 (OSEP Dec. 13, 1993) ("If the parent demonstrates that unique circumstances necessitate the selection of an evaluator who does not meet the agency's location criteria [i.e., in-state requirement], that IEE must be publicly-funded."); *Letter to Fields*, 213 IDELR 233 (OSEP Sept. 15, 1989) ("[W]hen enforcing IEE criteria, the district must allow the parents to demonstrate that unique circumstances justify an IEE that does not fall within the district's criteria."); *Letter to Heldman*, 20 IDELR 621 (OSEP July 1, 1993) (same).

"Same criteria" Requirement: In adopting any criteria applicable to IEE evaluators, the school must ensure that such criteria are "the same as the criteria that the public agency uses when it initiates an evaluation." 34 C.F.R. § 300.502(e); *Letter to Savit*, 64 IDELR 250 (OSEP Jan. 19, 2016).

10. Can the school put a dollar "cap" on the amount it will pay for an IEE?

Yes—*with important caveats*. In comments issued with the final amendments to its IDEA regulations in 2006, the Department of Education stated: "It is the Department's longstanding position that public agencies should not be required to bear the cost of unreasonably expensive IEEs." 71 Fed. Reg. 46540, 46689 (Aug. 14, 2006); *Letter to Hull*, 211 IDELR 132 (OSEP Sept. 6, 1979) (same). Accordingly, the Department of Education recognized that "it is appropriate for a public agency to establish reasonable cost containment criteria applicable to personnel used by the agency as well as to personnel used by the parents." 71 Fed. Reg. at 46689-90.

The Department's position has been repeatedly echoed in

OSEP guidance letters. *Letter to Anonymous*, 22 IDELR 637 (Feb. 2, 1995) ("To avoid unreasonable charges for independent educational evaluations (IEEs), a school district may establish maximum allowable charges for specific tests."); *Letter to Anonymous* (OSEP Oct. 9. 2002) (same); *Letter to Heldman*, 20 IDELR 621 (OSEP July 1, 1993) ("A public agency may … establish criteria to ensure that the cost of a publicly-funded IEE is reasonable."); *Letter to Kirby* 213 IDELR 233 (OSEP May 4, 1990); *Letter to Thorne*, 16 IDELR 606 (OSEP Feb. 5, 1990) (same); *Letter to Wilson*, 16 IDELR 83 (OSEP Oct. 17, 1989).[23]

Courts have likewise upheld enforcement of reasonable cost-containment criteria. *E.g., Shafi A. v. Lewisville Ind. Sch. Dist.*, 69 IDELR 66, 2016 WL 7242768 (E.D. Tex. 2016) (holding that the school was not obligated to foot the bill for an IEE conducted by the parents' preferred evaluator because the evaluator's fee significantly exceeded customary assessment rates in the area and there were no unique circumstances to justify the excessive cost).

Establishing Cost-Containment Amounts—Not Just an Average: In establishing maximum charges/cost-containment criteria, OSEP warns that such criteria cannot be simply an average of charges; rather, only "unreasonably excessive fees" may be precluded. *Letter to Anonymous*, 22 IDELR 637 (Feb. 2, 1995) ("If a district does establish maximum allowable charges for specific tests, the maximum cannot simply be an average of the fees customarily charged in the area by professionals who are qualified to conduct the specific test. Rather, the maximum must be established so that it allows parents to choose from among the qualified professionals in the area and only eliminates unreasonably excessive fees."); *Letter to Thorne*, 16 IDELR 606 (OSEP Feb. 5, 1990) (same); *Letter to Wilson*, 16 IDELR 83 (OSEP Oct. 17, 1989) (same).

In upholding the school district's cost-containment criteria, the court in *Abarca v. Goleta Union Sch. Dist.*, 2017 WL 700082, 69 IDELR 156, 2017 WL 700082 (C.D. Cal. 2017), explained that the district adopted cost ceilings established by the county's Special Education Local Plan Area ("SELPA"). SELPA set cost ceilings by "calling various types of education professionals throughout [the surrounding counties] and inquiring as to what those assessors charge for different types of evaluations." Importantly, when determining cost caps, SELPA "excluded outliers on both the high and low ends of the spectrum but did not simply average the rates of the professionals polled." *Id.* (affirming ALJ's conclusion that District properly rejected parents' request to pay for at $6,000 IEE that exceeded District's maximum cost containment criteria where cost criteria was reasonable, and parent failed to establish unique circumstances that would justify an "above-ceiling" evaluation); *see also M.V. v. Shenendehowa Cent. Sch. Dist.*, 60 IDELR 213, 2013 WL 936438, at *7 (N.D.N.Y. Mar. 8, 2013) (upholding school's IEE cap, noting that: "in the parties' geographical area, there existed several psychologists or neuropsychologists willing to perform IEEs for less than $1,800, whom Plaintiff never attempted to call (due to an apparent desire to obtain an IEE only from Dr. Curley).").

Unique Circumstances Exception: Although schools may establish maximum allowable charges, they may not enforce such maximums in an absolute manner. Rather, according to the Department of Education, in enforcing its cost containment criteria, "a public agency would need to provide a parent the opportunity to demonstrate that **unique circumstances** justify selection of an evaluator whose fees fall outside the agency's cost containment criteria." 71 Fed. Reg. 46540, 46690 (Aug. 14, 2006) (emphasis added); *see also Letter to Anonymous* (OSEP Oct. 9. 2002) ("When enforcing reasonable cost containment criteria, the district must allow parents the opportunity to demonstrate that unique circumstances justify an IEE that does not fall within the district's criteria."); *Letter to Anonymous*, 22 IDELR 637 (Feb. 2, 1995) ("When enforcing reasonable cost containment criteria, the district must allow parents the opportunity to demonstrate that unique circumstances justify an IEE that does not fall within the district's criteria. If an IEE that falls outside the district's criteria is justified by the child's unique circumstances, that IEE must be publicly funded."); *Letter to Heldman* 20 IDELR 621 (OSEP July 1, 1993) ("[T]he public agency must allow parents the opportunity to demonstrate that unique circumstances justify an IEE that does not fall within the agency's criteria."); *Letter to Thorne*, 16 IDELR 606 (OSEP Feb. 5, 1990) (same); *Letter to Parker* (Feb. 20, 2004); *Letter to Wilson*, 16 IDELR 83 (OSEP Oct. 17, 1989).).

May school simply offer up to the maximum?: According to OSEP, schools may not simply offer to pay up to the maximum and then leave it up to parents to contest the maxi-

mum through a due process filing. *Letter to Anonymous*, 103 LRP 22731 (OSEP Oct. 9, 2002) (noting that where parents' proposed IEE exceeds the school's cost containment criteria, and the school believes there is no justification for the excess cost, "the school district cannot in its sole judgment determine that it will pay only the maximum allowable cost and no further.") Rather, the school must initiate a due process hearing "to demonstrate that the evaluation obtained by the parent did not meet the agency's cost criteria and that unique circumstances of the child do not justify an IEE at a rate that is higher than normally allowed." *Id.*; *See also Letter to Petska*, 35 IDELR 191 (Sept. 10, 2001); *Letter to Anonymous*, 22 IDELR 637 (Feb. 2, 1995); *but see Letter to Thorne*, 16 IDELR 606 (OSEP Feb. 5, 1990) (suggesting that if the school believes there is no justification for exceeding the school's cost criteria, "the cost of the IEE must be publicly funded to the extent of the district's maximum allowable charge.").

Endnotes

[1] 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502.

[2] 34 C.F.R. § 300.502(a)(3)(i).

[3] 300 C.F.R. § 300.502(a)(1).

[4] 34 C.F.R. § 300.502(c). Agency "criteria" are discussed in detail, below. If an IEE obtained at private expense does not meet the school's criteria, the school "is [not] compelled to consider [it.]" 71 Fed. Reg. 46540, 46690 (Aug. 14, 2006). In such cases, "it would be appropriate for the agency to explain to the parent why it believes the parent-initiated evaluation does not meet agency criteria." *Id.*

[5] *Id.*

[6] 34 C.F.R. § 300.502(d).

[7] 34 C.F.R. § 300.502(b)(1).

[8] G.J. v. Muscogee Co. Sch. Dist., 58 IDELR 61, 668 F. 3d 1258, 1266 (11th Cir. 2012) ("The right to a publicly funded inde pendent educational evaluation does not obtain until there is a[n] evaluation with which the parents disagree."); Sund berg v. Riverside Unified Sch. Dist., 321 Fed. Appx. 630 (9th Cir. 2009) (upholding denial of claim for IEE costs where parents submitted request before school district had conducted its evaluation of student); Michael P. v. West Chester Area Sch. Dist., 53 IDELR 109, 585 F.3d 727 (3rd Cir. 2009) (holding parents not entitled to reimbursement for private evalua tions obtained before school district completed its initial evaluation); Genn v. New Haven Bd. of Educ., 62 IDELR 168, 219 F. Supp. 3d 296 (D. Conn. 2016) (same); see also 71 Fed. Reg. 46689 (Aug. 14, 2006) ("If a parent disagrees with the results of a completed evaluation …, the parent has a right to an IEE at public expense, subject to the conditions in §300.502(b)(2) through (b)(4)." (Emphasis added). But see Los Angeles Unified Sch. Dist. v. D.L., 49 IDELR 252 548 F. Supp. 2d 815, 822 (C.D. Cal. 2008) (concluding that, despite the absence of a preceding evaluation by the school, parent had an "equitable right" to reimbursement for IEE where evidence established that school should have, but did not, evalu ate student); Tamalpais Union High Sch. Dist. v. D. W., 70 IDELR 230, 271 F. Supp. 3d 1152 (N.D. Cal. 2017) (concluding that school's payment of IEE was an appropriate equitable remedy for school's improper failure to conduct a mental health assessment). Notably, the courts in these cases did not rely on the IEE rubric under 34 C.F.R. § 300.502. Indeed, the Los Ange les Unified Sch. Dist. expressly acknowledged the inapplicability of the IEE statute/regulation: "As LAUSD never provided an assessment of D.L., no statutory right to public reimbursement of his assessment arose." 548 F. Supp. 2d at 821. Instead, the issue was what remedy a student is entitled to when the school simply refuses or fails to conduct an evaluation requested by the parent. Thus, the primary differences between a "statutory" and an "equitable" IEE at public expense appear to be procedural—i.e., which party is obliged to seek relief; who bears the burden of proof; what defenses may the school raise.

[9] Letter to Zirkel, 52 IDELR 77 (OSEP Dec. 11, 2008).

[10] Query whether this result is unduly harsh in that it precludes the parents from ever changing their mind.

[11] Letter to Saperstone, 21 IDELR 1127 (OSEP July 28, 1994) (stating also: "[A] parent may obtain an IEE without providing prior notice to the public agency."); see also Letter to Anonymous, 21 IDELR 1185 (OSEP Sept. 15, 1994); Letter to Anonymous, 55 IDELR 106 (OSEP Jan. 4, 2010); Letter to Thorne, 16 IDELR 606 (OSEP Feb. 5, 1990) ("[T]here is no Federal requirement that a parent notify a school district that the parent will be requesting and IEE at public expense."); Letter to Imber, 19 IDELR 352 (OSEP Aug. 18, 1992; Letter to Gramm, 17 IDELR 216 (OSEP June 12, 1990) (same). Accordingly, the school cannot decline to pay for an IEE on the sole basis that it did not have advance notice that parent was seeking an IEE at public expense. Id; but see Kuszewski ex rel. Kuszewski v. Chippewa Valley Sch., 34 IDELR 59, 131 F.

Supp. 2d 926, 931 (E.D. Mich. 2001), aff'd sub nom. Kuszewski v. Chippewa Valley Sch. Dist.,38 IDELR 63, 56 Fed. Appx. 655 (6th Cir. 2003) (suggesting, to the contrary, that parents must "first give [the school] the opportunity to either defend their evaluation in a due process hearing or agree to allow the parents to take the child for an IEE."). However, "it is not unreasonable for an LEA to *request* that the parents given notice before obtaining the IEE." *Letter to Saperstone*, 21 IDELR 1127 (OSEP July 28, 1994) (emphasis added); *Letter to Thorne*, 16 IDELR 606 (OSEP Feb. 5, 1990) (same); *Letter to Imber*, 21 IDELR 677 (OSEP June 13, 1994) (opining that a state regulation can even "require" advance notification, so long as it also clarifies that failure do to so would not, alone, preclude a request that the IEE nevertheless be publicly funded). *Letter to Saperstone*, 21 IDELR 1127 (OSEP July 28, 1994) (stating also: "[A] parent may obtain an IEE without providing prior notice to the public agency."); *see also Letter to Anonymous*, 21 IDELR 1185 (OSEP Sept. 15, 1994); *Letter to Anonymous*, 55 IDELR 106 (OSEP Jan. 4, 2010); *Letter to Thorne*, 16 IDELR 606 (OSEP Feb. 5, 1990) ("[T]here is no Federal requirement that a parent notify a school district that the parent will be requesting and IEE at public expense."); *Letter to Imber*, 19 IDELR 352 (OSEP Aug. 18, 1992; *Letter to Gramm*, 17 IDELR 216 (OSEP June 12, 1990) (same). Accordingly, the school cannot decline to pay for an IEE on the sole basis that it did not have advance notice that parent was seeking an IEE at public expense. *Id; but see Kuszewski ex rel. Kuszewski v. Chippewa Valley Sch., 34 IDELR 59, 131 F. Supp. 2d 926, 931 (E.D. Mich. 2001), aff'd sub nom. Kuszewski v. Chippewa Valley Sch. Dist.,38 IDELR 63, 56 Fed. Appx. 655 (6th Cir. 2003)* (suggesting, to the contrary, that parents must "first give [the school] the opportunity to either defend their evaluation in a due process hearing or agree to allow the parents to take the child for an IEE.").

[12] Rather than relying on the statute of limitations, the 11th Circuit concluded simply that the request for IEE reimbursement was moot in light of the stale nature of the school's evaluation: "The evaluation in connection with which Parents sought an IEE at public expense -- the 2010 initial evaluation of T.P. -- is no longer current because more than three years have passed since September 2010."

[13] In connection with the 1999 amendment to the IDEA regulations, "[t]here were several requests for a definition of unnec essary delay in § 300.502(b), some proposing 10 calendar or school days from the receipt of a request for an IEE." 64 Fed. Reg. 12406, 12607 (Mar. 12, 1999).) In rejecting the calls for such hard-and-fast timelines, the Department stated: "Since the necessity or reasonableness of a delay is case specific, no definition of these terms has been added." *Id.* at 12608.

[14] For example, New Jersey law imposes a 20-day response timeline. N.J.A.C. 6A:14-2.5(c). Thus, schools who fail to file for a due process hearing within twenty days of the parent's request risk having waived their right to contest payment of the IEE. *E.g., In re Hillsborough Pub. Sch. Dist.*, 118 LRP 4663 (NJ SEA, January 19, 2018) (analyzing applicable state-law decisions and concluding that: "the case law is clear that where a due-process petition is filed late, the parent is entitled to reimbursement").

[15] The *C.W.* court's analysis is particularly interesting, given that the regulations do not require parents to explain the basis for their disagreement with the school's evaluation. 34 C.F.R. 300.502(b)(4) ("[T]he public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation …."). Accordingly, while parents have the right not to disclose the basis for their disagreement, their refusal to do so may justify some delay in electing between funding the IEE or filing for due process. Parents can't have it both ways.

[16] Notably, the court concluded that the

[17] Note: The school conceded that its delay was "likely" unreasonable, but argued that student was not prejudiced.

[18] As noted above, even when the school promptly agrees to fund the IEE, "mini-fights" may remain to be resolved and may also implicate an analysis of whether the school acted without unnecessary or unreasonable delay. For example, in *D.A. v. Fairfield-Suisun Unified Sch. Dist.*, 2013 WL 5278952 (E.D. Ca. Sept. 18, 2013), although the school failed to obtain IEEs for more than half a school year after the request was made and agreed to, "[school] was diligent in its efforts to obtain the IEEs and … Plaintiff has not shown that [the school] unnecessarily delayed obtaining the IEEs" where: the initial IEE request was made by advocate who lacked confirmed authority to speak on parents' behalf; the school promptly consented to the IEE within two weeks of parent confirmation of IEE request; the parent failed to provide accurate contact information for preferred evaluator, resulting in communication delays; one of the parent's preferred evaluators refused to sign the school's contract for services without significant modifications; the school was diligent in reaching out to parent's alternative proposed evaluators to confirm their credentials and willingness to conduct the IEE. Under such circumstances, the court concluded that the school "was forced into a holding pattern while trying to agree on terms with [parents' selected evaluator] and while searching for an alternative assessor." *Id.* at *18.

[19] The court further noted that "subsequent to 1983, Congress reauthorized the IDEA in 1990, 1997, and 2004 without altering a parent's right to a publicly financed IEE. Under the re-enactment doctrine, 'Congress is presumed to be aware of an admin istrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.'" *Id*, 701 F.3d at 696–97 (citations omitted).

[20] It was irrelevant that the parents submitted the claim to their insurer "voluntarily" and without being pressured by the state. *Id.* at 1294-95.

[21] The court also ordered parents to repay their insurer for the unreimbursed costs of the IEE, noting that doing so would "place[] the parties back in the position they would have occupied if Plaintiffs had first sought and obtained payment from [the school]," and would avoid a "financial windfall to the plaintiffs." *Id.* at 1297.

[22] Of course, regardless of whether recommendations on methodologies or materials are permitted, such recommendations are not dispositive, as "[a]ny decisions made regarding the content of an IEP on the basis of an evaluation, including methodolo gies or use of materials, would be made by the IEP team …." *Letter to LoDolce*, 50 IDELR 106 (OSEP Dec. 12, 2007).

[23] OSEP has also pointed out that a school can still challenge IEE charges as unreasonably expensive, even if it has not specifcally adopted a maximum allowable charge. *Letter to Anonymous*, 22 IDELR 637 (OSEP Feb. 2, 1995).