

To minimize legal battles over IEEs, focus on communicating with parents

By the New York State
Association of School Attorneys

Another day, another stack of paperwork finds its way onto the desk of a special education administrator. Since districts resumed in-person learning this school year, they have been inundated with requests from parents for outside professionals to evaluate their child in connection with special education services. The reasons are unclear, but one theory is that parents may be motivated by concerns over COVID-related learning loss. Another theory is that parents see no downside to asking for an outside evaluation.

In response to such parental requests, the law requires the district either to pay for an Independent Educational Evaluation (IEE) or immediately commence an impartial hearing to defend its own evaluation.

This article will review the purpose of IEEs and make recommendations for school districts to work effectively with parents and manage the IEE process.

What is an Independent Educational Evaluation?

Under the federal Individuals with Disabilities Education Act (IDEA), determinations about a child's eligibility and special education placement are made by a district Committee on Special Education (CSE). The CSE must include, but is not limited to, a parent or guardian, teachers, a school psychologist and a district representative. The committee relies on a variety of sources including parent recommendations and data found in aptitude and achievement tests.

Sometimes a parent will disagree with evaluations the district has performed or feel the district has not performed an evaluation the way that it should have.

In some cases, a parent may be entitled to an evaluation by a professional who does not work for the school district – an IEE – at public expense. An IEE is defined by state regulation as “an individual evaluation of a student with a disability (or a student thought to have a disability) conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.”

The IEE dilemma

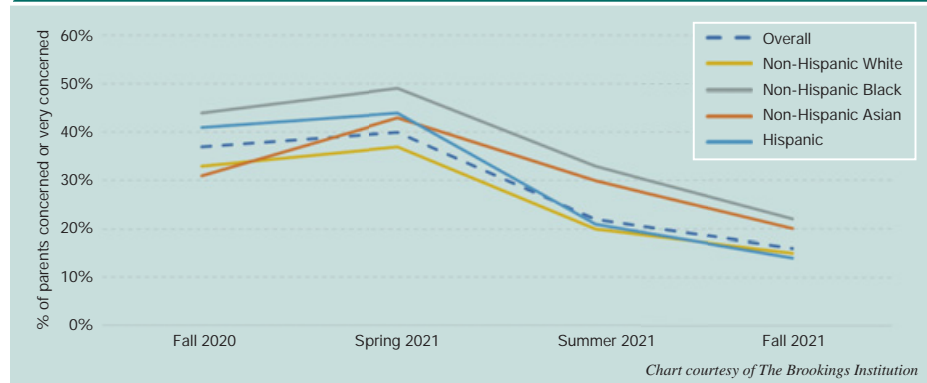
Parents typically seek IEEs when they disagree with an existing evaluation or when they think a different evaluation should be performed that has not already been conducted. The U.S. Department of Education's Office of Special Education Programs (OSEP) has opined that if a parent disagrees with an evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in the area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs.

In *D.S. v. Trumbull Board of Education*, the Second Circuit U.S. Court of Appeals appears to reinforce OSEP's position that a parent may challenge an evaluation on the ground that the initial evaluation was too limited (because the IDEA requires an evaluation to be comprehensive). The Second Circuit, which has jurisdiction over all of New York State, also determined that the IDEA's two-year statute of limitations does not apply to a parent's request for an IEE. Thus, each new evaluation offers fodder for a potential IEE request.

In each IEE case, a school district has only two choices. It can either grant the IEE request at public expense or file a due process complaint.

If the district's evaluation is determined to be appropriate by an Impartial Hearing Officer, the parent may still obtain an IEE but at the family's expense.

PARENTS' CONCERNS ABOUT THE AMOUNT THEIR CHILD IS LEARNING



The result? School districts that are presented with an IEE demand are left in the unenviable position of either paying for an IEE that it believes is not needed or spending a considerable amount of money litigating whether its evaluation, or lack of evaluation, was appropriate.

To avoid the expense of litigation, many districts routinely pay for IEEs.

What can districts do?

Although managing IEE requests is difficult, there are seven steps districts can take to mitigate exposure in this area.

1. Communicate, communicate and then communicate again. Sometimes parents do not have a full understanding of the steps a district has taken to address a child's needs and the development the child is showing in a particular area. Parents also want to know that their concerns have been heard and considered by the district. Maintaining open and honest communication about a child's education builds trust between the district and parent, and this can avert disputes down the road.

2. Test thoroughly. Districts should ensure that their Response to Intervention and other progress measurement processes are thorough and solid. Data is critical in the world of special education, particularly in the area of reading. Sharing data with parents can potentially avert IEE requests by helping parents understand the student's progress. Such data will also place districts in a stronger position should they need to defend themselves in an impartial hearing.

3. Set criteria for IEE evaluator credentials. Districts are permitted to set certain parameters with respect to IEEs, and they should review their policies to ensure they have done so. For example, districts may require that the IEE criteria must be the same criteria that a school district would use when it initiates its own evaluation, to the extent those criteria are consistent with a parent's right to an IEE. School districts should organize evaluator qualifications criteria either by the type of evaluation, area of evaluation, or the professional title of the evaluator. A school district may also establish qualifications that require an IEE evaluator to hold or be eligible to hold a particular certification or license when a school district requires the same licensure or

certification for its own staff conducting the same types of evaluations. However, OSEP has opined that there may be instances where the most appropriate individual to conduct an evaluation might not have a certification from the State Department of Education or they may not be licensed by any state agency, because such licensure does not exist or is not required by state law at that time.

4. Establish cost criteria of the IEE. Districts may also impose reasonable cost constraints on IEEs and should regularly review and revise their cost caps to ensure they match prevailing market prices. Administrators should survey those costs at least twice a year and report them to the board. Districts may be entitled to deny reimbursement if a parent's chosen evaluator charges above market and there are no unique circumstances to justify an exception. Notably, however, parents must be given the opportunity to demonstrate exceptional circumstances.

5. Update the district's list of Independent Evaluators. Districts must provide parents with a list of independent educational evaluators (although parents are not required to use a district recommended evaluator). Administrators should regularly update their list of independent evaluators to ensure it includes evaluators who will meet the district's credential as well as cost criteria, and also provide a sound evaluation.

6. Highlight IEE alternatives. Some behavior or academic struggles may not point to a need for special education services. Districts should discuss with parents other supports the district can offer including, for example, building level services available to non-classified students, additional testing, or the like, as this can sometimes prompt a parent to withdraw an IEE request in favor of an alternative course.

7. Capitalize on IEEs. An IEE can offer valuable insight to school officials about the child's needs and abilities.

An increased level of IEE requests is likely to continue for the foreseeable future. However, by taking a more proactive approach before the IEE process is initiated, and enhancing communication efforts along the way, a district can take meaningful steps to mitigate its exposure while enhancing its ongoing relationships with the parents of the special education students it serves.



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