IEEs at Your Expense: What to Consider and How to Respond

Amber King, Thompson & Horton LLP
IEEs at *Your* Expense:
What to Consider and How to Respond

by

Amber K. King
Thompson & Horton LLP
Phoenix Tower, 3200 Southwest Freeway, Suite 2000
Houston, Texas 77027
(713) 554-6763
aking@thompsonhorton.com

TCASE Summer Conference
July 16, 2014
GENERAL OVERVIEW OF THE IEE

An independent educational evaluation (IEE), also referred to as a private evaluation, provides parents with the opportunity to obtain their own evaluation of their child when, among other things, they suspect that the district’s evaluation has not discerned the true nature of a student’s disabilities and resulting needs. Parental entitlement to an IEE is a right guaranteed by the procedural safeguard section of the Individuals with Disabilities Education Act (“IDEA”). The details regarding IEEs are found in the IDEA regulations at 34 CFR § 300.502.

Pursuant to the IDEA regulations, the parents of a child with a disability have the right to obtain an IEE of the child, subject to certain conditions. 34 C.F.R. § 300.502(a)(1). An IEE is defined as “an evaluation conducted by a qualified examiner who is not employed by the school district or other public agency responsible for the education of the student in question.” 34 C.F.R. § 300.502(a)(3). “Public expense” means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent. Id. § 300.502(a)(3)(ii).

An IEE must be fully independent. Pursuant to the IDEA, an IEE must be performed by a qualified individual who is not employed by the school district. If an IEE is performed at the behest of a parent, but the IEE incorporates portions of the district’s evaluation, the district can properly refuse to pay for the evaluation. In re Student with a Disability, 113 LRP 33653 (SEA LA 2013).

PARENTS’ RIGHT TO REQUEST AN IEE

A parent has the right to request an IEE if the parent disagrees with an evaluation obtained by the public agency, subject to certain conditions. Id. § 300.502(b)(1). In order to trigger the parent’s right, the district must have first conducted and completed an evaluation with which the parent disagrees. If the district has not performed its own evaluation, a parental request for an IEE is premature. “Evaluation” is defined in the regulations as the “procedures used in accordance with §§ 300.305-300.306 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.” Id. § 300.502(b)(2).

Following are examples of situations where the district had not conducted and/or completed an “evaluation,” as that term is defined; therefore, the parents were properly denied the right to an IEE at public expense:

- Houston Indep. School Dist., 114 LRP 9516 (SEA TX 2013) – District was unable to complete its own evaluation of student because the parent had refused to provide necessary updated sociological information needed for determining eligibility. Therefore, the parent’s request for an IEE was premature, and the parent was not entitled to an IEE at public expense until the district could complete its own evaluation.
• *Department of Education, State of Hawaii*, 113 LRP 36667 (SEA HI 2013) – Parents refused to authorize the district to conduct an academic and core program evaluation; therefore, parents were not entitled to an IEE at public expense. The district’s evaluation was a predicate to the parental right to an IEE, and without the predicate evaluation, the parent had no right to a publicly funded IEE.

• *G.J. v. Muscogee Co. Sch. Dist.*, 58 IDELR 61, 668 F.3d 1258 (11th Cir. 2012) – Parents who refused to consent to school district's proposed triennial reevaluation of student's special education services under IDEA had no right to a publicly funded IEE since district had not obtained a reevaluation with which parents disagreed.

• *Montgomery County Intermediate Unit*, 110 LRP 37067 (SEA Pa. 2010) – Parents were properly denied reimbursement for an IEE because they secured the evaluation before the intermediate unit had completed its own evaluation. According to the court, the parents set the IEE in motion well before the intermediate unit completed its evaluation and before the parents could have disagreed with the agency’s evaluation.

• *D.Z. v. Bethlehem Area Sch. Dist.*, 54 IDELR 323 (Pa. Comm. Ct. 2010) – Parents refused to consent to the district’s reevaluation, and subsequently sought an IEE. The court found that the parents’ right to request an IEE did not vest until the district’s evaluation was completed and the parents disagreed with the results of the evaluation.

• *G.B. ex rel. T.B. v. San Ramon Valley Unified Sch. Dist.*, No. C-08-2805 EDL, 2008 WL 4279701 (N.D. Cal. Sept. 16, 2008) – Rejected parents' IEE reimbursement request as premature where their disagreement concerned whether the child needed a reevaluation rather than whether the district's reevaluation was appropriate.

• *Letter to Zirkel*, 52 IDELR 77 (OSEP 2008) – A district has no obligation to provide an IEE at public expense just because a parent objects to its use of a response-to-intervention process. Instead, the parent must wait until the district has completed an evaluation of the student to request an IEE.

• *Krista P. v. Manhattan Sch. Dist.*, 255 F. Supp. 2d 873, 889 (N.D. Ill. 2003) – Parents requested an IEE after the district denied their request for a case study evaluation (CSE). The court found the parents did not have a right to an IEE at public expense because the district’s refusal to conduct a CSE did not amount to an evaluation. The parents’ request for an IEE was not prompted by their dissatisfaction with a specific CSE, but instead came after the district denied their request for a CSE.

A parent is 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). This was a change made to the IDEA in 2004.
In re Student with a Disability, 54 IDELR 110 (SEA N.Y. 2010) – Parents were not entitled to reimbursement for an IEE because they had already received a publicly-funded IEE after they disagreed with the district’s most recent evaluation.

Seattle Sch. Dist., 52 IDELR 30 (SEA WA 2008) – The district funded an IEE in response to the child’s most recent evaluation; therefore, the parent was not entitled to another IEE until the district conducted a new assessment.

The regulations do not address how long a parent has to request an IEE at public expense. A few cases have addressed this issue and found that a parent may forfeit the right to an IEE by waiting too long to request one from the district.

Beaumont Indep. Sch. Dist., 114 LRP 7471 (SEA TX 2013) – Student’s evaluations were conducted in late 2010 and early 2011, but student’s parents did not seek an IEE until April 24, 2013. The district denied the request for an IEE and argued that student was not entitled to one because the request was outside the one-year statute of limitations in Texas. The hearing officer agreed finding that any claims asserted by the student concerning the inadequacies of the district’s evaluations conducted in 2010 and 2011 were time barred and student was not entitled to an IEE.

Ottis W. vs. Brazos ISD, 113 LRP 2098 (SEA TX 2012) – Parents did not request an IEE within one year of the student's last evaluation. The Texas 1-year statute of limitations outlined in 19 TAC 89.1141(c) barred the claim seeking an IEE at public expense.

TP v. Bryan County Sch. Dist., 114 LRP 45 (S.D. Ga. 2014) – A Georgia district that evaluated a student with autism in September 2010 did not have to fund an IEE that his parents requested nearly 26 months later. The IDEA’s two-year statute of limitations period barred the parents’ request for a publicly funded IEE.

Placentia-Yorba Linda Unified Sch. Dist., 112 LRP 41903 (SEA CA 2012) – If the parent fails to request an IEE within the 2-year limitation, the district’s only legal obligation is to provide the parent with prior written notice of whether it will or will not provide the IEE. Because the parent’s request was outside the 2-year limitation, the district was not required to fund the requested IEE or to file for due process to defend the appropriateness of its assessment.

Atlanta Pub. Schs., 51 IDELR 29 (SEA Ga. 2008). Where the student's last evaluation occurred more than three years before the request for an IEE, the IDEA’s 2-year statute of limitations barred her claim seeking an IEE at public expense. To the extent the student disagrees with an evaluation conducted in 2005 and seeks an IEE in 2008 based on that disagreement, the request is untimely, as it was not made within a reasonable period of time after the district conducted its evaluation and is beyond the 2-year statute of limitations.
• *Letter to Thorne*, 16 IDELR 606 (OSEP 1990). The regulations do not establish timelines regarding how long after receiving the results of the district's evaluation a parent can wait to request reimbursement for an IEE. It would not seem unreasonable for the district to deny a parent reimbursement for an IEE that was conducted more than two years after the district’s evaluation. Thus, it would not be necessary for the district to initiate a hearing in this situation.

**SCHOOL DISTRICT’S DUTIES SUBSEQUENT TO A REQUEST FOR AN IEE**

Pursuant to the regulations, each school district must provide the following two things after a request for an IEE: (1) information about where an IEE may be obtained and (2) the school district’s criteria applicable to an IEE. 34 C.F.R. § 300.502(a)(2).

A school district may ask for the parent’s reason(s) why he/she objects to the public evaluation; however, the school district may not require the parent to provide an explanation and may not unreasonably delay either providing the IEE at public expense or filing a due process complaint to defend the public evaluation. *Id.* § 300.502(b)(4).

*Practical Note:* an IEE request should trigger a review of any potential concerns with the District’s current evaluation or educational programming for the student. If multiple requests for IEEs occur from different parents, examine any potential patterns that might raise concerns.

**CRITERIA A SCHOOL DISTRICT MAY IMPOSE ON A PUBLICLY FUNDED IEE**

If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent’s right to an independent educational evaluation. *Id.* § 300.502(e)(1). Except for these criteria, a public agency may not impose conditions or timelines related to obtaining an IEE at public expense. *Id.* § 300.502(e)(2).

However, if a district does maintain a list of qualified evaluators and specified criteria for an IEE, parents must always be given an opportunity to demonstrate that there is no appropriate evaluator for the child’s needs within the criteria stated by the district, therefore their unique circumstances justify a waiver of the criteria. *Letter to Anonymous*, 56 IDELR 175 (OSEP 2010); *Letter to Parker*, 41 IDELR 155 (OSEP 2004); *Letter to Anonymous*, 20 IDELR 1219 (OSEP 1993). As a practical matter, it is often difficult for a parent to establish unique circumstances unless the student has a rare disability or combination of disabilities and lives in an area in which qualified examiners are scarce.

**Geographical Criteria**

A district may establish criteria that restrict the location of the evaluation, as long as the restrictions are reasonable and parents are given the opportunity to demonstrate unique circumstances justifying their need to exceed the limitations.
- **Dover City Schools, 57 IDELR 208 (SEA Ohio 2011)** – The court ordered a district to take remedial action because of the geographical restrictions imposed on the IEE. The district imposed a 30-mile radius restriction on IEEs; however, three of the five evaluators provided on the district’s list practiced outside the 30-mile radius.

- **South Coast Educ. Servs. Dist. & Central Curry Sch. Dist., 57 IDELR 300 (SEA Ore. 2011)** – A court found two school districts in violation of the IDEA because they required parents to select from an approved list of evaluators who operated in a specific geographical area but did not allow parents the opportunity to prove extraordinary circumstances.

- **Letter to Anonymous, 20 IDELR 1219 (OSEP 1993)** – A district may require that independent evaluators be located within the same state as the district as long as there are enough evaluators to conduct the required evaluations within the state.

**Cost Criteria**

It is the Education Department’s longstanding position that public agencies should not be required to bear the cost of unreasonably expensive IEEs. Therefore, a district may establish a reasonable maximum dollar amount it will pay / reimburse for an IEE, as long as the parents are given an opportunity to demonstrate extenuating circumstances that would warrant reimbursement or funding in excess of the maximum.

The maximum established 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 1990).*

- **Irvington Community Schs., 113 LRP 29944 (SEA IN 2013)** – District’s cost criteria that it would pay for an evaluation “up to rates comparable to those charged by evaluators in Marion County” was appropriate.

- **Dover City Schools, 57 IDELR 208 (SEA Ohio 2011)** – The court ordered a district take remedial action because of the cost restrictions imposed on the IEE. The district imposed a $1,000 cost restriction on IEEs; however, some of the evaluators provided on the district’s list charged more than the allotted amount.

- **Dunmore Sch. Dist., 53 IDELR 107 (SEA Pa. 2009)** – A court upheld a parent’s request for an IEE by a practitioner that was 100 miles away and cost $4,200 because, among other things, the district did not maintain specific criteria for an evaluator. Instead, the district’s criteria were merely “categories.” For example, the district stated that it allowed for “reasonable cost,” but did not specify a dollar amount or dollar range.

- **Tolar Indep. Sch. Dist., 22 IDELR 174 (SEA TX 1994)** – The district allowed for a maximum $1,000 for an IEE even though the prevailing rate in the area was only $500. The district denied the parent’s request for an IEE at the rate of $4,800. The district’s
refusal was upheld because the district had established a reasonable cost limitation, and the parent had failed to provide any evidence of a unique circumstance justifying a waiver.

When a district does not adopt cost criteria, parents are free to obtain the services of any qualified evaluator. *Letter to Thorne*, 16 IDELR 606 (OSEP 1990).

**Qualifications of Evaluators**

A district may require that independent evaluators meet certain qualifications, as long as the qualifications are the same as those imposed on evaluations conducted by or on behalf of the school district. In other words, the school district cannot impose more rigorous requirements for publicly funded IEEs. *See* C.F.R. 300.502(e)(1).

- *Humble Sch. Dist.*, 55 IDELR 150 (SEA Tex. 2010) – Upholding school district’s refusal to fund parent’s IEE because the evaluator did not meet the district’s requirement that he be a licensed school psychologist or educational diagnostician to conduct evaluations on SLD eligibility. The school district did not limit the parent’s selection to the lists provided, but did properly require the parent’s selection meet its criteria. Furthermore, the parent failed to establish any unique circumstances other than her skepticism of professionals with public school experience. Such skepticism, without more, did not justify her selection.

- *Letter to Young*, 39 IDELR 98 (OSEP 2003) – A public agency may establish qualifications that require an IEE examiner to hold a particular license when it requires the same licensure for its own staff conducting the same types of evaluations.

- *Letter to Petska*, 35 IDELR 191 (OSEP 2001) – Several policies imposed by four Wisconsin school districts were found inappropriate. For example, OSEP found that 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 were not qualifications necessary to perform an evaluation. Such qualifications were unrelated to an examiner’s ability to conduct an educational evaluation and undermined the parent’s ability to obtain an independent evaluation. Also, the qualification that IEE examiners have "recent and extensive experience in the public schools" was found inconsistent with the parent's right to an IEE. This requirement was too narrow and could prohibit examiners with the expertise necessary for a full and individual evaluation under certain circumstances.

- *School Admin. Dist. #74*, 21 IDELR 1021 (SEA ME 1994) – Parents are not entitled to public funding of an IEE performed by an out-of-state practitioner when a state has a requirement for in-state licensure for publicly contracted evaluations, absent extraordinary circumstances.

- *But see In re Etowah County Bd. of Educ.*, 20 IDELR 843 (SEA Al 1993) – When a state has no licensure requirement for performance of evaluations by psychologists, a school
district cannot refuse to fund an IEE performed by a psychologist licensed outside the state on the basis of his lack of in-state licensure.

However, a school district may not require all evaluators to be licensed if only those individuals employed by the school district are capable of obtaining the required license. Comment, 71 Fed. Reg. 156, p. 46689; see Humble Indep. Sch. Dist. 55 IDELR 150 (SEA Tex. 2010).

Preferred List of Qualified Evaluators

Listing the names and addresses of evaluators who meet the minimum qualifications can be an effective way for school districts to inform parents of where and how they might obtain an IEE. There is nothing in the IDEA that would prohibit a school district from publishing a list of examiners that meet the district’s criteria. Letter to Young, 39 IDELR 98 (OSEP 2002). A district may provide parents with a list of qualified evaluators pursuant to its right to require an evaluation that matches its own criteria, so long as the list is responsive to the child’s needs and the list is exhaustive. Letter to Anonymous, 56 IDELR 175 (OSEP 2010). If the district wishes to limit parents to using examiners from a list, the list must be exhaustive; that is, all qualified examiners in a geographic location must be included. Id; Humble Indep. Sch. Dist., 55 IDELR 150 (SEA Tex. 2010); Letter to Young, 39 IDELR 98 (OSEP 2002). If a district fails to list all qualified evaluators within a given geographic area, the parents may choose qualified evaluators who are not listed. Letter to Young, 39 IDELR 98 (OSEP 2002).

- Dunmore Sch. Dist., 53 IDELR 107 (SEA Pa. 2009) – A court upheld a parent’s request for an IEE by a practitioner that was 100 miles away and cost $4,200 because, among other things, the district’s approved list of evaluators was not complete and many of the approved evaluators had a conflict of interest or could not be reached.

If the parent uses an evaluator not on the district’s list, the district may seek due process to demonstrate the parent’s evaluation did not satisfy the IEE rules or that there was no justification for selecting an evaluator that did not meet the criteria. If, however, the district chooses not to initiate a hearing, it must ensure that the parent is reimbursed for the evaluation. Letter to Parker, 41 IDELR 155 (OSEP 2004).

Classroom Observations by Evaluators

If a district includes or permits in-class observation as part of a publicly funded evaluation, it must afford the same opportunity for observation for a person performing a privately funded IEE. Letter to Wessels, 16 IDELR 735 (OSEP 1990).

A classroom observation by an independent evaluator may be necessary where parents invoke their right to an IEE and the evaluation requires observing the student in the educational environment. Letter to Mamas, 42 IDELR 10 (OSEP 2004).

- Manatee Co. Sch. Dist., 53 IDELR 149, 666 F.Supp.2d 1285 (M.D. Fla. 2009) – While the district could maintain reasonable guidelines for a private psychologist's on-campus activities, it could not prevent the independent evaluator from conducting an in-school observation of a disabled student. Thus, the district was required to allow for at least a two-hour observation.
Miscellaneous

A district’s requirement that the independent evaluator must make himself available for consultation either via telephone or in person was found to be appropriate. *Irvington Community Schs.*, 113 LRP 29944 (SEA IN 2013).

A district’s IEE procedures requiring that after requesting an IEE, the parent was required to attend an assessment planning meeting for the IEE was found to be an inappropriate condition on parental access to an IEE. Such requirement would force parents to plan an IEE with the very staff whose evaluation and opinion they disagreed with. Nothing in the IDEA requires such an assessment planning meeting and it unambiguously violated the IDEA. *Gresham-Barlow Sch. Dist.*, 113 LRP 22781 (SEA OR 2013).

Districts have not been permitted to establish criteria relating to advance notice required for public funding of IEEs. A state may not condition payment for the IEE on the parents’ provision of prior written notice of intent to obtain an IEE. Nor may a state make the parents' receipt of the state's response to their request a precondition for payment. *Letter to Imber*, 21 IDELR 677 (OSEP 1994).

A school 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. *Letter to Anonymous*, 21 IDELR 1185 (OSEP 1994).

**School District’s Response to an IEE Request**

If a parent requests an IEE, the school district must legally respond in one of two ways: (1) file a due process complaint to request a hearing to show that its evaluation is appropriate; or (2) ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria. 34 C.F.R. § 300.502(b)(2).

The school district must choose one of these options “without unnecessary delay.” *Id.* There is no specific time limit during which a district must exercise one of its choices. Of course, ignoring the request is not an option. *Regional Sch. Unit #61*, 111 LRP 48320 (SEA ME. 2011); *In re Baldwin County Bd. of Educ.*, 21 IDELR 311 (SEA Ala. 1994). School districts must respond to parental request for an IEE without undue delay and within a reasonable amount of time but not take so long as to essentially eliminate the parent’s right to an IEE. *Letter to Anonymous*, 21 IDELR 1185 (OSEP 1994).

What constitutes an “unnecessary delay” depends heavily on the facts and circumstances involved. While the phrase “without unnecessary delay” is not defined, “it 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 2010). While definitely not a rule of thumb, it appears that often times when a district is found to have acted unreasonable it is because the district acted in bad faith by ignoring the request or neglecting to communicate with the parents.
Following are examples of cases in which the district’s delay in requesting a hearing or paying for the IEE was found to be reasonable:

- **Penn-Delco Sch. Dist.,** 113 LRP 25807 (SEA PA 2013) – A delay of 2 months was found to not constitute an unreasonable delay. The hearing officer considered and balanced the following three factors in making this determination – (1) the amount of time that passed; (2) the reason for delay; and (3) the substantive effect, if any, attributable to the delay.

- **C.W. v. Capistrano Unified Sch. Dist.,** 112 LRP 39913 (C.D. Cal. 2012) – The district did not unreasonably delay in taking forty-one (41) days to request a due process hearing. Because the parent did not challenge any specific component of the district’s evaluation report but rather told the IEP team the report was “stupid,” the district had to review the entire report. “Such a detailed review obviously takes time and money . . . [The parent] could have reduced this time and money by identifying her specific objections to the disputed report.”

- **Keene Sch. Dist.,** 111 LRP 63293 (SEA N.H. 2011) – The school district’s delay of one hundred and thirty (130) days before filing for a due process hearing was appropriate under the circumstances of this case because the school district had a good faith belief that the IEE request was inapplicable since its original evaluations were already independent.

- **J.P. Ripon Unified Sch. Dist.,** 52 IDELR 125, 2009 WL 1034993 (E.D. Cal. 2009) – The district filed its due process request more than two (2) months after the request for an IEE. However, during that time, the parties were communicating regarding the request and did not come to an impasse on the issue until less than three weeks before the school district’s filing. Therefore, the district’s request was timely.

- **L.S. & C.S. v. Abington Sch. Dist.,** 48 IDELR 244 (E.D. Pa. 2007) – The district’s 10-week delay in denying request for publicly funded IEE was reasonable in light of the district’s efforts to meet with the parents and resolve the issue.

- **Northside Indep. Sch. Dist.,** 39 IDELR 178 (SEA Tex. 2003) – The district’s delay of nine (9) months was found to be reasonable because after the parent requested and IEE, the parties agreed, due to the student’s recent brain surgery, to allow the district to complete additional assessment before addressing the request.

Following are examples of cases in which the district’s delay in requesting a hearing or paying for an IEE was found to be unreasonable, and therefore, the parents were entitled to a publicly funded IEE:

- **Brooklyn Center Indep. Sch. Dist.,** 113 LRP 28525 (SEA Minn. 2013) – The district wholly failed to respond to the parents’ request for an IEE. “Once the parent requests an IEE, the proverbial ball is in the district’s court and the district must take action.” The district violated the IDEA because it took no action of any type.
Los Angeles Unified Sch. Dist., 111 LRP 48178 (SEA Ca. 2011) – The district did not file for due process to uphold the validity of its evaluation nor did it deny the parent’s request. More than 90 days from the date the request, the student filed for due process requesting an IEE. During the 90 days, the district failed to communicate with the parents and failed to explain its reason for delay. The ALJ determined that the district’s delayed response was unreasonable and ordered a district-sponsored IEE.

Regional Sch. Unit #61, 111 LRP 48320 (SEA Me. 2011) – After the parents requested an IEE, the district attempted to resolve the matter. However, after the negotiations broke down, the district failed to request a hearing or agree to pay for the IEE. The district was found to have violated the IDEA by unnecessary delaying to either provide an IEE or request a due process hearing.

Pajaro Valley Unified Sch. Dist. v. J.S., 47 IDELR 12, 2006 WL 3734289 (N.D. Cal. 2006) – The school district did not file its due process complaint until approximately 11 weeks after the request. At the hearing, the school district offered no explanation for the delay or why the delay was necessary. The court found the school’s unexplained and unnecessary delay waived its right to contest the student’s request for an IEE at public expense.

Los Angeles Unified Sch. Dist., 48 IDELR 293 (SEA Ca. 2007) – The ALJ determined that the district’s 74-day delay in requesting a due process hearing was unnecessary and unreasonable. The district waited for the parents to file a due process hearing, and then attempted to defend the appropriateness of its evaluations during that proceeding. The ALJ explained that the district’s defensive maneuver did not satisfy the district’s obligation to request a due process hearing.

Red Clay Consolidated Sch. Dist., 108 LRP 52265 (SEA Del. 2005) – School district first notified parents of concerns about the evaluator’s qualifications and the IEE in January 2005. By May 2005, the school district had still not resolved the issue. The district did not request a hearing for 4 months, which was found to constitute an unnecessary delay. The parents were, therefore, entitled to reimbursement for IEE a private expense.

Nicole L. v. Brownsville Indep. Sch. Dist., 42 IDELR 134 (SEA TX 2004) – A Texas hearing officer determined a district violated the procedural rights of the parents of a 6-year-old student diagnosed with a speech impairment when, following their request for an independent educational evaluation, it neither scheduled an IEE nor requested a hearing regarding its refusal to provide an IEE.

Bd. of Educ. of the Monticello Central Sch. Dist., 37 IDELR 143 (SEA N.Y. 2002) – The district’s 20-month delay in requesting a due process hearing was found unreasonable. The district argued it acted reasonably because it filed once it realized the parents insisted on the evaluation. However, the SRO determined the district was “well aware” of the parents’ request but waited until it was presented with a bill before initiating the hearing.
ADVANCING FUNDS FOR PAYMENT OF AN IEE

Since the manner of funding IEEs, either as reimbursement or advance funding, is not addressed in Part B of the regulations, it is within the discretion of the district whether to advance funds to a parent. Nonetheless, if the denial of advance funding effectively denies the right to an IEE, a parent is entitled to relief. *Edna Indep. Sch. Dist.*, 21 IDELR 419 (SEA TX 1994). However, if the need for the IEE itself is disputed, IDEA does not require public funding of IEEs based on the parent’s inability to privately fund one.

Pursuant to § 300.103(a), each state may use whatever state, local, federal, and private sources of support are available in the state to meet the requirements of this part. For example, if it is necessary to place a child with a disability in a residential facility, a State could use joint agreements between the agencies involved for sharing the cost of that placement.

RECOVERY OF OUT-OF-POCKET COSTS

When an out-of-district IEE is publicly funded, the parents' related travel, meal and lodging expenses must be funded as well, even if the parents are financially able to bear these costs, subject to reasonableness for costs incurred. *Letter to Heldman*, 20 IDELR 621 (OSEP 1993). The district maintains the right to a due process hearing to challenge the parents’ overall entitlement to funding for the IEE based upon location, qualification of the evaluator, or reasonable cost criteria.

However, in *Utah Schools for the Deaf and the Blind*, 113 LRP 31076 (SEA Utah 2013), the parent failed to establish the necessity of trekking across country to obtain an IEE. The parent was not entitled to recover the costs associated with traveling to Massachusetts because there were qualified evaluators who could have conducted an appropriate evaluation in Utah. “Nowhere in the IDEA does it require a public agency to reimburse the costs of unnecessary travel expense, especially when the necessary travel expenses were available within the community.”

CONSIDERATION OF AN IEE

Pursuant to 34 C.F.R. § 300.502(c), if the parent obtains an IEE at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation (1) must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and (2) may be presented by any party as evidence at a hearing on a due process complaint under subpart E of this part regarding that child.

It is, however, unclear exactly what the term “consider” entails. One court has said that meaning of “considered” – to reflect on or think about with some degree of care or caution – seemed appropriate. *T.S. ex rel. S.S. v. Board of Educ. of the Town of Ridgefield*, 20 IDELR 889 (2d Cir. 1993).

- *Lewisville Indep. Sch. Dist.*, 113 LRP 15002 (SEA TX 2013) – The district appropriately considered the parent’s IEE and observations and determined that it did not indicate autism as an issue for the student. The parent’s information and IEE did not match the district’s own evaluative data.
• **Plainville Board of Education v. R.N.**, 112 LRP 16721 (D. Conn. 2012) – District Court held that a Connecticut district erred in failing to consider independent reports from two psychiatrists and a neuropsychologist when determining a placement for a grade schooler with bipolar disorder. The district maintained that it had no obligation to consider the IEEs, as the evaluators did not observe the student in the classroom or have formal meetings with district personnel as required by district policy. However, the court pointed out that the policy appeared to apply only when the parent sought an IEE at public expense. Because the parent obtained the IEEs at her own expense, the court held that the plain language of the district's IEE policy required the student's IEP team to consider the evaluators' placement recommendations.

• **K.E. Indep. Sch. Dist. No. 15**, 57 IDELR 61, 647 F.3d 795 (8th Cir. 2011) – Parent’s claim that the district failed to consider the reports of the IEE was rejected because the IEPs incorporated many of the recommendations discussed in the recommendations by the student’s psychiatrist.

• **Garvey Sch. Dist.**, 110 LRP 44204 (SEA CA. 2010) – Parents complained that the district failed to consider the IEE because the evaluator’s presentation was cut short at the meeting. The district was found to have complied with the IDEA. The agency found that the duty to consider the IEE is fairly narrow. It does not obligate a district to accept the evaluator's advice, or even to discuss the evaluation report at the IEP meeting. In this case, the parent failed to show that the team did not consider the IEE. Furthermore, the speech language therapist attending the meeting testified that she developed new speech goals aimed at improving the student's ability to engage in conversation with peers and teachers, and that she did so based on the independent evaluator's specific recommendations. Furthermore, the team facilitator testified that all of the reports submitted and presented by the evaluator were considered by the team.

• **T.S. ex rel. S.S. v. Board of Educ. of the Town of Ridgefield**, 20 IDELR 889 (2d Cir. 1993) – The court found the district had properly “considered” the IEE at issue, despite the fact that a copy of the full report had not been distributed to every evaluation team, when the report was read in full by the director of special education at the IEP meeting and the minutes of the meeting reflected some subsequent discussion of the issues raised by the IEE.

• **DiBuo v. Bd. of Educ. of Westchester County**, 35 IDELR 248 (D. MD. 2001) – The district did not even look at the expert reports submitted by the parents – much less consider them – in devising the IEP. Thus, the district court ruled the district’s inaction seriously infringed on the parents’ opportunity to participate in the IPE, leading to a denial of FAPE and a reimbursement award.

The district should document its consideration of an IEE at the ARD committee meeting, including how the report was made available to ARD committee members and the forum in which the report was reviewed and discussed by the ARD committee. To the extent the district disagrees with the IEE, it should document the reasons why the findings and recommendations of the IEE are not accepted. **T.S. ex rel. S.S. v. Board of Educ. of the Town of Ridgefield**, 20 IDELR 889 (2d Cir. 1993).
The district's obligation to consider the IEE does not translate into a corresponding obligation to accept the IEE or its recommendations. See, e.g., Garvey Sch. Dist., 110 LRP 44204 (SEA Ca. 2010). A district has no obligation to substitute a privately obtained IEE for an evaluation of its own. Quitman Sch. Dist., 111 LRP 18235 (SEA Miss. 2011).

**DUE PROCESS HEARINGS**

Any party can present the results of an IEE (either publicly or privately funded) at a hearing on a due process complaint regarding the child. 34 C.F.R. § 300.502(c)(2).

A hearing officer in a due process hearing can order an IEE, and the cost of such evaluation must be a public expense. Id. § 300.502(d).

If the school district can show through a due process hearing that its evaluation is appropriate, the parent still has the right to an IEE, but not at public expense. Id. § 300.502(b)(3).

Following are examples of a school district challenging the adequacy of its evaluation in a due process hearing:

- **Forney Indep. Sch. Dist., 114 LRP 13237 (SEA TX 2014)** – Overall the school district’s FIE met the requirements of the IDEA and was appropriate. The evidence showed that the FIE assessed student in all areas of suspected disability. The parent’s request for an IEE at public expense, therefore, was denied.

- **Little Cypress Mauriceville Consolidated Indep. Sch. Dist., 113 LRP 16321 (SEA TX 2013)** – District failed to meet its burden of proving that its FIEs were appropriate under the IDEA. The District’s evaluations failed to rule out whether student was sensory impaired by medication, failed to assess student in areas related to student’s suspected disability of Autism (speech/language), and they were not sufficiently comprehensive to identify all of student’s special education and related services needs. The parents, therefore, were entitled to an IEE at public expense.

- **S.F. v. McKinney Indep. Sch. Dist., 58 IDELR 157 (E.D. Tex. 2012)** – District was required to reimburse the parents for their privately obtained IEE because the district could not demonstrate that it used the proper tools in its assessment and the record showed that the district failed to conduct is evaluation in sign language, which was the student’s best known language. Thus, there was insufficient evidence to show that the district complied with the IDEA procedural standards in arriving at its evaluation conclusions.

- **Waynesboro Area Sch. Dist., 110 LRP 68609 (SEA Pa. 2010)** – The hearing officer concluded that the district’s evaluation was substantively inappropriate. The parties agreed that the student exhibited deeply problematic school-based behaviors; yet, the evaluation reported minimal emotional / behavioral assessments. The fatal flaw in the district’s reevaluation report was the complete omission of data or reporting scales from the student’s teachers. Without such information, the district’s reevaluation report was
rendered useless. The hearing officer concluded the parents were entitled to be reimbursed for the cost of the IEE.

- **Blake B. v. Council Rock Sch. Dist., 51 IDELR 100 (B.D. Pa. 2008) –** Appellate panel's determination that the district's evaluation was appropriate was upheld. The parents' assertion that the district used inadequate instruments when assessing the student and failed to administer them in accordance with their instructions was rejected. Although the observation checklist that the district's psychologist distributed to teachers was not normed or validated for any purpose, the psychologist did not use the checklist as a diagnostic tool. Rather, it was used only to elicit from the teachers observations of behavior that might be relevant to a diagnosis of autism. Clearly, the psychologist used a variety of assessment tools in evaluating the student and administered all screening instruments in accordance with their directions. Further, the psychologist had the credentials and training required to evaluate the student. While the parents may have disagreed with the results of the evaluations, the evaluations themselves were appropriate. Thus, the parents' request for an IEE at public expense was denied.
TOP TEN TIPS FOR IEE REQUESTS

1. **Require that all IEE requests be in writing.**

2. “**Consider**” all IEE requests and evaluate areas of potential concern.

3. **Determine if an IEE request is appropriate** (premature? multiple requests in one year, etc.).

4. **Establish good written IEE criteria and provide to parent when IEE requested.**
   - a. **Geographical**
   - b. **Cost**
   - c. **Evaluator qualification**
   - d. **Allow parent to demonstrate unique circumstances to justify deviating from IEE criteria**

5. **Produce and provide a list of qualified evaluators and related locations.**

6. **Carefully evaluate whether to grant the IEE request or file a due process hearing and defend the district’s evaluation**

7. **Respond to all IEE requests without “unnecessary or unreasonable delay.”**

8. **Document and provide prior written notice (notice of refusal) if the IEE request is denied.**

9. **Fully consider any completed IEE or other outside evaluation in an IEP team meeting, but do not adopt wholesale.**

10. **When in doubt, consult your legal counsel!!**
AMBER K. KING

Education

- J.D., summa cum laude, Texas Tech University School of Law, 2007, Order of the Coif
- B.A., summa cum laude, Oklahoma State University, 2004

Bar Admissions

- Texas

Affiliations and Honors

- State Bar of Texas, Litigation Section
- American Bar Association
- Houston Bar Association
- Texas Association of School Boards – Council of School Attorneys
- National Association of School Boards – Council of School Attorneys

Court Admissions

- U.S. District Court for the Southern and Northern District
- U.S. Court of Appeals for the Fifth Circuit

Amber K. King focuses her practice on the representation of school districts, colleges, and other governmental entities. Ms. King’s areas of interest and experience include governmental immunity issues; the Texas Tort Claims Act; employment law and discrimination law; and special education law. Prior to joining Thompson & Horton, Ms. King worked for Brown & Kornegay LLP where she attained experience in civil litigation, practicing in both state and federal court. While at Brown & Kornegay, Ms. King also assisted as outside litigation counsel for the Port of Houston Authority, which allowed her to gain experience in the representation of governmental entities. Ms. King also served as a briefing attorney for the Honorable John S. Anderson on the Fourteenth Court of Appeals. While in law school, Ms. King served as an Articles Editor for the Texas Tech Law Review and was awarded the Law Review’s Tradition of Excellence Award.

PUBLICATIONS AND SPEECHES

Texas Council of Administrators of Special Education, January 2014: “A Year in Review: Discussion of 2013 Special Education Hearing Officer Decisions and Lessons Learned”