

# Independent Educational Evaluations at District Expense under the Individuals with Disabilities Education Act

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## I. INTRODUCTION

The 2004 reauthorization<sup>1</sup> of the Individuals with Disabilities Education Act (IDEA) legislation left unchanged the brief provision according parents the right to obtain an “independent educational evaluation” (IEE) as one of their notable<sup>2</sup> procedural safeguards without further specifications such as a definition or standards.<sup>3</sup> The 2006 IDEA regulations<sup>4</sup> repeated the various specifications of the 1999 version with only one change—limiting parents to only one IEE at public expense each time the school district conducts an evaluation with which a parent disagreed.<sup>5</sup> In addition to defining an IEE as “an evaluation conducted by a qualified examiner who is not employed by the [district],”<sup>6</sup> the regulations contain the following pertinent provision regarding IEEs at no cost to the parent:

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1. Pub L. No. 108-446, 111 Stat. 2647 (amending 20 U.S.C. §§ 1400-1480 (2000)).

2. Indeed, in *Schaffer v. Weast*, 546 U.S. 49 (2005), the Supreme Court, in ruling that the burden of persuasion for IEP challenges was on the parents, reasoned that the IEE provides parents “with the firepower to match the opposition” via “an expert who can evaluate all the materials that the school authorities make available, and who can give an independent opinion.” *Id.* at 60-61. This reasoning is subject to question; as one commentator cogently contended, the IEE provision “fails to empower parents the same way a hired expert would.” Ashlie D’Errico Surur, *Placing the Ball in Congress’s Court*, 27 J. NAT’L ASS’N ADMIN. L. JUDICIARY 547, 600 (2007).

3. See 20 U.S.C. § 1415(B)(1) (2006). The Act repeats this specification in the required contents of the procedural safeguards notice that districts must provide to parents at least once yearly. § 1415(d)(2)(A).

4. 34 C.F.R. Part 300 (2008).

5. See 34 C.F.R. § 300.502 (2008). For the one IEE change, see § 300.502(b)(5). This change represents reinstatement of a previous limitation. See, e.g., *Hudson v. Wilson*, 828 F.2d 1059 (4th Cir. 1987); Letter to Fields, EHLR 213:260 (OSERS 1989).

6. 34 C.F.R. § 300.502(a)(3)(i) (2008). The regulations also define public expense as meaning that the school district either pays for the IEE’s full expense or ensures that other authorized sources do so without cost to the parent. *Id.* § 300.502(a)(3)(ii).

(1) A parent has the right to an [IEE] at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the [following] conditions.

(2) If a parent requests an [IEE] at public expense, the public agency must, without unnecessary delay, either-

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an [IEE] is provided at public expense, unless the agency demonstrates in [an impartial hearing under the IDEA] . . . that the evaluation obtained by the parent did not meet agency criteria.<sup>7</sup>

Regarding “agency criteria” for IEEs at public expense, the regulations provide that “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 [district]<sup>8</sup> uses when it initiates an evaluation, to the extent those criteria are consistent with the parent’s right to an [IEE].”<sup>9</sup>

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7. 34 C.F.R. § 300.502(b) (2008). In addition to the aforementioned one IEE limitation, this pertinent part also includes provisions for a contingent right to an IEE at the parent’s expense and a limited right for the school district to inquire as to the parent’s reason for the disagreement. *See* § 300.502(b)(3)-(4). More importantly for this final condition, the regulations also include boundaries for the “agency criteria.” *See infra* note 109 and accompanying text. Additionally, the subsequent subsections require district consideration of IEEs at public (or private expense) that meet agency criteria and authorize hearing officer-ordered IEEs at public expense. *Id.* § 300.502(c)-(d).

8. Although the regulations refer to “public agency” so as to include other applicable local or state education agencies, “district” (or, to avoid confusion with a district court, “school district”) is used herein as the specific and simple representation of this more generic term.

9. 34 C.F.R. § 300.502(e) (2008). These provisions have remained basically unchanged since the early IDEA regulations, except for the “without unnecessary delay” addition. *See, e.g.*, Letter to Wessels, 16 EHLR 735 (OSEP 1989). State special education laws typically parallel this language. It is rare for them to exceed these requirements. Moreover, it is generally understood that they may not remove or reduce them. *See, e.g.*, Letter to Smith, 16 EHLR 1080 (OSERS 1990); Letter to Bartlett, 16 EHLR 292 (OSERS 1989).

This regulatory language effectively forms the following framework of procedural then substantive standards for IEEs at public expense,<sup>10</sup> akin to the provisions for tuition reimbursement:<sup>11</sup>

- (1) the parent must disagree;
- (2) the district must file without unnecessary delay;
- (3) the district must show its evaluation is appropriate; and
- (4) the district must show that the IEE is not appropriate.

The purpose of this Article is to synthesize the legal boundaries concerning these four standards for IEEs at public expense.<sup>12</sup> The source material consists primarily of court decisions available via the Lexis and Westlaw databases and via IDELR<sup>13</sup> with the U.S. Department of Education (USDE) policy interpretations serving as a secondary supplement.<sup>14</sup> However, given this ample higher authority, the scope does not include hearing or review officer decisions under the IDEA: because the legal literature lacks such a synthesis, and because most hearing or review officers' decisions concerning IEEs do not cite these primary sources, hearing and review officers are among the groups that will benefit from

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10. This framework represents the intersection of the pertinent regulatory provision and the corresponding case law. For the sake of practical simplification and synthesis, the language is only an approximation in several regards. First, the final two conditions in the aforementioned regulation do not necessarily mean that the burden of proof is on the school district due to (1) the intervening decision in *Schaffer v. West*, 546 U.S. 49, 58 (2005), (2) the inconsistent role of the district filing standard, and (3) lack of clarity in terms of the burden of production versus the burden of persuasion. Second, a literal reading of the regulation reveals that "without unnecessary delay" applies to both district filing and district payment, which is the implicit converse of the framework. Third, the district filing requirement is not expressly part of the final condition, which the regulation states separately from the other substantive exception to payment.

11. See 34 C.F.R. § 300.148(b)-(e) (2008).

12. Thus, the scope does not extend to those residual IEEs that are at private expense. See 34 C.F.R. § 300.502(c) (2008). Similarly, it does not extend to the more closely related IEEs that hearing officers are authorized to order at public expense during the hearing. See 34 C.F.R. § 300.507(d) (2008).

13. "IDELR" refers to the Individuals with Disabilities Education Law Report and its predecessor, the Education for the Handicapped Law Report (EHLR), a specialized series that includes court decisions and hearing or review officer decisions and that is available from LRP Publications. However, the synthesis does not include early decisions provided negligible guidance. See, e.g., *Hessler v. State Bd. of Educ.*, EHLR 553:262 (D. Md. 1981), *aff'd*, 700 F.2d 134 (4th Cir. 1983); *Winfield v. Sch. Bd. of Fairfax County*, EHLR 551:269 (Va. Cir. 1979).

14. USDE is used generically herein to represent the successively smaller offices thereof, specifically the Office of Special Education and Rehabilitative Services (OSERS) and the Office of Special Education Programs (OSEP). For the legal effect of such policy interpretations, see, e.g., *Raymond S. v. Ramirez*, 918 F. Supp. 1280 (N.D. Iowa 1996). See also Perry A. Zirkel, *Do OSEP Policy Letters Have Legal Weight?*, 171 EDUC. L. REP. 391 (2003).

this article.<sup>15</sup> Further, the coverage does not extend to technical matters related to IEEs at public expense,<sup>16</sup> such as standing to pursue the reimbursement for an IEE<sup>17</sup> or to IEE reimbursement under other provisions in the IDEA<sup>18</sup> or under other laws, such as Section 504<sup>19</sup> and state laws for gifted students.<sup>20</sup> Finally, the scope does not include the related question of the meaning of “public expense” regarding parents’ insurance.<sup>21</sup>

Some of the case law did not carefully adhere to the pertinent regulation, providing summary and suspect rationales. For example, in a 1997

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15. See Susan Etscheidt, *Ascertaining the Adequacy, Scope, and Utility of District Evaluations*, 69 EXCEPTIONAL CHILD 227 (2003) (synthesizing mostly IDELR-published hearing or review officer decisions specific to the appropriateness of school district evaluations in the IEE context).

16. The term IEE reimbursement is used generically herein because most of the pertinent cases arise from a request for reimbursement, although a few are limited to the threshold right, where the IEE is yet to happen and, thus, its appropriateness is not at issue. See, e.g., *Alvin Indep. Sch. Dist. v. A.D.*, 503 F.3d 378 (5th Cir. 2007).

17. See, e.g., *IDEA Pub. Charter Sch. v. Dist. of Columbia*, 374 F. Supp. 2d 158 (D.D.C. 2005) (charter school); *Michigan Dep’t of Educ. v. Grosse Pointe Pub. Sch.*, 701 N.W.2d 195 (Mich. Ct. App. 2005), *vacated as moot*, 712 N.W.2d 445 (Mich. 2006) (parentally placed private school children) For other such ancillary issues, see, e.g., *Taylor v. Vt. Dep’t of Educ.*, 313 F.3d 768 (2d Cir. 2002) (standing); *Edie F. v. River Falls Sch. Dist.*, 243 F.3d 329 (7th Cir. 2001); *Kirkpatrick v. Lenoir County Bd. of Educ.*, 216 F.3d 380 (4th Cir. 2000); *Dell v. Twp. High Sch. Dist.*, 113, 32 F.3d 1053 (7th Cir. 1994); *Mary Courtney v. Sch. Dist. of Philadelphia*, Civ. A. No. 06-2278, 2009 WL 185426 (E.D. Pa. Jan. 22, 2009); *E.M. v. Marriott Hospitality Pub. Chartered High Sch.*, 541 F. Supp. 2d 395 (D.D.C. 2008); *D.S. v. Neptune Twp. Bd. of Educ.*, 264 Fed.Appx. 186 (3d Cir. 2008); *Wall Twp. Bd. of Educ. v. C.M.*, 534 F. Supp. 2d 487 (D.N.J. 2008) (statute of limitations); *Flores v. Dist. of Columbia*, 437 F. Supp. 2d 22 (D.D.C. 2006) (resulting proceedings); *Serpas v. Dist. of Columbia*, No. Civ.A. 02-02227HHK, 2005 WL 3211604 (D.D.C. Oct. 28, 2005); *Matthew V. v. DeKalb County Sch. Sys.*, 244 F. Supp. 2d 1331 (N.D. Ga. 2003); *Hyde Park Cent. Sch. Dist. v. Peter C.*, No. 93 CIV. 0250 (RPP), 21 IDELR 354 (S.D.N.Y. Mar. 1, 1994) (second-tier waiver and timeliness); *Lawyer v. Chesterfield County Sch. Bd.*, No. 3:92CV760, 20 IDELR 172 (E.D. Va. Aug. 25, 1993); *Panico v. Bd. of Educ.*, No. 92 C 2607, 19 IDELR 71 (N.D. Ill. Aug. 26, 1992); *Ken R. v. Stevenson High Sch. Dist.* No. 125, No. 89 C9590, 18 IDELR 20 (N.D. Ill. Aug. 8, 1991); *Williams v. Overturf*, 580 F. Supp. 365 (W.D. Wis. 1984) (exhaustion); *Pawling Cent. Sch. Dist. v. Munoz*, 14 A.D.3d 838 (N.Y. App. Div. 2005) (expert witness fees); *Leslie “E” v. Bethlehem Cent. Sch. Dist.*, 227 A.D.2d 72 (N.Y. App. Div. 1997) (attorneys’ fees); *P.T.P. v. Bd. of Educ. of County of Jefferson*, 488 S.E.2d 61 (W. Va. 1997) (appeal procedures); cf. *L.M. v. Capistrano Unified Sch. Dist.*, ---F.3d ---, No. 07-55469, 2009 WL 349795 (9th Cir. Feb. 13, 2009) (time limitation on independent evaluator’s observation).

18. See, e.g., *J.G. v. Douglas County Sch. Dist.*, 552 F.3d 786 (9th Cir. 2008) (awarding, in the wake of a violation of the IDEA requirement for prior written notice, full rather than 50% reimbursement based on equitable analysis).

19. See, e.g., *Lake Oswego (OR) Sch. Dist.*, No. 10-93-1053, 20 IDELR 767 (OCR Aug. 13, 1993); *Katy (TX) Indep. Sch. Dist.*, No. 06-93-1158, 20 IDELR 923 (OCR July 23, 1993); *Livingston Parish (LA) Sch. Bd.*, No. 06-92-1119, 20 IDELR 1470 (OCR Sept. 16, 1993); *Wauwatosa (WI) Pub. Sch. Dist.*, EHLR 257:355 (OCR 1982); *Hoover Schrumm (IL) Sch. Dist.*, EHLR 257:136 (OCR 1980).

20. See, e.g., *Huldah A. v. Easton Area Sch. Dist.*, 601 A.2d 860 (Pa. Commw. Ct. 1992).

21. See, e.g., *Raymond S. v. Ramirez*, 918 F. Supp. 1280 (N.D. Iowa 1996).

decision, a federal district court in Pennsylvania denied IEE reimbursement based on the purportedly “well-settled [proposition] that reimbursement is only appropriate where the evaluations result in a change in the IEP.”<sup>22</sup> Thus, courts too will benefit from a comprehensive and current canvassing of the judicial and USDE interpretations concerning IEEs.

## II. PARENT DISAGREEMENT

The federal appellate courts have moderated the role of this procedural standard rather than interpreting notification of parental disagreement as an absolute prerequisite for IEE reimbursement. The limited USDE policy guidance appears to agree, while illustrating that parental notification of intent to arrange an IEE and state regulations as to the form of notice (i.e., oral v. written) are often intertwined with this procedural standard.<sup>23</sup> The lower courts, however, have been less than consistent in following the appellate authority and have largely neglected the USDE guidance.

The federal appellate courts and some of the lower courts have been relatively consistent in rejecting a per se prerequisite of parental disagreement. First, in an early case, the Fourth Circuit rejected the school district’s contention that the parents must communicate their disagreement prior to obtaining their IEE.<sup>24</sup> The court reasoned:

This strained reading of the regulation obviously would leave the parent with no way to challenge a school’s evaluation with a reimbursed private evaluation. The plain thrust of the regulation is that the school can *later* challenge the private testing, and, if it then con-

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22. Jonathan G. v. Lower Merion Sch. Dist., 955 F. Supp. 413, 418 (E.D. Pa. 1997). The problem appears to be that the IEE claim was (1) incidental to the primary issue of whether the child was in the least restrictive placement and (2) conflated with the claim for additional educational support services. Thus, the court’s cited support was the Third Circuit’s tuition reimbursement decision, *Bernardsville Board of Education v. J.H.*, 42 F.3d 149 (3d Cir. 1994), which did not contain an IEE issue. For another court that ignored the regulatory framework, relying instead on a brief equitable analysis, see *J.G. v. Douglas County Sch. Dist.*, 552 F.3d 786 (9th Cir. 2008).

23. See Letter to Imber, 21 IDELR 677 (OSEP 1994); Letter to Imber, 19 IDELR 352 (OSEP 1992); Letter to Mitchell, 17 EHLR 282 (OSERS 1990).

24. See *Hudson v. Wilson*, 828 F.2d 1059 (4th Cir. 1987).

vinces the [adjudicators] that its initial evaluation was correct, the parent will not be reimbursed.<sup>25</sup>

Other courts summarily followed the Fourth's Circuit's lead.<sup>26</sup>

Second, in *Warren G. v. Cumberland County School District*,<sup>27</sup> the Third Circuit affirmed the district court's ruling that the parents' failure to express disagreement prior to the IEE does not foreclose their right to reimbursement.<sup>28</sup> The Third Circuit cited the Fourth Circuit decision, but its paraphrasing sharpened the rationale: "the object of the parents' obtaining their own evaluation is to determine whether grounds exist to challenge the District's."<sup>29</sup> Yet, more recently, while interpreting *Warren G.* to apply to a parents' failure to express disagreement at any time, the Third Circuit concluded that the obverse was, in effect, a deal breaker.<sup>30</sup> Specifically, distinguishing *Warren G.* as limited to failure to disagree, but as not extending to the opposite (i.e., affirmative agreement), the court concluded that the parents' communication of agreement—in this case, by checking the notice form accompanying the school district's evaluation as approved—precluded IEE reimbursement.<sup>31</sup>

Third, in a recent unpublished decision,<sup>32</sup> the Sixth Circuit cited and followed *Warren G.* and its Fourth Circuit predecessor to rule that the

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25. *Id.* at 1065 (emphasis in original). This rationale is not as obviously cogent as the court characterized it; the parent could challenge the appropriateness of the district's evaluation solely based on the applicable procedural and substantive regulatory standards for evaluation.

26. *See* Bd. of Educ. of Murphysboro Cmty. Unit Sch. Dist. v. Ill. St. Bd. of Educ., 41 F.3d 1162 (7th Cir. 1994); *Raymond S. v. Ramirez*, 918 F. Supp. 1280 (N.D. Iowa 1996); *Mullen v. Dist. of Columbia*, 89-2069-OG, 16 EHLR 792 (D.D.C. 1990); *Hiller v. Bd. of Educ. of Brunswick Cent. Sch. Dist.*, 687 F. Supp. 735 (N.D.N.Y. 1988). USDE has similarly expressly relied on this Fourth Circuit decision. *See* Letter to Anonymous, 17 IDELR 1113 (OSEP 1991).

27. 190 F.3d 80 (3d Cir. 1999).

28. *Id.* at 87. Yet, in a decision the following year, the same court noted, apparently by way of dicta, that the parents "met their burden" of notifying the district of their disagreement prior to obtaining their IEE. *Holmes v. Millcreek Twp. Sch. Dist.*, 205 F.3d 583, 590 (3d Cir. 2000).

29. *Warren G.*, 190 F.3d at 87. However, the court did not make clear to what extent its conclusion was independent of its apparent agreement with the lower court's view that overall equitable balancing does not apply to IEE reimbursement. *Id.*

30. *See* *Lauren W. v. DeFlaminis*, 480 F.3d 259, 275 (3d Cir. 2007). For a recent lower court application of this ruling in a case where the parents similarly approved the district's evaluation, see *Penn Trafford School District v. C.F.*, No. Civ. A. 04-1395, 45 IDELR ¶ 156 (W.D. Pa. Mar. 26, 2006).

31. *See* *Lauren W.*, 480 F.3d at 275. The court reasoned that their agreement did not preclude them from obtaining an IEE and, thus, having it considered by the school district, but allowing reimbursement would amount to "judicial alchemy" in light of the language of the applicable regulation. *Id.*

32. *P.R. v. Woodmore Local Sch. Dist.*, 256 Fed. Appx. 751 (6th Cir. 2007), *aff'g*, 481 F. Supp. 2d 860 (N.D. Ohio 2007).

parents' failure to notify the school district of their disagreement did not serve as a per se negation of their right to IEE reimbursement.<sup>33</sup>

The lower courts in the Third Circuit have not been entirely consistent. In a recent unpublished decision, the federal district court in Pennsylvania denied IEE reimbursement, citing the Third Circuit as having "suggested that some form of parental disagreement" is a required precondition,<sup>34</sup> but relying instead on the parents refusal to provide consent for the school district's evaluation while seeking an IEE, thus "circumvent[ing] the . . . evaluation process."<sup>35</sup> A recent federal district court decision in New Jersey failed to acknowledge, much less apply, the Third Circuit's guidance.<sup>36</sup> Instead, in a case in which the parents had not notified the school district of any disagreement, the court rejected their IEE reimbursement claim on the broader grounds that they "unilaterally sought independent evaluations outside the collaborative . . . process."<sup>37</sup> Further blurring the significance of the lack of compliance with this standard disagreement, the court relied additionally on regulatory reference to "the public agency responsible for the education of the child,"<sup>38</sup> observing that the child had attended a private school during the previous school year and that the parents had moved to another district during the summer before the effective date of the disputed IEP.

In addition, a pair of early Pennsylvania appellate court decisions provided only limited guidance. In the first case,<sup>39</sup> the Commonwealth Court appeared to avoid this situation by denying reimbursement "[a]s we have already concluded that the appeals panel correctly determined that the [school district's evaluation] was appropriate."<sup>40</sup> However, in a decision four years later, the same Pennsylvania court characterized the

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33. *Id.* at 755.

34. *D.H. v. Manheim Twp. Sch. Dist.*, No. Civ.A. 05-1113, 45 IDELR ¶ 38 (E.D. Pa. Nov. 29, 2005). Interestingly, the court only cited the *Holmes* decision, which was not the key Third Circuit ruling on this issue. *See supra* notes 27-28 and accompanying text.

35. *See D.H.*, 45 IDELR at \*166.

36. *M.S. v. Mullica Twp. Bd. of Educ.*, 485 F. Supp. 2d 555 (D.N.J. 2007), *aff'd*, 263 Fed.Appx. 264 (3d Cir. 2008).

37. *Id.* at 575.

38. *Id.* at 573-574 (citing 34 C.F.R. § 300.502(a)(3)(i) (2005)) (holding that the amendments to the regulations that were effective in October 2006 do not apply to the case). The court commented "[i]t is worth noting, however, that the [October 2006] amendments added new subsection (b)(5) which states, '[a] parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees.'" *Id.*

39. *Kozak v. Hampton Twp. Sch. Dist.*, 655 A.2d 641 (Pa. Commw. Ct. 1995).

40. *Id.* at 647.



prior decision as denying reimbursement because the parent obtained the IEE “not . . . because of a disagreement with the School District, but on his own initiative.”<sup>41</sup> In the latter case, the court ruled that the parents were entitled to a “fair portion” of the cost where: (1) they arranged for the IEE due to the child’s increasingly erratic behavior, not disagreement with the school district’s evaluation; (2) the district had failed to include one of the members of the evaluation team required by state law; and (3) the district used the IEE in developing the child’s IEP.<sup>42</sup>

Similarly, courts in other jurisdictions have been less than generous to parents who did not meet the disagreement standard. For example, a federal district court in Connecticut<sup>43</sup> and an earlier decision by West Virginia’s highest court<sup>44</sup> each denied IEE reimbursement because the parents desired additional information, not because they disagreed with the school district’s evaluation. As another variation, in an unpublished decision in California, the federal district court denied reimbursement where the parents obtained an IEE before the school district completed its evaluation, relying on “the plain meaning of the statute [sic]” and “every judicial decision of which the court is aware.”<sup>45</sup> In another variation, the federal district court in New Jersey, in an unpublished decision, denied reimbursement where the parents attempted an end-run around the procedural requirement by couching the reimbursement as expert witness fees.<sup>46</sup>

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41. *Cumberland Valley Sch. Dist. v. Lynn T.*, 725 A.2d 215, 219 (Pa. Commw. Ct. 1999), *aff’d sub nomine*, *In re Residence Hearing Before the Bd. of Sch. Dirs.*, 744 A.2d 1272 (Pa. 2000).

42. *Id.* at 219-20.

43. *R.L. v. Plainville Bd. of Educ.*, 363 F. Supp. 2d 222 (D. Conn. 2005).

44. *P.T.P. v. Bd. of Educ. of County of Jefferson*, 488 S.E.2d 61 (W. Va. 1997) (awarding parents reimbursement not because they disagreed with the evaluation, but only because they had contracted with the school for reimbursement).

45. *Hiram C. v. Manteca Sch. Dist.*, No. S-03-2568 WBS KJM, 2004 U.S. Dist. LEXIS 29175, at \*8-10 (E.D. Cal. Aug. 27, 2004) (citing *Taylor v. Vermont Dep’t of Educ.*, 313 F.3d 768, 774 (2d Cir. 2002) (“The federal regulations permit a parent’ who disagrees with a public agency’s evaluation either to initiate a hearing in which the agency must show that its initial evaluation was appropriate or to obtain a second IEE [independent educational evaluation] at public expense.”); *Eddie F. v. River Falls Sch. Dist.*, 243 F.3d 329, 334 (7th Cir. 2001) (“[W]e do not believe [the] parents were legally entitled to a second IEE because they did not significantly disagree with the first evaluation.”); *Seattle Sch. Dist., No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) (“Because [the] parent disagreed with the School District’s evaluation and the District was unable to establish the appropriateness of its evaluation, [the student] was entitled to an independent evaluation at public expense.”); 34 C.F.R. § 300.502(b)). The problems are that the court cited the relevant regulation, which is obviously not legislation, and the cited court decisions were not on point.

46. *See K.R. v. Jefferson Twp. Bd. of Educ.*, No. 00-Civ-5270 (WGB), 37 IDELR ¶ 92 (D.N.J. June 5, 2002).



Inferably subordinating disagreement into notification, a federal district court in Florida denied IEE reimbursement because the parental request was too vague.<sup>47</sup> In yet another factual variation, a published federal district court decision in Illinois ruled against reimbursement where the school district had denied the request for, rather than where the parents had disagreed with, the evaluation.<sup>48</sup> Finally, in what amounts to an odd outlier, a federal district court recently denied the IEE payment on legal grounds, based on the absence of a district evaluation (and, thus, parental disagreement with it), but the court granted the payment on equitable grounds, based on the unusual circumstances of the case.<sup>49</sup>

Although state special education laws often merely mirror the IDEA's IEE regulation, if the state provides a more rigorous procedural standard, it may be fatal to the parents' case. For example, in an early published decision, the federal district court in Massachusetts concluded that the parents' failure to meet the requirement in the then-applicable state regulation of timely prior notice to the school district precluded their requested reimbursement for the IEE.<sup>50</sup>

Finally, although rarely mentioned in the case law to date,<sup>51</sup> USDE has provided additional pertinent guidance. For example, in a pair of early policy letters, USDE interpreted the regulation as not allowing a school district to impose a period for rectification of its own evaluation as a precondition of a publicly funded IEE.<sup>52</sup> In another early policy letter USDE opined that parental notification of a request for an IEE at public

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47. *Sch. Bd. of Lee County v. E.S.*, 561 F. Supp. 2d 1282 (M.D. Fla. 2008).

48. *See Krista P. v. Manhattan Sch. Dist.* 255 F. Supp. 2d 873 (N.D. Ill. 2003); *cf. 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 need a reevaluation rather than whether the district's reevaluation was appropriate).

49. *Los Angeles Unified Sch. Dist. v. D.L.*, 548 F. Supp. 2d 815 (C.D. Cal. 2008). The defendant district had reason to, but did not, perform an evaluation and offered to fund an IEE after the parent filed for a due process hearing; the student moved to another district; and the new district requested the IEE. *Id.*

50. *See Norris v. Mass. Dep't of Educ.*, 529 F. Supp. 759 (D. Mass. 1981).

51. The reasons for this omission are not clear. Perhaps the parties' attorneys did not cite USDE authority, especially in light of the limited knowledge of these policy letters. An alternative and less likely explanation is that the courts may have regarded these policy interpretations as having insufficient weight. In any event, parent and district advocates can benefit from this information to the notable extent that USDE policy interpretations can have significant weight in the complaint resolution and compliance review process of IDEA enforcement, with which USDE has a more direct role than in the adjudicative mechanism.

52. *See Letter to Kirby*, EHLR 213:233 (OSEP 1989); *Letter to Gray*, EHLR 213: 183 (OSEP 1988).

expense was not an absolute prerequisite, and that the communication of disagreement need not specify the areas of disagreement.<sup>53</sup> Most recently, in the commentary accompanying the IDEA regulations, USDE proffered an interpretation tangential to the disagreement step specific to school districts that use response to intervention (RTI) as part of the eligibility process for specific learning disability. Specifically, USDE commented: “The parent . . . would not have the right to obtain an IEE at public expense before the [district] completes its evaluation simply because the parent disagrees with the [district’s] decision to use [RTI].”<sup>54</sup>

### III. DISTRICT FILING

Similarly, the courts have not been entirely consistent regarding the converse procedural standard for IEE reimbursement, ranging from absolute strictness to an ad hoc approach. The applicable judicial and USDE authority is divisible into two situations: (1) where the school district has not filed, in which case the parents were the moving party; and (2) where the district filed but, according to the parents, too late in relation to the regulatory limit of “without unnecessary delay.”<sup>55</sup> The absolute approach has applied more often in the first of these two situations but not pervasively.<sup>56</sup> The ad hoc approach has been predominant for the second situation. Finally, as an obvious outlier, one federal court inexplicably ruled, without cited support, that where the district does not comply with the parent’s request for an IEE at public expense, the burden is on the parents to file for an impartial hearing under the IDEA.<sup>57</sup>

#### A. Lack of Filing

In an early case in which IEE reimbursement was only a secondary issue, the Eighth Circuit summarily ruled, without further discussion or

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53. See Letter to Thorne, 16 EHLR 606 (OSEP 1990); see also Letter to Fields, EHLR 213:260 (OSERS 1989). However, in the same 1989 policy letter, OSERS took the position that a school district may establish reasonable timelines for parent notification of disagreement, adding that “it would not be unreasonable. . . for a school district to deny [a parent] reimbursement for an [IEE] that was conducted two years after the district’s evaluation.” Letter to Fields, EHLR 213:260 (OSERS 1989).

54. 71 Fed. Reg. 46,540, 46,689 (Aug. 14, 2006) (codified at 34 C.F.R. § 300.503 (2008)).

55. See *supra* note 7 and accompanying text.

56. One of the reasons that it may not be decisive is that in many cases, IEE reimbursement is one of several issues and often secondary in importance to the others, thus not attracting the same attention from the parent and the court.

57. Sch. Bd. of Lee County v. E.S., 561 F. Supp. 2d 1282 (M.D. Fla. 2008).

analysis, that because the school district “never initiated a hearing as required by [the IDEA regulation] to show the inappropriateness of the [parent’s] evaluation, [and the] appropriateness of its own evaluation . . . the parents had a right to an ‘[IEE] at public expense.’”<sup>58</sup> In a subsequent, parallel case, the Seventh Circuit summarily followed this ruling.<sup>59</sup>

In contrast to and in the same year as the Seventh Circuit decision, a published Alabama district court decision<sup>60</sup> treated the school district’s failure to file as harmless error because the parents’ filing resulted in “a due process review of all of the issues that they raised.”<sup>61</sup> In an aforementioned recent unpublished decision,<sup>62</sup> the Sixth Circuit excused the school district’s failure to fulfill this procedural standard based on the “unique facts of the case,” including the parents’ filing for an impartial hearing prior to providing the district with any communication regarding the IEE.<sup>63</sup> Reasoning that the parents’ argument would render the regulations “pointless,” the court concluded that “as long as the purpose of the regulations is accomplished, there is no reason to exalt form over substance.”<sup>64</sup> In a published decision, the federal district court in Connecticut similarly excused a school district’s failure to file where the parents had not met the related disagreement standard.<sup>65</sup>

## B. Without Unnecessary Delay

Although not subject to federal appellate authority, the timing of the school district’s filing has proven decisive in three relatively recent unpublished court decisions. First, a federal district court in Pennsylvania found an eight-month delay as insufficient to meet this ad hoc time limit. More specifically, the court regarded the school district’s acquiescence to an IEE for eight months, including incorporating some of its findings into the

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58. *Evans v. Dist. No. 17 of Douglas County*, 841 F.2d 824, 830 (8th Cir. 1988) (quoting 34 C.F.R. § 300.505(b)).

59. *See Bd. of Educ. of Murphysboro Cmty. Unit Sch. Dist. v. Ill. St. Bd. of Educ.*, 41 F.3d 1162 (7th Cir. 1994).

60. *Myles v. Montgomery County Bd. of Educ.*, 824 F. Supp. 1549 (M.D. Ala. 1993).

61. *Id.* at 1558.

62. *P.R. v. Woodmore Local Sch. Dist.*, 256 Fed.Appx. 751 (6th Cir. 2007), *aff’g*, 481 F. Supp. 2d 860 (N.D. Ohio 2007). *See supra* note 32 and accompanying text.

63. *Id.* at 754.

64. *Id.* at 755.

65. *R.L. v. Plainville Bd. of Educ.*, 363 F. Supp. 2d 222 (D. Conn. 2005).

child's IEP, until the parents filed for a hearing making unnecessary a determination of the substantive standards for the IEE.<sup>66</sup>

Similarly, a school district's unexplained delay of three months from the date of the parents' request to its filing for a hearing was determinative in a recent unpublished federal district court decision in California.<sup>67</sup> The court regarded the district's delay as constituting a waiver in light of the importance of procedural safeguards under the IDEA, but the court blurred the effect of this ruling by alternatively relying on one of the two substantive standards for an IEE.<sup>68</sup>

Finally, in the most recent decision,<sup>69</sup> the federal district court in Pennsylvania concluded that: (1) in light of the IDEA 2004 provision for a resolution session,<sup>70</sup> the time line in this matter begins 30 days after the parent's objection, i.e., communication of disagreement;<sup>71</sup> and (2) for three reasons, a six-week delay from that point did not constitute a per se violation.<sup>72</sup> The first reason was the several-month limitation period that the courts in this jurisdiction had established for filing a request for an

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66. *D.H. v. Manheim Twp. Sch. Dist.*, No. Civ.A. 05-1113, 45 IDELR ¶ 38 (E.D. Pa. Nov. 29, 2005). Although rendering nugatory the review officers' ruling that the IEE did not meet agency criteria, this ruling was not determinative in this case because the parents failed to fulfill the earlier procedural standard. *See supra* notes 32-33 and accompanying text.

67. *Pajaro Valley Unified Sch. Dist. v. J.S.*, No. C 06-0380 PVT, 47 IDELR ¶ 12, 50 (N.D. Cal. Dec. 15, 2006).

68. *Id.* at 50.

69. *L.S. v. Abington Sch. Dist.*, Civil No. 06-5172, 48 IDELR ¶ 244 (E.D. Pa. Sept. 28, 2007).

70. *See id.* at \*1096 (the new provision allows a 30-day grace period for starting the timeline for the impartial hearing. 20 U.S.C. § 1415(f)(1)(B)(ii) (2006). The court made this connection based on the interpretation of "complaint" in this context to include objection to an evaluation. This interpretation is suspect in light of the general understanding that "complaint" in this context refers to the filing for an impartial hearing, e.g., 34 C.F.R. § 300.510(b) (2008), and that the only other "complaint" in the IDEA regulations refers to the state's complaint resolution process, e.g., *id.* § 300.151 – 300.15).

71. *See L.S.*, 48 IDELR at \*1096-1097. *See also id.* at \*1095 (discussing that the court also addressed the related "reasonable time" requirement for the school district's written refusal, 34 C.F.R. § 300.503(a) (2006), ruling that a seven-week delay was unreasonable but that this procedural violation was not fatal in light of (1) the district's oral notice to the parent three weeks earlier; and (2) the IDEA provision that a procedural violation is determinative only when it impedes the child's right to FAPE); *id.* at \*1095 (discussing that the court concluded that the matter called for a case-by-case equitable analysis, relying on the Supreme Court's tuition reimbursement decision in *Burlington School Committee v. Massachusetts Department of Education*, 471 U.S. 359 (1985)).

72. *Id.* at \*1096-97. *See also id.* at \*1097 (pointing to the distrust evident on the part of both parties, the court commented that "public education in the District would likely benefit from more diligent, prompt, and open communications . . ."); *id.* at \*1098 (by way of concluding dicta, the court characterized the delay in this case as "necessary and potentially helpful . . .").

impartial hearing in general<sup>73</sup> until IDEA filled this silence with a two-year statute of limitations.<sup>74</sup> The second reason was the school district's ongoing efforts during this period to resolve the matter.<sup>75</sup> The final reason was the IDEA 2004 provision that discounted harmless procedural violations, i.e., those that did not impede the child's right to FAPE.<sup>76</sup>

In the early policy letters, the USDE took the position that it could not provide a bright-line "working definition" of this temporal limit beyond "a reasonable period of time," more specifically that the school district "must respond to a parent's request for an IEE without undue delay and in a manner that does not interfere with the child's right to free appropriate public education (FAPE)."<sup>77</sup> Finally and conversely, USDE has opined that, prior to implementing the IEE, a parent may initiate the hearing, rather than wait for the district's filing or then challenge its lack of filing, "if the parent believes that denial of advance funding for the IEE would deny the parent a publicly-funded IEE."<sup>78</sup>

#### IV. APPROPRIATENESS OF DISTRICT EVALUATION

In light of the relatively skeletal substantive criteria for district evaluations<sup>79</sup> and the restricted role of the procedural standards,<sup>80</sup> the courts have varied widely in their outcomes regarding this key step in the IEE reimbursement framework.

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73. *See* *Holmes v. Millcreek Twp. Sch. Dist.*, 205 F.3d 583 (3d Cir. 2000) (noting that one of these decisions was specific to IEEs).

74. *See* 20 U.S.C. § 1415(f)(3)(C) (2006).

75. *See id.* § 1415(e) The court based this equitable assessment on the cooperative process illustrated by the expanded provision for mediation and the new provision for a resolution session); *id.* § 1415(f)(1)(B).

76. *Id.* § 1415(f)(3)(E)(ii).

77. *See* Letter to Anonymous, 21 IDELR 1185, 1186 (OSEP 1994). *See also* Letter to Anonymous, 23 IDELR 721 (OSEP 1994); Letter to Saperstone, 21 IDELR 1127 (OSEP 1994). *Cf.* Letter to Anonymous, 17 EHLR 355 (OSEP 1990) (no timeline but before addition of "without necessary delay"). These letters also make clear that the reasonable time for filing and the reasonable time for responding to the parents' request tends to be conflated.

78. Letter to Anonymous, 17 EHLR 1113, 1115 (OSEP 1991).

79. *See* 34 C.F.R. § 300.304 (2008) (The other federal regulatory requirements for evaluations and reevaluations are largely procedural or specific to the learning disability classification); *see also id.* §§ 300.300, 300.303, 300.305-300.31. As with IEEs, the state regulations for evaluations and reevaluations in most jurisdictions do not provide significant additions to the federal evaluation and reevaluation requirements.

80. *See* 20 U.S.C. § 1415(f)(3)(E) (2006). As codified in the 2004 amendments of the IDEA, the judicially established harmless error approach to the procedural aspect of FAPE would seem to extend to appropriateness in other IDEA contexts, including district evaluations.

The appellate decisions largely have been less than deferential to district defendants. In a 1996 published decision,<sup>81</sup> the Ninth Circuit affirmed IEE reimbursement based on two deficiencies in the school district's evaluation: (1) the failure of the evaluation team to adhere to the regulatory requirement to include a teacher or other specialist with knowledge in the area of the suspected disability; and (2) the evaluation team's cursory conclusion concerning the student's placement without addressing the recommendations of the parents' medical experts.<sup>82</sup>

Similarly, in *Warren G.*, the Third Circuit found no clear error in the district court's ruling that the school district's evaluation was inappropriate primarily because it had failed to uncover the specific areas of the child's learning disabilities.<sup>83</sup> However, in a more recent decision, the same appeals court rejected the parents' challenge to a district's evaluation based on the qualifications of the evaluator.<sup>84</sup> The problem with the parents' attack, in the Third Circuit's view, was that they had relied on expert opinions rather than statutory or regulatory standards.<sup>85</sup>

The lower court decisions have also varied in outcome, but the majority of them have deferentially upheld the appropriateness of school district evaluations or reevaluations based on facial compliance with the relevant federal and state regulations.<sup>86</sup> For example, in the aforemen-

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81. *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493 (9th Cir. 1994).

82. *Id.* at 1499, 1500 n.3. The court seemed to ignore the corresponding requirement for the appropriateness of the IEE, mentioning it only marginally and as if it were not essential.

83. *See Warren G. v. Cumberland County Sch. Dist.*, 190 F.3d 80, 87-88 (3d Cir. 1999). In this case, there were two children—siblings with SLD. The secondary reason was that the parents' evaluator had identified the specific areas of SLD.

84. *See Holmes v. Millcreek Twp. Sch. Dist.*, 205 F.3d 583, 591-92 (3d Cir. 2000).

85. *See id.* at 591. The expert opinions included in this case state education department guidelines that, the court concluded, did not have the force of law.

86. *See, e.g., Jack B. v. Council Rock Sch. Dist.*, Civ. A. No. 06-1968, 2008 WL 4489793, 51 IDELR ¶ 100 (Oct. 3, 2008); *L.S. v. Abington Sch. Dist.*, Civil No. 06-5172, 48 IDELR ¶ 244 (E.D. Pa. Sept. 28, 2007); *DeMerchant v. Springfield Sch. Dist.*, No. 1:05-CV-316, 48 IDELR ¶ 181 (D. Vt. Sept. 4, 2007); *Wachlarowicz v. Sch. Bd. of Indep. Sch. Dist. No. 832*, No. Civ. 03-2437 (JNE/JGL), 42 IDELR ¶ 7 (D. Minn. Sept. 30, 2004); *Judith S. v. Bd. of Educ. of Cmty. Unit Sch. Dist. No. 200*, No. 97 C 2899, 28 IDELR 728 (N.D. Ill. July 15, 1998); *cf. Grapevine-Colleyville Indep. Sch. Dist. v. Danielle R.*, No. 4:98-CV-703-A, 31 IDELR ¶ 103 (N.D. Tex. Oct. 27, 1999) (reversed hearing officer for imposing higher standard than the IDEA required); *Das v. McHenry Sch. Dist. No. 15*, No. 92 C 4097, 20 IDELR 979 (N.D. Ill. Jan. 13, 1994), *aff'd* 41 F.3d 1510 (7th Cir. 1994) (deferred to hearing officer's conclusion of appropriateness without any further analysis). Additionally, various published and unpublished court decisions resolved the matter in favor of school districts based on other, related grounds. *See, e.g., Alvin Indep. Sch. Dist. v. A.D.*, 503 F.3d 378 (5th Cir. 2007); *P.R. v. Woodmore Local Sch. Dist.*, 256 Fed. Appx. 751 (6th Cir. 2007), *aff'g*, 481 F. Supp. 2d 860 (N.D. Ohio 2007) (resolved in terms of adequate previous proceedings); *Dale M. v. Bd. of Educ. of Bradley-Bourbonnais High Sch. Dist.*, 29 F. Supp. 2d 925 (C.D. Ill. 1998), *rev'd on other grounds*, 237 F.3d 813 (7th Cir. 2001); *Myles v. Montgomery*

tioned<sup>87</sup> recent unpublished decision, the federal district court upheld, on a clear error standard, the review officers' decision that the school district's reevaluation was appropriate.<sup>88</sup> Specifically, first the court first rejected the parents' reliance on *Warren G.*, concluding that their child's case was distinguishable because the school district here had successfully defended its evaluation at the impartial hearing, showing that it had tested the child in all areas of the suspect learning disability.<sup>89</sup> The court further concluded that the key was the methodology, which the district had shown to comply with the relevant regulations.<sup>90</sup> Second, the court rejected the parents' argument that the district's reevaluation failed to address their child's blood disorder, reasoning that the scope of the evaluation was the child's suspected IDEA disability, which in this case was a specific learning disability, not unrelated physical conditions.<sup>91</sup>

In a minority of cases, including the published decisions, the lower courts have sided with parents in terms of this substantive standard for IEE reimbursement. A prime example is the published Connecticut federal district court decision, which held that the school district's reevaluation was not appropriate.<sup>92</sup> The court based its ruling on the regulatory requirement to "use a variety of assessment tools and strategies . . . that may assist in determining—[t]he content of the child's IEP."<sup>93</sup> In this case, the school district, until hiring an expert one month after filing for the impartial hearing, had relied on progress reports of the child's regular and special education teachers that were not reported in terms of her IEP goals and objectives.<sup>94</sup> Similarly, a federal district court in

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County Bd. of Educ., 824 F. Supp. 1549 (M.D. Ala. 1994) (resolved within context of ESY in the specific circumstances of this case); *Akers v. Bolton*, 531 F. Supp. 300 (D. Kan. 1981) (summary affirmance of hearing officer's decision incidental to exhaustion ruling); *Kozak v. Hampton Twp. Sch. Dist.*, 655 A.2d 641 (Pa. Commw. Ct. 1995) (ultimately resolved as eligibility issue).

87. *See supra* notes 69-76 and accompanying text.

88. *L.S. v. Abington Sch. Dist.*, Civ. No. 06-5172, 48 IDELR ¶ 244 (E.D. Pa. Sept. 28, 2007) (citing *S.H. v. State-Operated Sch. Dist. of City of Newark*, 336 F.3d 260, 271 (3d Cir. 2003); *L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384, 389 (3d Cir. 2006)). Although the court referred to "clear error," the cited Third Circuit cases would seem to suggest a less deferential review standard. *Id.* at 1098-99.

89. *Id.* at 1097.

90. *Id.* at 1098.

91. *Id.* For confirmation of its decision upon a motion for reconsideration, the court found no clear IDEA requirement for a detailed description of the data for the SLD determination. *L.S. v. Abington Sch. Dist.*, Civ. No. 06-5172, 50 IDELR ¶37, \*172 (E.D. Pa. Apr. 9, 2008).

92. *A.S. v. Norwalk Bd. of Educ.*, 183 F. Supp. 2d 534 (D. Conn. 2002).

93. *Id.* at 550 (quoting 47 C.F.R. § 300.502(b) (2006)). Although the content of this regulation has remained the same, its current codification is 34 C.F.R. § 300.304(b)(1) (2008).

94. *Id.* at 546-549.



Minnesota, in an unpublished decision,<sup>95</sup> ordered IEE reimbursement, concluding that the school district's evaluation was inappropriate because it failed to identify the student's needs related to the suspected disability.<sup>96</sup> Likewise, in another unpublished decision,<sup>97</sup> a federal district court in California concluded that the school district's evaluation was inappropriate based on the failure to evaluate other suspected disabilities, including pervasive developmental delay and/or nonverbal learning disabilities.<sup>98</sup> The court relied on the independent evaluator's testimony, but evidence "highly suggestive that the district personnel did not approach the testing with an open mind" contributed to the court's judgment.<sup>99</sup>

Even more in contrast to the prevailing case law, the federal district court in the District of Columbia issued an unpublished decision<sup>100</sup> interpreting the regulations as entitling the parents to IEE reimbursement where they had disagreed, and there had not been a determination that the school district's evaluation was appropriate; instead, the court relied on the hearing officer's finding that the district violated the related, but seemingly separable, regulation requiring them to consider the IEE.<sup>101</sup>

USDE has not provided much guidance as to the standards of appropriateness, other than to cite the evaluation-specific IDEA regulations and to remind parents that, upon receipt of the required notice for the evaluation, "the parent may ask the [school district] about the qualifications of the diagnostician to ensure that he or she has the appropriate knowledge regarding the child's disability."<sup>102</sup> On the other hand, USDE has clarified the threshold matter that an evaluation, for purposes of an IEE at public expense includes not only a reevaluation but also a functional behavioral assessment that the district conducts because the IEP

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95. *Indep. Sch. Dist. No. 701, Hibbing Pub. Sch. v. J.T.*, No. Civ. 05-1892 DWFRL, 2006 WL 517648 (D. Minn. Feb. 28, 2006).

96. *Id.* at \*12.

97. *Pajaro Valley Unified Sch. Dist. v. L.S.*, No. C 06-0380 PVT, 47 IDELR ¶ 12 (N.D. Cal. Dec. 15, 2006).

98. *Id.* at \*48. However, arguably the independent examiner was wrong because they alleged disabilities—unlike the evaluation's targets of other health impairment, specific learning disability, and speech/language impairment—are not recognized disability classifications under the IDEA.

99. *Id.* at \*50. The court did not rely on this finding as an alternative basis, instead "simply find[ing] [that] the testimony of [the independent evaluator] . . . to be more credible and deserving of more weight." *Id.*

100. *Mullen v. Dist. of Columbia*, No. 89-2069-OG, 16 EHLR 792 (D.D.C. 1990).

101. *Id.*

102. Letter to Anonymous, 22 IDELR 637 (OSEP 1994).

team determined it was necessary to develop an appropriate IEP for the child.<sup>103</sup>

## V. APPROPRIATENESS OF PARENT IEE

The court decisions that have reached this final part of the IEE reimbursement framework are often anti-climactic in terms of providing substantive assessment of the IEE.<sup>104</sup> However, limited case law and extensive USDE policy interpretations provide guidance as to the timing and criteria for this final standard for IEEs at public expense.

### A. Timing

In an aforementioned Connecticut case,<sup>105</sup> the court rejected the district's argument that the parents were not entitled to IEE reimbursement because they arranged for the IEE in preparation for the impartial hearing rather than for the IEP that gave rise to the hearing.<sup>106</sup> More specifically, the court concluded that "the spirit of the regulations" supported the parents' right to object and obtain an IEE to challenge the IEP regardless of whether they did so before or after the district's filing.<sup>107</sup> Additionally, although not mentioned in the Connecticut case, USDE has opined that the parents' IEE should be after the district's evaluation.<sup>108</sup>

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103. Letter to Scheinz, 34 IDELR ¶ 34 (OSEP 2000).

104. For example, in an analysis incidental to eligibility and tuition reimbursement issues, the Ninth Circuit, in an unpublished decision, reversed the lower court's denial of reimbursement with respect to two of the numerous private evaluations, with the cursory conclusion that the district court should have deferred to the hearing officer's reasoning that "the two assessments taken together comprised a more complete assessment [than the school district's]." *Norton v. Orinda Union Sch. Dist.*, 168 F.3d 500, 504 (9th Cir. 1999).

105. *A.S. v. Norwalk Bd. of Educ.*, 183 F. Supp. 2d 534 (D. Conn. 2002). *See supra* notes 92-94 and accompanying text.

106. *A.S.*, 183 F. Supp. 2d at 551.

107. *Id.*

108. *See* Letter to Reedy, 16 EHRLR 1364 (OSEP 1990). This letter also seems to suggest that the district's use of the IEE in its evaluation, or at least reevaluation, does not automatically require reimbursement (i.e., that the parents' IEE was appropriate and the district's evaluation was not). *Id.*

## B. Criteria

The relevant regulation specific to “agency criteria” provides:

(1) If an [IEE] 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 [IEE].

(2) Except for the criteria described in [the previous] paragraph . . . , a public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.<sup>109</sup>

Thus, in the same Connecticut case, the court also rejected the district’s challenge to the independent evaluator’s methodology, concluding that “[t]he plain language of the applicable regulations requires only that a parent’s expert meet the same criteria that the [district] used when initiating its evaluation, not that the expert employ a methodology approved by the [district].”<sup>110</sup> Arguably, in light of “the extent” limitation in the first subsection of the regulation<sup>111</sup> and to the extent that the tuition reimbursement context is analogous,<sup>112</sup> the various criteria should be less rigorous for parent IEEs than for district evaluations.

Various USDE policy letters have provided interpretive guidance regarding the agency-criteria regulation. One line of letters concerns a district list of evaluators for IEEs. More specifically, USDE interpreted this agency-criteria regulation as allowing the district to publish a list of evaluators that meets its criteria, including those concerning reasonable cost, just as long as the district permits parents the opportunity to select an evaluator who is not on the list but who meets said criteria.<sup>113</sup> Earlier

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109. 34 C.F.R. § 300.502(e) (2008). Additionally, the IEE regulation requires the school district to consider the IEE, whether at public or private expense, “if it meets agency criteria.” *Id.* § 300.502(c)(1). For the lead case on the meaning of “consider” in this context, see *T.S. v. Board of Education of Town of Ridgefield*, 10 F.3d 87 (2d Cir. 1993).

110. *A.S. v. Norwalk Bd. of Educ.*, 183 F. Supp. 2d 534, 551 (D. Conn. 2002) (citing 34 C.F.R. § 300.502(e)(1)).

111. 34 C.F.R. § 300.502(e)(1) (2008).

112. See *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

113. See Letter to Parker, 41 IDELR ¶ 155 (OSEP 2004), available at <http://www.ed.gov/policy/speced/guid/idea/letters/2004-1/parker022004iee1q2004.pdf>.

policy letters added further detail, opining that the district may restrict parents to a selection from the list “if 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,” but even in such cases the district must include a statement in its policy allowing parents the show that unique circumstances justify a selection of an evaluator not on the list.<sup>114</sup> Additionally, the criteria need not be entirely objective so long as they are the same for the district’s own evaluations.<sup>115</sup>

As for restrictions generally, whether via such a district list or otherwise, another USDE policy letter opined that the following agency criteria were inconsistent with this regulation: (1) prohibiting affiliation with private schools and advocacy organizations (including those advocating particular instructional approaches); (2) similarly prohibiting expert witnesses who consistently testified on the parents’ side; (3) requiring recent and extensive experience in public schools; and (4) requiring, without reasonable exceptions, state education department licensure.<sup>116</sup> Similarly, USDE has taken the position that a district may not require advance consultation and clearance as a condition for payment.<sup>117</sup>

As for credentials for IEE evaluators, USDE opined in an early policy letter that the district might impose minimum requirements for qualifications “based on state standards.”<sup>118</sup> More recently, USDE recommended that districts set forth minimum qualifications and concluded, based on the relevant regulation,<sup>119</sup> said qualifications may include the criteria established by the producer of evaluation instruments.<sup>120</sup>

Regarding location,<sup>121</sup> USDE interpreted the regulation as allowing districts to impose a mileage limit on the IEE as long as this does not prevent a parent from getting an appropriate evaluation.<sup>122</sup> More recent-

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114. See Letter to Young, 39 IDELR ¶ 98 (OSEP 2003), available at <http://www.ed.gov/policy/speced/guid/idea/letters/2003-1/young032003iee1q2003.pdf>; Letter to Fields, EHLR 213:259 (OSERS 1989).

115. See Letter to Rambo, 16 EHLR 1078 (OSEP 1990).

116. See Letter to Petska, 35 IDELR ¶ 191 (OSEP 2001). To the extent of any conflict, the USDE interpretation accompanying the most recent regulations would appear to have a superceding effect. See *infra* note 120 and accompanying text.

117. See Letter to Bluhm, EHLR 211:227 (OSEP 1980).

118. *Id.* In the same letter, OSEP opined that a school district may impose restrictions on the use of particular evaluations whom the district had earlier found to be unsatisfactory, but may not limit the pool of eligible evaluators to one or more independent individuals or organizations. *Id.*

119. The current version of this regulation is at 34 C.F.R. § 300.304(c)(iv)-(v) (2008).

120. See Letter to Anonymous, 22 IDELR 637 (OSEP 1994).

121. For overlapping cost-related location considerations, see *supra* notes 113-114 and accompanying text.

122. See Letter to Bluhm, EHLR 211:227 (OSEP 1980).

ly, USDE opined that a district could restrict IEEs to evaluators within the state if: (1) there are a sufficient number of qualified evaluators within those boundaries; and (2) parents have the opportunity for an exception based on unique circumstances, with an impartial hearing being the forum to determine whether such circumstances apply.<sup>123</sup>

As for costs,<sup>124</sup> USDE has opined that a district may establish maximum allowable charges for specific tests if: (1) said maximum allows a choice among qualified professionals in the area by targeting unreasonably excessive fees rather than being limited to the average fee customarily charged in that area; and (2) it allows exceptions for justified unique circumstances.<sup>125</sup> Additionally, USDE has opined that “[i]f 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.”<sup>126</sup> Again, as applicable to qualifications and location, if the district regards the requested costs to be unreasonable, USDE has identified an impartial hearing—rather than unilateral refusal of reimbursement—as the proper district recourse.<sup>127</sup> As to the related issue of parents’ private insurance, USDE has warned that a district IEE procedure that requires parents to submit the charges first to their health care insurer violates the IDEA.<sup>128</sup>

Finally, the commentary accompanying the most recent IDEA regulations provided the latest USDE guidance as to these various matters. As a general matter, USDE interpreted “agency criteria” as including the regulatory requirements for the scope and sources of its own evaluation.<sup>129</sup> Said commentary also provided guidance as to two specific aspects of the regulatory reference to “agency criteria”<sup>130</sup>: personnel

123. See Letter to Anonymous, 20 IDELR 1219 (OSEP 1993).

124. For the latest additional guidance, see *infra* note 126 and accompanying text.

125. See, e.g., Letter to Anonymous, 22 IDELR 637 (OSEP 1994); see also Letter to Fields, EHLR 213:259 (OSERS 1989). The 1994 letter added the seemingly apparent conclusion that where a school district establishes a maximum allowable charge it may not pay said charge to one evaluator and refuse to pay the same to another evaluator, unless it initiates a hearing to show that the second IEE does not meet agency criteria. *Id.* In an earlier letter, OSEP opined that a district may establish the upper limit based on the cost for providing equal assessments by the district. See Letter to Bluhm, EHLR 211:227 (OSEP 1980).

126. Letter to Petska, 35 IDELR ¶ 191, at \*819 (OSEP 2001).

127. See *id.*; Letter to Wilson, 16 EHLR 83 (OSEP 1989); Letter to Fields, EHLR 213:259 (OSERS 1989); Letter to Heldman, 20 IDELR 621 (OSEP 1993). The Heldman letter also observed that the parents’ financial resources are not a relevant factor.

128. See Letter to Thompson, 34 IDELR ¶ 8 (OSEP 2000).

129. See Independent Education Evaluation, 71 Fed. Reg. 46,540, 46,690 (Aug. 14, 2006) (codified at 34 C.F.R. §300.502 (2008)).

130. See *supra* notes 8-9 and accompanying text.

licensure and cost containment. Regarding personnel conducting the IEE, USDE opined that “it 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 type of evaluation for the agency” unless “only individuals employed by a public agency may obtain a license.”<sup>131</sup> Regarding the costs of the IDEA, USDE repeated its “longstanding position that public agencies should not be required to bear the cost of unreasonably expensive IEEs,” opining more specifically that “it is appropriate for a public agency to establish reasonable cost containment criteria applicable to [both agency and parent evaluators],” but only with a provision for an exception when the parents shows unique circumstances justifying a higher fee.<sup>132</sup>

## VI. CONCLUSION

In sum, the case law concerning a parent’s right to an IEE at public expense has filled out the multi-step regulatory framework to a notable extent, which has not been comprehensively canvassed elsewhere. Although the courts have at least partially recognized and relied on said case law, they have not attended to the even more extensive guidance that USDE has provided in a lengthy skein of policy interpretations. Thus, not only the parties and hearing or review officers in IEE cases under the IDEA can benefit from this systematic combination of case law and USDE guidance.<sup>133</sup>

In short, the status of the law at this point may be summarized as follows. First, the two preliminary, procedural steps of the regulatory framework—parental disagreement and district filing—approximate, by way of analogy, the equitable considerations under tuition reimbursement analysis.<sup>134</sup> Second, the central substantive step of the appropriateness of

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131. 71 Fed. Reg. 46,560, 46,689 (Aug. 14, 2006) (codified at 34 C.F.R. §300.502 (2008)).

132. *Id.* at 46, 689-46, 690. For examples of USDE’s previous policy interpretations specific to cost containment, see, e.g., Letter to Petska, 35 IDELR ¶ 191 (OSEP 2001); Letter to Kerry, 18 IDELR 527 (OSEP 1991); Letter to Wilson, 16 EHLR 83 (OSEP 1989); Letter to Hull, EHLR 211:132 (OSEP 1979). In an early letter, OSERS traced this policy position to its commentary accompanying the original regulations in 1977. See Letter to Fields, EHLR 213:259 (OSERS 1989).

133. In the one IEE case where a court carefully analyzed the weight of USDE guidance, the court upheld the policy letter in question. See *supra* notes 12 and 18.

134. See 20 U.S.C. § 1412(a)(10)(C)(iii)(I) (2006); 34 C.F.R. § 300.148(d)(1) (2008). See, e.g., *Berger v. Medina City Sch. Dist.*, 348 F.3d 513 (6th Cir. 2003); *Rafferty v. Cranston Pub. Sch. Comm.*, 315 F.3d 21 (1st Cir. 2002).

the district's evaluation has—again analogous to the district FAPE step of tuition reimbursement analysis<sup>135</sup>—been subjected to a rather wide range of judicial interpretation in light of the broad-based standard for appropriateness. Finally, akin to the more relaxed judicial scrutiny for the parents' placement in tuition reimbursement analysis,<sup>136</sup> the final substantive step for IEE reimbursement—the appropriateness of the IEE—has received anti-climactic attention in the courts, which have particularly neglected the USDE guidance as to the nature and timing of applicable agency criteria.

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135. See, e.g., Thomas A. Mayes & Perry A. Zirkel, *Special Education Tuition Reimbursement Claims: An Empirical Analysis*, 22 REMEDIAL & SPECIAL EDUC. 350 (2001).

136. See, e.g., *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).