LET'S GET EXCITED ABOUT EVALUATING FULLY

By

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I. Child Find Obligations and Its Relationship to Referrals, Evaluations and Eligibility

A. A school district must conduct child find in order to seek out and identify all students with disabilities residing within its jurisdiction and attending private schools within its jurisdiction. 34 C.F.R. §§ 300.111 & .131.

B. It is not sufficient to handle the student exclusively through the RTI process or through child study process following a request for an evaluation without also making a determination of the need for an evaluation.

C. The delay in making a decision regarding the referral and the need for an evaluation can result in an obligation to provide compensatory education services if it is later determined that the student is eligible under the IDEA and an IEP was not timely offered.

D. Case Decisions:

1. *Harrison (CO) Sch. Dist. Two*, 57 IDELR 295 (OCR 2011). School district violated its child find requirement when it delayed for 18 months in conducting an evaluation, did not evaluate the student at the request of the parent and continued the RTI process. The school district should have initiated the evaluation process earlier because there was reason to suspect a disability due to increased misbehavior and ten suspensions.

2. *Artichoker, ex rel., D.D. v. Todd Co. Sch. Dist.*, No. 3:15-CV-03021-RAL, 2016 WL 7489033 (D.S.D. Dec. 29, 2016), 69 IDELR 58 (S.D. 2016. Student posted a picture of herself at school holding a knife with a marijuana leaf depicted on it. She was disciplined and the parent argued a failure of the school district to conduct an evaluation under the IDEA. The court held that the scheduling of a child study process did not halt the need to proceed with a determination on the referral.

II. Definition of Evaluation and Other Aspects of Evaluations

A. An initial evaluation must be "full and individual." 20 U.S.C. § 1414(a).

B. An evaluation must "… determine whether a child has a disability and the nature and extent of the special education and related services that the child needs." 34 C.F.R. § 300.15.

C. An evaluation may be conducted at the request of a parent or at the request of the LEA. 20 U.S.C. § 1414(a)(1)(B).

D. Informed consent from the parent is needed for an initial evaluation. If the parent does not consent, then a due process hearing or mediation can be utilized to gain consent for public school students. 20 U.S.C. § 1414(a)(1)(D)(ii). It is not required, however, that a due process hearing or mediation be initiated.

1. *G.J., L.J. & E.J. ex rel. G.J. v. Muscogee Cnty. Sch. Dist.*, 668 F.3d 1258 (11th Cir. 2012). Parents cannot place restrictions on evaluations such as who conducts the evaluations, requiring the presence of the parents, limiting the evaluation so that it cannot be used in litigation and requiring the parents to receive the evaluation first. Conditional consent with these stipulations is not consent.

E. Informed parental consent must be sought for a reevaluation but, if the LEA can show that it took reasonable measures to obtain such consent and the parents failed to respond, the informed consent is not required. 20 U.S.C. § 1414(c)(3).

1. Be very cautious in proceeding without consent. Not aware of school districts that would use this approach.

F. Parentally-placed private school students with disabilities cannot be forced into an evaluation over parental objection.

G. A reevaluation should be conducted: 1) once every three years; 2) earlier if the LEA determines a reevaluation is warranted due to changing needs; or 3) at the request of a parent or teacher, except not more frequently than once a year unless agreed by LEA and parents. 20 U.S.C. § 1414(a)(2)(A).

H. The team can determine that no additional data is needed for a reevaluation, but must provide notice to the parents of this determination and of the reasons and must notify the parents of their right to request an assessment. 20 U.S.C. § 1414(c)(4).

I. Evaluations must be conducted before finding an eligible child is no longer eligible. (Except: no evaluation is needed for students when the student graduates with a standard diploma, or the student reaches the maximum age of eligibility.) 20 U.S.C. § 1414(c)(5).

J. The timeframe for an evaluation and eligibility in federal law is 60 days after receipt of parent consent. 20 U.S.C. § 1414(a)(1)(C)(I).

K. The timeframe may be extended if the student transfers during the evaluation period and the new school division "…is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and the subsequent local educational agency agree to a specific time when the evaluation will be completed…." 20 U.S.C. § 1414(a)(1)(C)(ii).

L. The evaluation may be conducted by school personnel or by outside personnel at the request of the school district. The parents cannot be required to obtain and provide the evaluations. *See N.B. and C.B. v. Hellgate Elementary Sch. Dist*., 541 F.3d 1202, 50 IDELR 241 (9th Cir. 2008).

M. Taking too long to complete the evaluation can give rise to a claim for compensatory education services. *A.W., ex rel. H.W. and A.W. v. Middletown Area Sch. Dist.*, No. 1:13-CV-2379, 2015 WL 390864, 65 IDELR 16 (M.D. Pa. 2015).

II. Scope and Content of Evaluation

A. The evaluation must provide information to determine whether a child is a child with a disability and the educational needs of such child. 20 U.S.C. § 1414(b)(2)(A).

B. The evaluation must use a variety of assessments and strategies "to gather relevant functional, developmental, and academic information, including information provided by the parent…." 20 U.S.C. § 1414(b)(2)(A).

C. No single measure may be used and technically sound instruments must be used to assess "the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors." 20 U.S.C. § 1414(b)(1)(C).

D. Screenings and observations are not necessarily evaluations. It is fine to provide support for the teacher to assist in devising instructional strategies. If the observation is for purposes of eligibility, the consent of the parents is required. *See Letter to Torres*, 53 IDELR 333 (OSERS April 7, 2009).

E. School districts are entitled to conduct their own evaluations and cannot be forced to rely solely on private evaluations. *See Torda, ex rel. Capuano Torda and Torda, et al. v. Fairfax Cnty. Sch. Bd.*, 112 LRP 32614 (E.D. Va. 2012); *G.J., L.J. & E.J. v. Muscogee Cnty. Sch. Dist.*, 668 F.3d 1258 (11th Cir. 2012); *M.T.V. v. DeKalb Cnty. Sch. Dist.*, 446 F.3d 1153 (11th Cir. 2006).

1. "Notwithstanding the availability of private evaluations that identify a student as having a disability, the Section 504 regulation allows districts the opportunity to conduct its own evaluation in accordance with 34 C.F.R. Section 104.34."

Cobb Cnty. (GA) Sch. Dist., 59 IDELR 266 (OCR 2012).

F. Failing to conduct an evaluation for six years can result in a lack of sufficient information for IEP planning and for FAPE. *See Brock, et al. ex rel. S.B. v. New York City Dept. of Ed.*,117 F.Supp.3d 355, 65 IDELR 135 (S.D.N.Y. 2015).

G. Issues with the content of the evaluations.

1. Do not identify a disability within the evaluation. Leave that determination to the eligibility committee.

2. Do not give as the purpose for the evaluation "referred by attorney" or "parent is threatening a due process hearing."

3. Be careful not to link behaviors with the disability. For example, do not suggest that the student is likely to be aggressive as a result of his emotional disability.

4. Do clarify, when appropriate, that the behaviors or characteristics exhibited by the student are not necessarily attributable to a disability.

5. Do clarify that recommendations are not necessarily linked to a disability or required for FAPE.

III. Legal Issues with the Scope of Evaluations

A. *Torda, ex rel. Capuano Torda and Torda, et al. v. Fairfax Cnty. Sch. Bd.*, 112 LRP 32614 (E.D. Va. 2012). The student has Down syndrome and has a cognitive ability measured at 51. He was identified under the category of ID. He did not qualify for autism, visual impairment or auditory deficits. The student continued to make progress, but the parent continued to assert that an auditory processing deficit was not identified or being addressed. The parents obtained private neuropsychological, speech and language and auditory processing assessments. Fairfax had its psychologist and its speech therapist conduct evaluations. The court found that any auditory processing issues were secondary to the student's intellectual disability. The school district was not required to evaluate for an auditory processing disorder until it was raised as an issue by the parents or suspected by the school division. The private assessments identifying the auditory processing disorder were refuted by the position of ASHA that questioned this diagnosis for students whose mental age is below seven years, the lack of normative data on auditory processing for students under age seven and the fact that the APD should not substitute for problems associated with ID. The private speech pathologist/audiologist incorrectly used comparative tests for

students who were only six in diagnosing APD. The school division's speech therapist was found credible as follows: "Even if Johnson, as a speech language pathologist and not an audiologist, is not qualified to diagnose auditory processing disorder, see A.R. 466 at 8, she is qualified to conduct assessments that bear on the reliability of the APD testing conducted by Dr. Lucker and the credibility of its results."

B. *K.I. ex rel. Jennie I, et al. v. Montgomery Pub. Schs.*, 805 F. Supp. 2d 1283, 57 IDELR 93 (M.D. Ala. 2011). Student with limited muscle movement was not appropriately assessed when the student's cognitive, academic and communication skills were not assessed. The IEP could not be found to be appropriate if there was insufficient information about the student's functioning.

C. *Ford ex rel. Ford v. Long Beach Unified Sch. Dist, et al.*, 291 F.3d 1086, 37 IDELR 1 (9th Cir. 2002). School district administered tests to assess abilities and achievement but did not administer an intellectual assessment. The court found that a standardized IQ test was not required when alternative measures were used. IQ tests have come under criticism for "cultural bias and other factors tending to diminish their reliability…."

D. *H.C. and J.C., ex rel. M.C. v. Katonah-Lewisboro Union Free Sch. Dist*, 59 IDELR 108 (S.D.N.Y. 2012). The court found that the student made progress in the public schools. "Plaintiffs would have this Court measure M.C.'s progress by comparing her test results to the mean average of the educational abilities of children her age. This approach misconstrues the purpose of the IDEA. It is clear that a 'child's academic progress must be viewed in light of the limitations imposed by the child' s disability.'" Citing *Mrs. B. ex rel. M.M. v. Milford Bd. Of Educatio*n, 103 F.3d 1114, 1121 (2nd Cir. 1997). It is not appropriate to look at the child's relative standing through percentiles to measure progress against peers.

E. *Memorandum to State Directors of Special Education*, 56 IDELR 50 (OSEP 2011). Students in the process of an evaluation under RTI must be evaluated upon request of a parent if there is reason to suspect a disability. The use of RTI cannot delay a needed evaluation.

F. *A.G. ex rel. Gregory, et al. v. Lower Merion Sch. Dist.*, 62 IDELR 102 (3d Cir. 2013). A.G. attended school in LMSD throughout her career until graduation from high school. During the years, she received speech services for a lisp and Title I services. Later, she was referred for an evaluation because she was progressing slower than her peers. She was evaluated and determined eligible under the IDEA. Over the years, her mother participated in many IEP meetings and was given her procedural safeguards. In middle school, a full re-evaluation did not occur with the mutual consent of the mother and the school district. In high school, A.G. could not take some classes because of a schedule conflict with her special education classes. She also asserted that she had a lowered GPA because the special education classes did not count in the calculation of the GPA. An evaluation performed in high school confirmed that A.G. had OHI, but her

parents did not believe that she had a disability. During A.G.'s senior year, the parents initiated a due process hearing to challenge eligibility and the validity of the evaluations. The court approved the grant of summary judgment for the school district because the parents had been active participants in the evaluation and IEP processes and a misidentification through defective evaluations was not sufficient to prove deliberate indifference under Section 504 or Title II of the ADA.

G. *H.M., ex rel.J.M. v. Weakley Cnty. Bd. of Educ.*, 65 IDELR 68, 115 LRP 10860 (W.D. Tenn. 2015). H.M. is a student with truancy issues and a history of PTSD and major depression due to a sexual assault on her at the age of nine. While in high school, H.M. would skip school to meet a boy and also related her concerns with seeing a boy at school that reminded her of her assault. The court found that H.M. was emotionally disabled, rather than socially maladjusted, and that her depression, rather than any social maladjustment, was the cause of her troubles at school.

H. *Greenwich Bd. of Ed. v. G.M. and J.M. ex rel. K.M.*, 68 IDELR 8 (D. Conn. 2016). Parents obtained a private evaluation of K.M., which showed K.M. had anxiety and a reading disorder. The school district refused to conduct an evaluation even after it received the private evaluation and continued its RTI process. Using the private evaluations, the school district found the student ineligible. The court found there was a violation of child find obligations due to the refusal to evaluate. There was evidence sufficient to raise a suspicion of a disability and an obligation to evaluate. The parents received reimbursement for their private placement of student.

I. *Memorandum to State Directors of Special Education*, 65 IDELR 181, 115 LRP 18455 (OSEP Apr. 17, 2015). The U.S. Department of Education's Office of Special Education Programs ("OSEP") has been receiving complaints that some school districts are apparently refusing to conduct initial evaluations on students with high cognitive skills. As a result, OSEP requested that state special education directors widely distribute its 2013 guidance letter regarding "twice exceptional" or "2E" students. In *Letter to Delisle*, 62 IDELR 240 (OSEP Dec. 20, 2013), OSEP stated that students who have high cognition, have disabilities and require special education and related services are protected under the IDEA. OSEP explained that school districts cannot use cut-off scores as the sole basis for determining the eligibility of a student with high cognition who might qualify on the basis of a specific learning disability ("SLD"). The guidance letter explained that the IDEA requires the use of a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, and prohibits the use of any single measure or assessment as the sole criterion for determining eligibility. "[I]t would be inconsistent with the IDEA for a child, regardless of whether the child is gifted, to be found ineligible for special education and related services under the SLD category solely because the child scored above a particular cut score established by State policy."

IV. Missteps in Evaluations

A. **The school district should always conduct its own evaluations.** One of the most important things to remember about evaluations is that school divisions have the right to conduct their own evaluations. It is essential to exercise this right in order for staff to have knowledge and expertise regarding the student during decision-making.

B. **It is not necessarily required that the school district conduct an evaluation just because a parent requested it.** It is permissible to refuse a parent's request for an evaluation, but be sure to give prior written notice of the refusal. Also give prior written notice of any proposal to evaluate. Do consider, however, if it is really worth going to a due process hearing over a refusal to evaluate. It may be prudent to dispute the results of the evaluation rather than the need to evaluate.

C. **Do not wait the entire school year to refer a student who is not experiencing success and who might have a disability.** Teachers and staff should make referrals of those students suspected of having a disability as soon as possible in order to avoid a glut of evaluations and eligibility meetings over the summer months. It is not permissible, however, to preclude staff from making evaluations at certain times of the year.

D. **Look for the red flags that indicate a possible need to evaluate**. Seeking out children suspected of having a disability is the responsibility of general education and special education staff. Red flags include poor progress reports, low grades, hospitalization, and the existence of private evaluations.

E. **Conduct a thorough evaluation prior to finding a student eligible.** An evaluation must be conducted prior to the initial provision of special education services and parent permission is necessary to conduct the evaluation. It is permissible to count a file review as an evaluation. In the case of an initial evaluation, it is difficult to conceive of a situation in which a file review would provide all the necessary information to determine a disability and its effect on the student's education.

F. **Be sure to meet all time requirements.** Conduct evaluations within time requirements to avoid exposure for the cost of private placements. It is difficult to defend an untimely decision, especially if the student is found eligible. The delayed decision can support a finding of a denial of FAPE.

G. **Carefully review and determine the specific evaluations to be conducted.** Be sure to consider carefully the scope of the evaluation and perform all necessary evaluations. Do not get to the eligibility meeting and find that an important component has been omitted.

H. **If the parents mention a private provider or private evaluation, be sure to ask for copies of the evaluations or input from the private provider.** It is important to have information from all sources. Make sure to obtain copies of the

private evaluations that parents refer to as part of the evaluation and eligibility process. Don't forget that you need to have a release to communicate with the private provider or evaluator. If the parents refuse to supply a release, document that it was requested and refused by the parents. Do not make decisions based on oral or partial reports.

I. **Staff must feel confident that their evaluations are thorough and professional and that they have the expertise to assess any suspected disability.** Train staff so that they feel confident in their expertise to administer evaluations for any disability. If the evaluators do not feel confident, their concerns can influence parents or a hearing officer to believe that their evaluations are not adequate or to reject their conclusions.

J. **Watch for inappropriate statements in evaluations.** Do not recite that the evaluation is conducted at the request of the school division attorney or is needed to defend a due process hearing. Do not identify a specific disability in the evaluation. Do not provide extensive recommendations as part of the evaluation as they are perceived as requirements for incorporation in the IEP. Do not link behaviors to the disability thereby preventing an MDR team from making that decision.

V. Independent Educational Evaluations

A. An independent educational evaluation (IEE) is an evaluation conducted by a qualified examiner who is not employed by the district responsible for the child's education. 34 C.F.R. § 300.502(a)(3)(i).

B. The school division can establish IEE criteria regarding location, suggested personnel and qualifications. *Letter to Anonymous*, 56 IDELR 175 (OSEP 2010). The criteria must be waived if the criteria will prevent the receipt of an IEE.

C. It is important to verify that the individuals on the school division's list of IEE sources will actually do the evaluations and for the agreed-upon cost.

D. Be sure to establish written criteria for IEEs and make clear that no payment is made for the IEE until the evaluation is received by the school division. Get a release executed as part of the IEE process.

VI. Right to an IEE

A. Parents have the right to obtain an IEE at public expense each time the district conducts an evaluation that the parents disagree with, unless:

1. The district demonstrates in a due process hearing that its own evaluation of the child was appropriate; or

2. The district demonstrates in a due process hearing that the evaluation obtained by the parents did not meet the district criteria.

34 C.F.R. § 300.502(b)(2).

B. In a challenge to the validity of the IEE regulations, the U.S. Court of Appeals for the Eleventh Circuit held that the IDEA regulations regarding IEEs were indeed valid. The U.S. Department of Education "did not exceed its authority in promulgating 34 C.F.R. § 300.502, providing parents the right to a publicly financed independent educational evaluation. . . ." *Phillip C., Angie C., ex rel. A.C. v. Jefferson Cnty. Bd. of Educ.*, 60 IDELR 30 (11th Cir. 2012), *cert. denied*, 113 LRP 40516, 134 S. Ct. 64 (2013).

C. A parent is entitled to only one IEE at public expense each time the district conducts an evaluation with which the parent disagrees. 34 C.F.R. § 300.502(b)(5).

D. A review of existing information is not an evaluation which would trigger the right to an IEE. *F.C. ex rel. E.C. & J.C. v. Montgomery Co. Pub. Schs., et al.*, 68 IDELR 6 (D. Md. 2016).

E. Parents may request an evaluation prior to the completion of the RTI process.

F. When a parent requests reimbursement for an IEE before the completion of the district's evaluation, the district can deny the request without filing for a due process complaint. 71 Fed. Reg. 46,689 (2006); *Letter to Zirkel*, 52 IDELR 77 (OSEP 2008).

G. Parents may forfeit their right to an IEE by failing to provide consent for a district assessment. *See G.J. v. Muscogee Cnty. Sch. Dist.*, 58 IDELR 61 (11th Cir. 2012).

VII. Functional Behavior Assessments and IEEs

A. A parent who disagrees with a functional behavior assessment (FBA) that is conducted in order to develop an appropriate IEP is entitled to request an IEE. *Questions and Answers on Discipline Procedures, Question E-5*, 52 IDELR 231 (OSERS 2009).

VIII. District's Response to Request for an IEE

A. When a parent requests an IEE at public expense, the district must, without unnecessary delay, either:

1. File a due process complaint for a hearing to show that its evaluation is appropriate (or that the evaluation obtained by the parent did not meet district criteria); or

2. Provide the IEE at public expense. 34 C.F.R. § 300.502(b)(2).

B. If the district files a due process complaint to request a hearing to show that its evaluation is appropriate and the ultimate decision is that the district's evaluation is appropriate, the parent still has the right to an IEE, but not at public expense. 34 C.F.R. § 300.502(b)(3).

C. There is no specific time limit for responding to a parent's request for an IEE.

D. The regulations require that the district act "without unnecessary delay." 34 C.F.R. § 300.502(b)(2).

E. The phrase "unnecessary delay" is not defined. Whether a delay is unreasonable will ultimately depend on the particular circumstances involved. *See e.g., Capistrano Unified Sch. Dist.*, 12 ECLPR 42 (SEA CA 2014) (five-month delay in filing for due process constituted an unreasonable delay).

F. When a parent requests an IEE, the district can ask the parent the reason why he or she disagrees with the district's evaluation, however, the district cannot require the parent to provide an explanation and cannot unreasonably delay in either:

1. Providing the IEE at public expense; or

2. Filing a due process complaint to defend its evaluation. 34 C.F.R. § 300.502(b)(4).

G. While a district cannot require a parent to provide an explanation for why they are requesting an IEE, a parent must, at a minimum, identify a completed district evaluation with which they disagree in order to trigger the entitlement to a publically-funded IEE. *See Letter to Zirkel*, 52 IDELR 77 (OSEP 2008); *Letter to Anonymous*, 55 IDELR 106 (OSEP 2010).

H. When parents request an IEE, the district must provide information about where the parents can obtain an IEE, as well as the district's criteria for IEEs. 34 C.F.R. § 300.502(a)(2).

IX. IEE Criteria

A. The criteria under which the IEE at public expense is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria which the district uses when it initiates an evaluation. 34 C.F.R. § 300.502(e)(1).

B. Except for a district's evaluation criteria, a district cannot impose other conditions or timelines related to obtaining an IEE at public expense. 34 C.F.R. § 300.502(e)(2).

X. IEE Criteria: Qualifications of the Evaluator

A. A district can require an IEE evaluator to hold a particular license when the district requires the same licensure for personnel who conduct district evaluations.

B. One exception: if only district employees can obtain such a license. 71 Fed. Reg. 46,689 (2006).

C. The district should have criteria for the minimum qualifications of the persons who conduct evaluations.

D. If the list of approved providers is not exhaustive, parents can select whomever they wish provided that the evaluator(s) satisfy the district's criteria. *Letter to Fields*, 213 IDELR 259 (OSERS 1989); *Letter to Petska*, 35 IDELR 191 (OSEP 2001).

XI. IEE Criteria: Cost

A. Districts can limit the cost of IEEs, so long as the cap does not prevent the parent from obtaining an IEE.

B. In addition, parents must be given an opportunity to demonstrate that unique circumstances justify selection of an evaluator whose fees exceed the district's cap. 71 Fed. Reg. 46,690 (2006).

C. If a parent demonstrates that his or her request for an out-of-district IEE is justified, the IEE costs, including the expenses incurred for travel, meals, and lodging if an overnight trip is necessary, are to be reimbursed. *Letter to Heldman*, 20 IDELR 621 (OSEP 1993).

D. The court awarded reimbursement for the time the independent evaluator spent on a teleconference with the eligibility team explaining the IEE results. *Meridian Joint Sch. Dist., No. 2 v. D.A. and J.A ex rel. M.A.*, 62 IDELR 144 (D. Idaho 2013).

E. Full reimbursement for an IEE was denied when the IEE exceeded the district's monetary cap. *M.V. ex rel. G.V. v. Shenendehowa Cent. Sch. Dist.*, 60 IDELR 213 (N.D.N.Y. 2013); *Seth B. ex rel. Donald and Cheryl B., et al. v. Orleans Parish Sch. Bd.*, 67 IDELR 2 (5th Cir. 2016) ($3,000 cap).

XII. IEE Criteria: Location

A. Reimbursement for an IEE was denied when the IEE did not meet the district's criteria regarding the location of the IEE. *A.L. and P.L.B. v. Jackson Cnty. Sch. Bd.*, 64 IDELR 173 ; aff'd in part, rev'd in part by 66 IDELR 271 (N.D. Fla. 2014).

XIII. IEE Criteria: Restrictions

A. The criteria under which an IEE is obtained must match the criteria that the district uses for its evaluations.

B. A district cannot impose restrictions on independent evaluators that its own evaluators do not follow.

C. If a district does not prohibit its evaluators from including age and grade level scores, or from making recommendations in evaluation reports, it cannot prohibit independent evaluators from doing so. *Letter to LoDolce*, 50 IDELR 106 (OSEP 2007).

D. The IDEA is silent as to whether a district must permit an independent evaluator to observe a student in the classroom as part of an IEE.

E. According to OSEP, however, if a district observed a student in conducting its evaluation, it must give independent evaluators an opportunity to do so as well. *Letter to Wessels*, 16 IDELR 735 (OSEP 1990).

XIV. IEE Criteria: Substantial Compliance

A. The U.S. Court of Appeals for the Fifth Circuit has recently adopted a "substantial compliance" standard for publicly-funded IEEs.

B. "[I]nsignificant or trivial deviations from the letter of agency criteria may be acceptable as long as there is substantive compliance with all material provisions of the agency criteria and the IEE provides detailed, rigorously produced and accessibly presented data." *Seth B. ex rel. Donald and Cheryl B., et al. v. Orleans Parish Sch. Bd.*, 67 IDELR 2 (5th Cir. 2016).

XV. Timeliness of the IEE Request

A. There appears to be no consensus among courts as to whether the IDEA's two-year statute of limitations applies to IEE requests.

B. The U.S. Court of Appeals for the Eleventh Circuit held that the mootness doctrine may bar a due process complaint seeking an IEE because of the age of the district's evaluation. In this case, the district's evaluation was over three years old. *T.P. ex rel. T.P. and B.P. v. Bryan Cnty. Sch. Dist.*, 115 LRP 29136 (11th Cir. 2015).

XVI. Consideration of an IEE

A. A district must consider the results of an IEE, whether it is publicly or privately funded, in any decisions with respect to the provision of a free appropriate public education. 34 C.F.R. § 300.502(c)(1).

B. The district's obligation to consider an IEE that meets its criteria does not translate into a corresponding obligation to accept the recommendations. *See, e.g., T.S. ex rel. S.S. v. Bd. of Educ. of the Town of Ridgefield,* 20 IDELR 889 (2d Cir. 1993).

XVII. IEEs and Due Process Hearings

A. When a parent requests an IEE at public expense, the district must "without unnecessary delay" either comply with the request or initiate a due process hearing to show its evaluation is appropriate. 34 C.F.R. § 300.502(b)(2).

B. At the due process hearing, the district has the burden of proving that its assessment is appropriate.

C. When assessing the adequacy of the district's evaluation, the hearing officer will use the IDEA's evaluation procedures in 34 C.F.R. § 300.304 as the relevant standard. *Cobb Cnty. Sch. Dist. v. D.B. ex rel. G.S.B., et al.,* 66 IDELR 134 (N.D. Ga. 2015).

D. Either the parents or the district can present the results of a publicly-funded IEE as evidence in a due process hearing.

E. If a parent shares a privately-funded IEE with the district, the privately-funded IEE also may be used evidence. 34 C.F.R. § 300.502(c).

XVIII. Top Evaluation Tips:

A. When a request for an evaluation is made, even if the student is in the RTI or child study process, make an immediate decision through the correct process as to whether an evaluation is needed even if RTI and child study continue to be pursued. An evaluation must be timely conducted if the student is suspected of having a disability. Give Prior Written Notice of the decision to evaluate or not to evaluate.

B. Consider all disability categories at each eligibility meeting. A listing of all IDEA disabilities should be available to the eligibility team and to the parents at the start of the meeting. The meeting leader should ask the team at the start of the meeting to identify which of these disabilities should be the focus of the committee. The eligibility team can focus on the one or more disabilities and report in the meeting documentation that the remaining disabilities were rejected by agreement as inapplicable. If the parents later say a particular disability was not considered, the team will have documentation that it did consider all areas of disability.

C. Do not over-identify students as having a disability. Especially be mindful of social maladjustment, substance abuse and other issues that might mitigate the need for identification.

D. Do not rely solely on a DSM diagnoses or on a doctor's statement. The IDEA disabilities are educationally based.

E. Not every academic failure results from a disability. It is important to identify the source of the academic failure. Unless it is caused by a disability, the student does not qualify for identification.

F. When a student has a number of absences or a hospitalization, consider the reason for the absences and the student's situation following a hospitalization in deciding whether the student may have a disability.

G. A student who has a disability must also need special education services to qualify under the IDEA. If the student does not need special education services, the student will not qualify even though the student has one of the IDEA-listed conditions.

H. Be sure to have knowledgeable staff present to make the eligibility determination and seek information from many sources, including the parents and private providers.

I. Do not turn every case where a student is subject to discipline into an eligibility case, but do determine through appropriate procedures whether repeated disciplinary incidences may indicate the presence of a disability.

J. Be careful about what is written in the eligibility records to document the basis for eligibility. The rationale can limit the ability to discipline the student.

K. Provide the parents with copies of all eligibility documentation and a prior written notice following the eligibility meeting.

L. If a student is found ineligible under the IDEA, the school division should then consider whether the student qualifies under Section 504.

XIX. Other Cases and Guidance to Consider

A. *G.J. v. Muscogee Cnty. Sch. Dist.*, 668 F.3d 1258 (11th Cir. 2012). The Eleventh Circuit held that parents cannot dictate the terms of an IDEA evaluation or re-evaluation. When they do, they effectively deny or withhold their consent and a district has no obligation to proceed with the evaluation or re-evaluation. G.J., a non-verbal child with autism and brain injuries, was eligible for special education services. In an IEP meeting, the school district sought the consent of G.J.'s parents to evaluate G.J. The parents would not sign the consent form provided by the district, and instead provided an addendum with seven conditions to their consent. The court held that the parents had refused to provide their consent for re-evaluation, noting that the parents' "conditions vitiated any rights the school district had under the IDEA for the reevaluation process…." The court held that the district court did not err in ordering the parents to consent to a re-evaluation without conditions. The parents wanted to name the person to conduct the

interview, be present during the evaluation, exclude the evaluation from litigation, and receive the information prior to the school district. The court determined that the parents were not entitled to either a publically or privately-funded independent educational evaluation, because no re-evaluation had taken place due to the parents' refusal to consent.

B. *Blunt v. Lower Merion Sch. Dist.*, 64 IDELR 32, 114 LRP 39807 (3d. Cir. 2014). Plaintiffs alleged that African-American students were more frequently identified with disabilities under the IDEA, Section 504 and the ADA due to racial discrimination. The court acknowledged that statistics can be used to show discrimination when bolstered by other evidence. In this case, however, the students were individually assessed using the same assessments regardless of race and there was no evidence that the over-representation in special education classes was due to discrimination. There is no specific statistical disparity that will prove discrimination. For example, in the 2009-10 school year, the African-American students constituted 8.6% of the student body, but were 14.3% of the special education students. While minority students were more likely to be identified as having a disability, the statistical difference was not sufficient to show racial discrimination without other proof.

C. *Memorandum to State Directors of Special Educ.*, 65 IDELR 181, 115 LRP 18455 (OSEP Apr. 17, 2015). The U.S. Department of Education's Office of Special Education Programs ("OSEP") has been receiving complaints that some school districts are apparently refusing to conduct initial evaluations on students with high cognitive skills. As a result, OSEP requested that state special education directors widely distribute its 2013 guidance letter regarding "twice exceptional" or "2E" students. In *Letter to Delisle*, 62 IDELR 240 (OSEP Dec. 20, 2013), OSEP stated that students who have high cognition, have disabilities and require special education and related services are protected under the IDEA. OSEP explained that school districts cannot use cut-off scores as the sole basis for determining the eligibility of a student with high cognition who might qualify on the basis of a specific learning disability ("SLD"). The guidance letter explained that the IDEA requires the use of a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, and prohibits the use of any single measure or assessment as the sole criterion for determining eligibility. "[I]t would be inconsistent with the IDEA for a child, regardless of whether the child is gifted, to be found ineligible for special education and related services under the SLD category solely because the child scored above a particular cut score established by State policy."

D. *Memorandum to State Directors of Special Educ.*, 67 IDELR 272 (OSEP Apr. 29, 2016). The evaluation and identification of students in preschool cannot be delayed in order to utilize an RTI process.