
**2012 WYOMING ANNUAL EDUCATION LEADERSHIP SYMPOSIUM
PAIRED ATTORNEY SESSION**

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COMPREHENSIVE EVALUATIONS

This session will address legal requirements for comprehensive evaluations, including notice, consent, and fundamental safeguards, while also providing practical guidance on tricky issues such as proper scope of evaluation, avoiding common problem areas, reconciling conflicting data, reviewing evaluations at IEP meetings, answering parents' questions about evaluation reports, issues involving SLD evaluations, and making proper use of evaluation data in development students' IEPs.

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COMPREHENSIVE EVALUATIONS

I. Evaluation Timeline and Consent Fundamentals

A. Initial Evaluation.

1. Timeline – Federal Law.

(a) Eligibility determined within 60 days of receiving parental consent, or, if the state establishes a timeframe, within the timeline set for an evaluation by state law.

(i) Exceptions to timeline (timeline does not apply).

○ Child Transfers Schools During Evaluation Period.

1. If a child enrolls in the new school district after the date of providing parental consent, but prior to completion of the evaluation by the old school district, then the timeline does not apply, and

2. New school district is “making sufficient progress,” and

3. Parent and new school district “agree to a specific timeline when the evaluation will be completed.”

○ Parent Conduct.

1. If the parent repeatedly fails or refuses to produce the child for the evaluation.

2. Consent for Initial Evaluation – Federal Law.

(a) Consent is required for an initial evaluation.

(i) School districts may use the due process procedures outlined in IDEA to pursue an evaluation despite lack of consent by the parents.

- (ii) Consent Required for Initial Provision of Services.
 - Adds requirement that school district may not provide special education and related services despite lack of parental consent through due process procedures.
 - 1. If parent refuses to consent for special education and related services, or fails to respond to a request for consent:
 - a) The school district is not considered to be in violation of FAPE requirements, and
 - b) The school district does not have to convene an IEP meeting to develop an IEP.

B. Reevaluations.

1. Federal Law. Parental Consent.

- (a) Each school district must obtain informed parental consent in the same manner as for initial evaluations, except such informed parental consent need not be obtained if the school district can demonstrate that it had taken “reasonable measures to obtain such consent and the child’s parent has failed to respond.”
 - (i) Same as IDEA 1997 language.
- (b) Timeline.
 - (i) IDEA 2004 does not require reevaluations to be completed within 60 days of parental consent, as is the case with initial evaluations. There is no explicit timeline for reevaluations in IDEA 2004.
 - (ii) Must be completed at least once every three years unless the parent and school district agree that a reevaluation is not necessary.
 - (iii) Reevaluations may not be completed more frequently than one per year unless the parent and school district agree to more than one reevaluation per year.
- (c) Triggers for Reevaluation.

- (i) School district determines that “educational or related service needs, including improved academic achievement and functional performance” call for reevaluation.
- (ii) Parent request.
- (iii) Teacher request.

2. Referral Timeline Complication: Response to Intervention (“RtI”) Process.

- (a) “The screening of a student to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services.” 34 C.F.R. §300.302.
- (b) RtI Programs in Wyoming – The Wyoming DOE Policy and Procedure Manual for Special Education defines RtI as follows: “Response to intervention integrates assessment and intervention within a multi-level prevention system to maximize student achievement and reduce behavior problems. With RTI, schools identify students at risk for poor learning outcomes, monitor student progress, provide evidence-based interventions and adjust the intensity and nature of those interventions depending on a student’s responsiveness, and identify students with learning disabilities.” WYDOE Policy and Procedure Manual for Special Education, at p. 35.
- (c) Unanswered and/or Unclear Questions
 - (i) What happens if a parent asks for an evaluation and triggers the timeline before RtI has been implemented by the district? or ...
 - (ii) What if the state requires RtI to be implemented, but the timeline has already been triggered?
 - Parents may consent by written agreement to extend the timeline. 34 C.F.R. §300.309(c).
 - School districts should consult with parents to explain the RtI process and benefits thereof, if the state and district choose to utilize RtI. Then the parents may agree to extend the timeline and allow the RtI process to run through completion. If the parents are not in consensus and maintain their request for evaluation, the school’s options may narrow.

- The Department of Education’s Office of Special Education Programs (OSEP) has stated that IDEA only allows use of RtI programs, and that “it would be inconsistent with the evaluation provisions [of the IDEA regulations] for an LEA to reject a referral and delay provision of an initial evaluation on the basis that a child has not participated in an RTI framework.” Memorandum to State Directors of Special Education, 56 IDELR 50 (OSEP 2011). Thus, while schools may reject a parental request for IDEA evaluation, the reason must be a lack of grounds to suspect disability and need for special education. But, the referral cannot be rejected simply because the student has not participated in, or completed, an RtI program of interventions.
- Of course, there would be nothing to prevent the school from continuing to implement the RtI program while the initial evaluation is pending, so that data could still be used as part of the evaluation, even if incomplete. This may be the best option for schools in states that require some level of RtI implementation as part of the referral process.
- The Wyoming RtI Framework document states that “parent and family involvement is an important factor in improving student achievement and is a key aspect of a successful RtI framework. Parents provide a unique perspective about the student’s skills, strengths and challenges. Written information about the RtI framework should clearly explain that the framework emphasizes the vital collaborative role of parents and families. It must also be clearly communicated that RtI is not intended to delay referral for special education services but addresses students’ needs in order to prevent a widening learning gap.” See Wyoming Department of Education Booklet, “A Model Response to Intervention (RtI) Framework to Identify Students with Specific Learning Disabilities,” at p. 21 (May 2011).

II. Substantive IDEA Evaluation Fundamentals

- A. 34 C.F.R. §300.304—Evaluation Procedures
 - 1. Notice of evaluation (see 34 C.F.R. §300.503)

2. Non-discriminatory assessment instruments and administration
 3. Use of variety of assessment tools and strategies, including parent input
 4. Validated standardized instruments, if used
 5. Administration by trained personnel
 6. Compliance with test instructions and manuals
 7. Selection of tests considers impaired skills and effect on testing
 8. No reliance on any single measure or procedure as sole criterion
 9. Assessment of all areas of suspected disabilities
 10. Sufficient evaluation scope to identify all need areas (without limits)
 11. Use of technically sound instruments that address all relevant factors
 12. Use of tools and strategies that yields relevant information
 13. Evaluation is sufficiently comprehensive to identify all special education and related services needs, whether or not commonly linked to the disability category
- B. 34 C.F.R. §300.305—Additional Requirements: Determination of Needed Evaluation Data
1. Need for evaluation data must be determined based on review of existing data (including private evaluations, parent info, classroom and state assessments, and teacher observations).
 2. Data question: What evaluation data is needed to determine:
 - (a) if student has a qualifying disability;
 - (b) the educational needs;
 - (c) present levels of performance, and ‘
 - (d) whether student needs special education and related services
 3. In the case of reevaluations, the data goal is sufficient evaluation data to determine whether the student continues to have a qualifying disability and the current educational needs of the student.
 4. In some cases, additional data may not be necessary.

- (a) See 34 C.F.R. §300.305(d):
 - (i) If team determines no additional data is needed for the required determinations, parents must be notified of (1) the determination and its reasons, and (2) the parents' right to request assessment despite the team's determination.
 - (ii) The policy underpinning this provision is to avoid situations where reevaluation would simply fulfill a requirement but not provide any useful information regarding the student's disability or needs.

5. Schools must reevaluate students before IEP team can determine that child is no longer eligible (except for students graduating with regular diploma or aging out of program).

- (a) Students who age out of IDEA or receive a regular diploma must be provided a "summary of the child's academic achievement and functional performance," with recommendations on assisting the child in meeting postsecondary goals.

C. 34 C.F.R. §300.306—Determination of Eligibility

- 1. IEP team must determine eligibility based on assessment data.
- 2. School must provide evaluation report to parents.
- 3. Child is not eligible if determinant factor is (1) lack of instruction in reading or math or (2) limited English proficiency.

D. 34 C.F.R. §300.303—Reevaluations

- 1. Reevaluations must be conducted every 3 years or earlier, if conditions warrant or parent or teacher requests.
- 2. But, not more than once per year, unless parents and school agree.

III. Modern Evaluations for Specific Learning Disabilities

A. A Big Picture Overview of the SLD Evaluation Regulation at §300.309

- 1. At its core, 34 C.F.R. §300.309 envisions a four-element system:
 - (a) A determination that the child is not achieving adequately for their age or to meet state standards;
 - (b) Either (A) a determination that the child is not making sufficient progress to meet age or state standards using an RtI process, or (B)

a determination that the child exhibits a pattern of strengths and weaknesses relative to age, state standards, or IQ, using appropriate assessments;

- (c) A determination that the team’s findings on the above are not primarily the result of visual, motor, or hearing disabilities, MR, ED, or cultural, environmental , economic disadvantage, or limited English proficiency; and
- (d) A consideration, as part of the evaluation, of data that demonstrates that prior to evaluation, the child was provided appropriate instruction in regular settings, including data-based documentation of repeated assessments of achievement at reasonable intervals, which is shared with parents.

B. States must promulgate their own SLD models that comply with the above requirements, but add detail to each of the parts of the evaluation process. (See 34 C.F.R. §300.307.)

- 1. For example, the regulation leaves to the states the job of establishing the nature of the data to be collected under an RtI model, as well as the amount of data needed.
- 2. In addition, it appears that states will need policies on the types of general education services that can support the RtI option. (See 34 C.F.R. §300.311.)
- 3. States may also decide to establish a completely alternative means of determining LD, as long as it is “research-based.”
- 4. The states, moreover, are expected to add clarity and specificity to the rather amorphous “strengths and weaknesses” assessment-based option, which implies a movement to more modern and sophisticated use of test instruments and interpretation techniques.

C. RtI or Discrepancy?

- 1. The question actually presents a false choice—the options are not either continued use of a discrepancy formulation (if assessments are used to determine LD in the second step of §300.309), or analysis of student response to high-quality research-based interventions.
- 2. The use of assessments must lead to a determination of whether analysis of the scores indicates patterns of strength and weakness that are particularly indicative of the presence of LD under modern LD theoretical frameworks.
- 3. But the “RtI or discrepancy” misconception is persistent.

(a) In High Tech Middle Media Arts School and Desert Mountain SELPA, 47 IDELR 114 (SEA CA 2007), the hearing officer states that “there are two current methods for determining whether a child has an SLD: the ‘severe discrepancy’ method and the response to intervention (RTI) method.”

4. Both the regulations and U.S. Department of Education guidance make clear that is not the case—if an RtI analysis is used, the evaluation must still comply with the remaining three elements of §300.309.
5. The alternative to the second element of §300.309 requires use of assessment instruments to determine if there is a pattern of strength and weaknesses indicative of LD.
6. While the use of a discrepancy procedure could be a part of the procedures used to determine patterns of strength and weakness, it may be inappropriate to rely solely on that procedure to fulfill the requirements of the second element of §300.309, as discussed above.

D. Researching modern use of assessment instruments.

1. Schools would be well-advised to research modern approaches to using assessment instruments, both cognitive and achievement, in order to help determine the presence of an LD, or make a finding that some other condition is at work.
2. For example, the work of researchers Dawn Flanagan and Salomon Ortiz of St. Johns University on cross-battery assessment techniques is advancing our knowledge of how to use cognitive and achievement testing not only to determine eligibility, but also to help plan individualized interventions. See, e.g., FLANAGAN, ORTIZ, ALFONSO, MASCOLO, “Essentials of Cross-Battery Assessment” (2007).

E. The modern role of cognitive testing.

1. In the past, cognitive testing was used primarily to derive an overall idea of intellectual functioning, usually in the form of a full-scale IQ, to compare statistically with standard scores on norm-referenced achievement tests.
2. In fact, experts on LD assessment believe this to be a misuse of today’s highly advanced cognitive tests.
3. Modern cognitive tests are made of subtests that are aligned to specific areas of cognitive processing, which in turn are linked to specific areas of academic achievement.

4. Thus, modern IQ tests can provide quite specific data to assist in finding patterns of strength and weakness that may be indicative of LDs.

F. Can evaluations use both RtI data and assessments?

1. Nothing in the regulations appears to prohibit schools from making use of both data from regular education interventions and assessments as parts of the LD evaluation.
2. Indeed, assessment data may help corroborate information from RtI programs and assist in eventual development of individualized strategies and special education services.

G. The Wyoming SLD Model

1. See Wyoming DOE Website.
2. To determine eligibility for specific learning disabilities (LD) the Wyoming Public Schools utilizes an evaluative model commonly referred to as pattern of strengths and weaknesses (PSW).
3. The PSW model involves two main components.
 - (a) The first component is to review the student's response to targeted interventions in the general education setting.
 - (i) Prior to considering LD eligibility it should be clear that intensive general education interventions were attempted but unsuccessful in correcting the academic delay(s).
 - (b) The second component is to review existing data and administer assessments in an effort to determine if a pattern of strengths and weaknesses can be identified.
 - (c) Consistent with commonly accepted practice, the eligibility determination team must identify at least four areas of weakness within a single LD category and three areas of strength in a separate LD category in order for eligibility to be considered.
 - (d) The specific categories of LD eligibility as defined by the State of Michigan (Rule 340.1713) are: Basic Reading Skills, Reading Fluency, Reading Comprehension, Math Calculations, Math Problem Solving, Written Expression, Oral Expression, and Listening Comprehension.
4. www.wyoming.k12.mi.us/admin/SSEligibility.html

IV. Defending School Evaluations

- A. What does “defending the evaluation” really mean for school evaluation personnel?
- B. Continuum of “defense” of evaluation in various contexts.
 - 1. Reviewing the evaluation in an effective manner.
 - 2. Responding to questions and concerns about the report.
 - 3. Responding to requests for Independent Educational Evaluations (IEEs).
 - 4. Dealing with a conflicting private evaluation.
 - 5. Proving the evaluation complies with IDEA in a special education due process hearing.

V. Required Ingredients for Successful “Defense”

- A. Understanding the IDEA evaluation requirements.
- B. Compliance with minimum legal requirements.
- C. Promptness—meeting deadlines for reports and ARDC reviews.
- D. Application of sound diagnostic principles.
- E. Enough time, enough tests, enough interpretation.
- F. Evidence of an individualized evaluation process.
- G. Solid written report.
- H. Effective oral review and interpretation of reports.
- I. Proper application of evaluation recommendations to the IEP.

VI. The Data on Court Cases Addressing Appropriateness of School Evaluations

- A. Author and researcher Susan Etscheidt examined dozens of cases from 1997 to 2001 and found that hearing officers and courts addressing claims involving the appropriateness of school evaluations primarily examined three main questions:
 - 1. Did the school’s evaluation meet basic IDEA requirements?
 - 2. Was the scope of the evaluation sufficiently broad to address all areas of suspected disability?

3. Did the evaluation provide sufficient information to enable the school to understand the student's educational needs in order to develop an appropriate IEP? (See Susan Etscheidt, "Ascertaining the Adequacy, Scope, and Utility of District Evaluations," *Exceptional Children*, Vol. 69, No. 2, pp. 227-247.)
- B. Thus, evaluations can be attacked on three fronts: adherence to the basics, scope, and utility.
1. Hopefully, the basics are fairly automatic in team-based school assessment processes, although it never hurts to review evaluation reports for compliance with those fundamental requirements outlined above from the IDEA regulations.
 2. Ensuring that the evaluation is of the proper scope, however, requires making some initial decisions about the potential disabilities that may be present, as well as revising those initial decisions as the assessment data, observational data, and parent info is collected.
 3. The utility issue has to do with whether the evaluation does more than merely identify the existence of a disability and make a determination of IDEA eligibility. The evaluation must provide information on the precise areas of educational need and how those needs could be properly addressed in an IEP. This is an area in which comprehensive evaluations can be weak—too much focus on eligibility, and too little on providing key information to the IEP team on what the IEP must include.

VII. Common and Harmful Legal Pitfalls for Assessment Personnel

- A. Not performing tests in accordance with instructions provided by their producers, or diverging from best practices in administering and interpreting test data.
- B. Failing to address all areas of suspected disability raised in the referral and evaluation process.
- C. Relying exclusively on a small set of assessment instruments and procedures.
- D. Failing to consider language or verbal skills as part of the test selection process, thus risking the validity of the test results.
- E. Not fully making use of data from modern measures of cognitive ability.
- F. Failure to obtain and incorporate data from all relevant sources (teachers, tests, parents), even in cases of conflicting information.
- G. Use of test data in ways that reveal pre-conceptions about a particular result or agenda.

- H. Failure to use, interpret, and explain conflicting data—Tossing out subtest data because it does not line up with other data or an emerging hypothesis.
- I. Failing to individualize assessment process (complex cases require more than the routine tests).
- J. Allowing placement preferences or other issues to influence evaluation results.
- K. Overuse of the review-of-existing-evaluation-data option, rather than conducting true three-year reevaluations.
- L. Evaluation only reports data, does not make sense of the data.

VIII. Dealing with Private Evaluations and Evaluation Disputes

- A. Some useful evaluation dispute tactics
 - 1. If a parent disputes an evaluation, offer to do more data-gathering and testing, and issue an addendum.
 - 2. If parents still dispute the district evaluation, offer an IEE at district expense.
 - 3. If parents submit contrary private evaluations, determine if those evaluations have obvious weaknesses or questionable assertions.
 - 4. Make sure the district has more and better evaluation data than private evaluators.
 - 5. Make sure the conclusions drawn from district data make basic sense and can be clearly articulated to the parents (and a hearing officer).
 - 6. Think twice before agreeing to fund private evaluations before consent is provided for district evaluations. Parents may refuse consent to the district evaluations once the private evaluators issue their reports. This leaves the district with only privately-obtained data.

IX. Strategies to Examine a Privately-Obtained Evaluation

- A. Does the evaluation report contain an indication that the evaluator's perspective is one of maximum benefit or maximum potential? If so, the evaluator's recommendations are likely to exceed the FAPE standard for services.
- B. Are the sources of data sparse? Few tests? Brief tests? No input sought from school staff? No input from persons other than parents? No effort to request previous evaluations?
- C. Is the evaluator properly qualified?
- D. Are the findings well-supported by data or fairly conclusory?
- E. Does the report go into purely educational decision-making not within the evaluator's expertise?
- F. Did the evaluator administer some tests or subtests that were not reported?
- G. Is the evaluator willing to answer some questions about the assessment?

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