



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

May 2, 2019

Perry A. Zirkel, Ph.D., J.D.
University Professor Emeritus of Education and Law
Lehigh University
Department of Education and Human Services
111 Research Drive
Bethlehem, Pennsylvania 18015-4793

Dear Dr. Zirkel:

This letter is in response to your electronic mail (email) addressed to Lisa Pagano of the Office of Special Education Programs (OSEP), U.S. Department of Education (Department), regarding independent educational evaluations (IEEs). In that email, you noted that the regulation at 34 C.F.R. § 300.502(a) regarding the right to an IEE, applies to “the parents of a child with a disability.” Based on this provision, you asked a series of questions regarding the rights of a parent to an IEE when the parent’s child has been evaluated under the Individuals with Disabilities Education Act (IDEA) and found not to be a child with a disability in need of special education and related services. Each of your questions is answered below.

We note that section 607(d) of IDEA prohibits the Secretary from issuing policy letters or other statements that establish a rule that is required for compliance with, and eligibility under, IDEA without following the rulemaking requirements of section 553 of the Administrative Procedure Act. Therefore, based on the requirements of IDEA section 607(e), this response is provided as informal guidance and is not legally binding. This response represents an interpretation by the Department of the requirements of IDEA in the context of the specific facts presented and does not establish a policy or rule that would apply in all circumstances.

Question 1: Does the parent have the right to obtain an IEE at public expense if the child is evaluated under IDEA and found not to be a child with a disability in need of special education and related services?

Answer: Yes. Under 34 C.F.R. § 300.502(a), the parents of a child with a disability have the right under Part B of IDEA to obtain an IEE, subject to 34 C.F.R. § 300.502(b) through (e). Under 34 C.F.R. § 300.15, the term “evaluation” means the procedures used in accordance with 34 C.F.R. §§ 300.304 through 300.311 to *determine whether a child has a disability* (emphasis added), and the nature and extent of the special education and related services that the child needs. Because the definition of evaluation includes eligibility determinations under IDEA, we believe an IEE can be obtained after an initial evaluation regardless of whether the child was found eligible as a child with a disability, if the parent disagrees with the initial evaluation obtained by the public agency, subject to certain conditions. 34 C.F.R. § 300.502(b)(1). The right to an IEE at public expense, therefore, would extend to parents who suspect their child might be

400 MARYLAND AVE., S.W. WASHINGTON, D.C. 20202-2600

www.ed.gov

The Department of Education’s mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

a child with a disability and who disagree with the initial evaluation obtained by the public agency.

Question 2: If a parent whose child has been found not to be a child with a disability provides an IEE at his or her expense, is the district required to consider it?

Answer: Yes. Under 34 C.F.R. § 300.502(c), if the parent obtains an IEE at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of a free appropriate public education (FAPE) to the child. This requirement applies to a parent who seeks an IEE after his or her child has been found not to be a child with a disability.

Question 3: In a case where the parent files for a due process hearing to claim a child find violation but either: (a) the district's belated evaluation determines that the child is not eligible under IDEA; or (b) the district never evaluated the child, is the parent deprived of the right to a FAPE-denial remedy (e.g., compensatory education or tuition reimbursement) and to attorneys' fees under the IDEA?

Answer: The determination of a specific remedy resulting from a due process hearing is made on a case-by-case basis in light of the specific facts of each case at the discretion of the hearing officer. We believe that the hearing officer, as the designated trier of fact under IDEA, is in the best position to determine whether a delayed evaluation or a failure to complete an evaluation would be subject to the remedies described in your question.

If you have any further questions, please do not hesitate to contact Ms. Pagano at 202-245-7413 or by email at Lisa.Pagano@ed.gov.

Sincerely,

/s/

Laurie VanderPloeg

Director

Office of Special Education Programs