

## The Law of Evaluations under the IDEA: An Annotated Update\*

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This comprehensive examination of evaluations and reevaluations under the Individuals with Disabilities Education Act (IDEA) is an update of an annotated outline of the specific issues and legal citations for the supporting pertinent primary sources—legislation, regulations, Office of Special Education Programs (OSEP) policy interpretations, court decisions, and hearing/review officer decisions.<sup>1</sup> The focus is on relatively recent primary legal authority. Moreover, to illustrate the need and way to customize the contents to corollary state law that adds to the foundation of the IDEA, the outline provides special attention to **Texas** law, designating these citations in **bold font**.<sup>2</sup> The perspective is that of an impartial legal specialist, as distinguishable from legal advocacy or evaluation expertise (including professional best practice).<sup>3</sup>

The specific scope is limited to Part B of the IDEA, which covers children aged 3 to 21 from preschool to grade 12.<sup>4</sup> It does not extend to specialized forms of evaluation, such as manifestation determinations,<sup>5</sup> and provides only peripheral coverage of independent educational evaluations

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\* This article was published in *West's Education Law Reporter* (Ed.Law Rep.), v. 368, pp. 594–617. Additions since publication are highlighted in yellow.

<sup>1</sup> For the original version, see Perry A. Zirkel, *The Law of Evaluation under the IDEA*, 297 Ed.Law Rep. 637 (2013).

<sup>2</sup> For another illustration of such customization to the state level, see Perry A. Zirkel, *Tuition and Related Reimbursement under the IDEA: A Decisional Checklist*, 282 Ed.Law Rep. 785 (2012).

<sup>3</sup> For the need for transparency about this significant distinction, see, e.g., Lauryn Collins & Perry A. Zirkel, *Functional Behavior Assessments and Behavior Intervention Plans: Legal Requirements and Professional Recommendations*, 19 J. POSITIVE BEHAV. INTERVENTIONS 180 (2017); Perry A. Zirkel, Professional Misconceptions of the Supreme Court's Decision in *Endrew F.*, 47 COMMUNIQUÉ 12 (June 2019).

<sup>4</sup> For evaluation issues under Part C (ages 0 to 3), see, e.g., *Letter to Skyer*, 68 IDELR ¶ 141 (OSEP 2016); *Letter to Barnett*, 36 IDELR ¶ 37 (OSEP 2001).

<sup>5</sup> E.g., Perry A. Zirkel, *Manifestation Determinations under the IDEA: The Latest Case Law*, 72 THE SCH. PSYCHOL. 13 (Winter 2018); Perry A. Zirkel, *Manifestation Determinations under IDEA 2004: A Legal Analysis*, 29 J. SPECIAL EDUC. LEADERSHIP 32 (2016); Perry A. Zirkel, *Manifestation Determinations under the new Individuals with Disabilities Education Act: An Update*, 31 REMEDIAL & SPECIAL EDUC. 378 (2010); Perry A. Zirkel, *Manifestation Determinations under the Individuals with Disabilities Education Act: What the New Criteria Mean*, 19 J. SPECIAL EDUC. LEADERSHIP 3 (2006).

(IEEs),<sup>6</sup> and functional behavioral assessments (FBAs).<sup>7</sup> Similarly, it does not include (1) evaluations under Section 504;<sup>8</sup> (2) IDEA evaluation issues resolved on technical adjudicative grounds, such as the exhaustion doctrine or the statute of limitations;<sup>9</sup> and (3) hearing/review officer decisions, with the limited exception of a limited sample of those by Texas hearing officers and published in the INDIVIDUALS WITH DISABILITIES LAW REPORTS (IDELR).

The organization of the outline subheadings is illustrated in Figure 1. The key is to recognize the sequence from the IDEA obligations of child find to free appropriate public education (FAPE). These successive categories provide not only the context but also the overlap with the central concept of evaluation. The approximate labels and time periods at the bottom of Figure 1 provide operational road marks for this organizational path.<sup>10</sup> After canvassing various threshold considerations for this framework, the outline proceeds to examine in chronological order the OSEP interpretations and case law specific to each of the overlapping categories, starting with child find. Although the dividing lines are far from bright, the coverage herein does not extend to “pure” eligibility and FAPE cases, where the evaluation was not directly at issue.<sup>11</sup>

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<sup>6</sup> The coverage here is largely limited to the issues beyond IEEs at public expense, which is comprehensively covered elsewhere. Perry A. Zirkel, *Independent Educational Evaluation Reimbursements: The Latest Update*, 341 Ed.Law Rep. 555 (2017).

<sup>7</sup> E.g., Lauren W. Collins & Perry A. Zirkel, *Functional Behavior Assessments and Behavior Intervention Plans: Legal Requirements and Professional Recommendations*, 19 J. POSITIVE BEHAV. INTERVENTIONS 180 (2017); Perry A. Zirkel, *An Update of Judicial Rulings Specific to FBAs or BIPs under the IDEA and Corollary Special Education Laws*, 51 J. SPECIAL EDUC. 50 (2017); Perry A. Zirkel, *State Special Education Laws for Functional Behavioral Assessments and Behavior Intervention Plans: An Update*, 45 COMMUNIQUÉ 3 (Nov. 2016); Perry A. Zirkel, *Case Law for Functional Behavioral Assessments and Behavior Intervention Plans: An Empirical Analysis*, 35 SEATTLE U. L. REV. 175 (2011).

<sup>8</sup> E.g., 34 C.F.R. § 104.35(a) (requiring reevaluation not only “periodically” but also upon “any significant change in placement”); *Williams v. Dist. of Columbia*, 771 F. Supp. 2d 29, 268 Ed.Law Rep. 866 (D.D.C. 2011).

<sup>9</sup> E.g., *Doe v. Dublin City Sch. Dist.*, 57 IDELR ¶ 243 (6th Cir. 2011); *Marc V. v. N.E. Indep. Sch. Dist.*, 455 F. Supp. 2d 577, 214 Ed.Law Rep. 597 (W.D. Tex. 2006).

<sup>10</sup> The inexactitude is attributable to not only variability in the terminology of the penultimate line but also differences in state law for the time periods on the final line at the bottom of the Figure.

<sup>11</sup> For a broad sampling of published court decisions concerning eligibility, see, e.g., Perry A. Zirkel, *Case Law under the IDEA*, in IDEA: A HANDY DESK REFERENCE TO THE LAW, REGULATIONS AND INDICATORS 709 (2014). For a specialized, in-depth sampling concerning eligibility of the most common classifications, see Perry A. Zirkel, *The Legal Meaning of Specific Learning Disability for IDEA Eligibility: The Most Recent Case Law*, 43 COMMUNIQUÉ 4 (June 2015); Perry A. Zirkel, *The Legal Meaning of Specific*

[INSERT FIGURE 1, WHICH IS ON THE LAST MS PAGE, APPROXIMATELY HERE.]

## I. FRAMEWORK CONSIDERATIONS

### A. Procedural v. Substantive Violations

- interrelationship with FAPE<sup>12</sup>

### B. Adjudicative Avenue v. Complaint Resolution Process

- harmless error approach v. strict compliance<sup>13</sup>

### C. Other Significant Legal Distinctions

- initial evaluations<sup>14</sup> v. reevaluations<sup>15</sup>
- screening<sup>16</sup> v. evaluation<sup>17</sup>

*Learning Disability for IDEA Eligibility: The Latest Case Law*, 41 COMMUNIQUÉ 10 (Jan.-Feb. 2013); Perry A. Zirkel, *Checklist for Identifying Students Eligible under the IDEA Classification of Emotional Disturbance: An Update*, 286 Ed.Law Rep. 7 (2013); Stacy Martin & Perry A. Zirkel, *Current Issues in Eligibility Decisions for Students with ADHD: What the Courts Say*, 40 COMMUNIQUÉ 265 (Spring 2011).

<sup>12</sup> 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2):

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies--

- (i) Impeded the child's right to a FAPE;
- (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or
- (iii) Caused a deprivation of educational benefit.

For the substantive side, the applicable standard in Texas continues to be the Fifth Circuit's four-factor test in *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997) to determine whether the IEP is reasonably calculated to yield meaningful benefit. *E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 360 Ed.Law Rep. 719 (5th Cir. 2018) (concluding that the Supreme Court's decision in *Endrew F.* did not change this framework). Although the line is a blurry one, this overview does not include FAPE cases where evaluation was only a secondary consideration. *E.g.*, *K.C. v. Mansfield Sch. Dist.*, 618 F. Supp. 2d 568, 245 Ed.Law Rep. 860 (N.D. Tex. 2009).

<sup>13</sup> *E.g.*, Perry A. Zirkel, *The Two Dispute Resolution Processes under the Individuals with Disabilities Education Act: An Empirical Comparison*, 16 CONN. PUB. INT. L.J. 169 (2017); Perry A. Zirkel & Brooke L. McGuire, *A Roadmap to Legal Dispute Resolution for Students with Disabilities*, 23 J. SPECIAL EDUC. LEADERSHIP 100 (2010).

<sup>14</sup> For the IDEA statutory requirements, including eligibility generally and SLD specifically, see 20 U.S.C. §§ 1414(a)–(c) (including, for example, assessment “in all areas of suspected disability”); *see also id.* § 1412(a)(6)(B) (nondiscriminatory and no single procedure) and § 1402(34)(C) (transition services include functional vocational evaluation when appropriate). For the IDEA regulatory requirements, which include those for eligibility generally and SLD eligibility specifically, see 34 C.F.R. §§ 300.301 and 300.304–300.311; *see also id.* § 300.306(a) (eligibility team and report at no cost); *id.* § 300.503 (prior notice for evaluation initiation or refusal).

<sup>15</sup> The IDEA regulatory requirements for reevaluations overlap with those for initial evaluation except for these additions: 34 C.F.R. §§ 300.303(b) and 300.305. For recognition that the IDEA does not require the reevaluation to have the same scope as the initial evaluation, *see, e.g.*, *Robert B. v. W. Chester Area Sch. Dist.*, 44 IDELR ¶ 123 (E.D. Pa. 2005).

- child find v. eligibility<sup>18</sup>
- parentally placed private school children: district of location v. district of residence<sup>19</sup>
- evaluation v. expedited evaluation<sup>20</sup>
- IDEA v. Texas legislation/regulations<sup>21</sup>

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<sup>16</sup> 34 C.F.R. § 300.302 (screening for instructional purposes is not evaluation); *see also* Letter to Torres, 53 IDELR ¶ 333 (OSERS 2009) (“Nothing in either the IDEA or its implementing regulations requires a . . . [district] to, or prohibits a . . . [district] from, developing and implementing policies to temporarily remove a student from his or her classroom for purposes of administering screening instruments to determine appropriate instructional strategies for the student. In addition, there is nothing in the Act that requires a . . . [district] to, or prohibits a . . . [district] from, developing and implementing policies that permit screening children to determine if evaluations are necessary. However, screening may not be used to delay an evaluation for special education and related services.”)

<sup>17</sup> 34 C.F.R. § 300.15 (procedures in accordance with the applicable regulatory requirements to determine whether a child is eligible and, if so, the nature and extent of the child’s FAPE needs). For further overlaps between evaluation and eligibility, *see id.* § 300.305.

<sup>18</sup> Child find as an individual, as contrasted with institutional, matter, triggers the obligation for an evaluation within a reasonable period of time, which may or may not result in eligibility. For the relatively few cases that clarify this distinction, *see, e.g., T.B. v. Bryan Indep. Sch. Dist.*, 628 F.3d 240, 263 Ed.Law Rep. 490 (5th Cir. 2010); *J.P. v. Anchorage Sch. Dist.*, 260 P.3d 285, 271 Ed.Law Rep. 1077 (Alaska 2011). However, for cases that went full circle to reject relief for a child find violation because the child was not eligible, *see D.G. v. Flour Bluff Indep. Sch. Dist.*, 481 F. App’x 887, 286 Ed.Law Rep. 131 (5th Cir. 2012); *T.W. v. Leander Indep. Sch. Dist.*, 74 IDELR ¶ 12 (W.D. Tex. 2019). For the also relatively infrequent cases of a successful child find claim, *see, e.g., Spring Branch Indep. Sch. Dist. v. O.W.*, \_\_\_ F.3d \_\_\_ (5th Cir. 2019); *Krawietz v. Galveston Indep. Sch. Dist.*, 900 F.3d 673, 357 Ed.Law Rep. 875 (5th Cir. 2018); *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 236 Ed.Law Rep. 679 (W.D. Tex. 2008); *C.C. v. Beaumont Indep. Sch. Dist.*, 65 IDELR ¶ 109 (E.D. Tex. 2015); *cf. D.A. v. Houston Indep. Sch. Dist.*, 716 F. Supp. 2d 603 (S.D. Tex. 2009), *aff’d on remedial grounds*, 629 F.3d 450, 264 Ed.Law Rep. 50 (5th Cir. 2010) (no money damages).

<sup>19</sup> For the evaluation obligation of both districts, *see* Perry A. Zirkel, *Legal Obligations to Students with Disabilities in Private Schools*, 351 Ed.Law Rep. 688 (2018). For the limited extent of the IDEA obligation to home-schooled children with disabilities, *see, e.g., Hooks v. Clark Cty. Sch. Dist.*, 228 F.3d 1036, 147 Ed.Law Rep. 870 (9th Cir. 2000); *Letter to Sarzynski*, 29 IDELR 904 (OSEP 1997); *Letter to Farris*, 20 IDELR 177 (OSEP 1993). For the unilateral authority of the parent of a home-schooled or parentally placed private school child to refuse consent for an initial evaluation, *see* 34 C.F.R. § 300.300(d)(4); *Fitzgerald v. Camdenton R-III Sch. Dist.*, 439 F.3d 773, 206 Ed.Law Rep. 837 (8th Cir. 2006); *Durkee v. Livonia Cent. Sch. Dist.*, 487 F. Supp. 2d 313, 221 Ed.Law Rep. 129 (W.D.N.Y. 2007). For the related but separate issue of the resident district’s obligations, including possible reevaluation, to an eligible child returning from home schooling or private schooling, *see Letter to Goldman*, 53 IDELR ¶ 97 (OSEP 2009). Finally, for the resident district’s evaluation obligation to a child enrolled in other non-district placements, *see L.T. v. N. Penn Sch. Dist.*, 342 F. Supp. 3d 610, 361 Ed.Law Rep. 220 (E.D. Pa. 2018) (residential treatment facility); *I.H. v. Cumberland Valley Sch. Dist.*, 842 F. Supp. 2d 762, 281 Ed.Law Rep. 1057 (M.D. Pa. 2012) (cyber charter school).

<sup>20</sup> This expedited-evaluation exception is expressly limited to parental requests for an initial evaluation during the time period specific to a disciplinary change in placement. 34 C.F.R. § 300.534(d)(2).

<sup>21</sup> For a side-by-side comparison of the IDEA regulations and Texas legislation and regulations (i.e., “Commissioner’s/SBOE Rules”), *see* <http://framework.esc18.net/display/Webforms/LandingPage.aspx>.

## II. CONSENT FOR EVALUATION<sup>22</sup>

### A. OSEP Policy Interpretations

*Letter to Anonymous*, 20 IDELR 998 (OSEP 1998)<sup>23</sup>

- the IDEA does not require evaluation automatically upon parental request; if the district has no reason to suspect eligibility, it must provide parents with written notice of its denial of an evaluation, including an explanation of the basis for the refusal and the procedural safeguards—i.e., the right to request a due process hearing to contest the refusal

*Letter to Christiansen*, 48 IDELR ¶ 161 (OSEP 2007)

- consent is required for an FBA intended to evaluate the educational and behavioral needs of a single, specific child but not when used to address the effectiveness of behavioral interventions throughout a school or district<sup>24</sup>

*Letter to Sarzynski*, 49 IDELR ¶ 228 (OSEP 2007)

- consent is not required for assessment or testing administered to large groups of students without regard to their disability status, unless the assessment or testing requires permission of all parents<sup>25</sup>

*Letter to Anonymous*, 50 IDELR ¶ 258 (OSEP 2008)

- unless a state law imposes a specific timeline for doing so in a child find case, the IDEA only requires the district to obtain parental consent “in a timely manner”<sup>26</sup>

*Letter to Sarzynski*, 51 IDELR ¶ 193 (OSEP 2008)

- the reevaluation definition and, thus, the consent requirement applies even if continued eligibility is stipulated but the data are necessary to determine whether the special education or related services should be reduced or increased for the individual child
- an FBA is a reevaluation if it is necessary to determine “whether the positive behavioral interventions and supports set out in the current IEP for a particular child with a disability would be effective in enabling the child to make progress toward the child's IEP goals/objectives, or to determine whether the behavioral component of the child's IEP would need to be revised”

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<sup>22</sup> For the IDEA’s regulatory definition of consent and the requirements relevant to (re)evaluation, see 34 C.F.R. §§ 300.9 and 300.300.

<sup>23</sup> The commentary accompanying the 2006 regulations repeat this clarification. 71 Fed. Reg. 46,450, 46,636 (Aug. 14, 2006).

<sup>24</sup> For further relevant guidance, see *Letter to Sarzynski* and *Harris v. Dist. of Columbia (infra)*. *But cf. In re Butte*, 73 IDELR ¶ 198 (D. Mont. 2019) (ruling that an FBA is not an evaluation).

<sup>25</sup> For the basis of the exception, see *id.* § 300.300(d)(1)(ii).

<sup>26</sup> The commentary accompanying the IDEA regulations interpreted “several months” as generally unacceptable. 71 Fed. Reg. 46,450, 46,540 (Aug. 14, 2006).

*Letter to Ward*, 56 IDELR ¶ 238 (OSEP 2010); *Letter to Cox*, 54 IDELR ¶ 60 (OSEP 2009)

- where the parents split on revoking consent for initial services and there is no legal document providing only one of them with educational custody, either parent’s revocation is effective (i.e., the “no” is the controlling answer)<sup>27</sup>
- where the parents revoke consent for IEP services and subsequently reinstate their consent for same, the resulting district obligation is for an initial evaluation, not a reevaluation

*Letter to Olex*, 74 IDELR ¶ 22 (OSEP 2019)

- consent is not required for postsecondary assessments unless they are part of the student’s evaluation or reevaluation

## B. Case Law

***Shelby v. Conroe Indep. Sch. Dist.*, 454 F.3d 450, 211 Ed.Law Rep. 42 (5th Cir. 2006)**<sup>28</sup>

- where parent refused reevaluation (here medical evaluation), court provided consent where the evaluative information was necessary to determine the child’s special education needs

*J.H. v. Northfield Pub. Sch. Dist.*, 52 IDELR ¶ 165 (Minn. Ct. App. 2009)

- where one parent consented and the other refused, the effect—in light of silence in the IDEA—was refusal based on state law<sup>29</sup>

*Hogan v. Fairfax Cty. Sch. Bd.*, 645 F. Supp. 2d 554, 250 Ed.Law Rep. 273 (E.D. Va. 2009)

- ruled that parent’s lack of consent for evaluation (additional evaluation in this case) was relevant part of unreasonable parental conduct in equitable analysis for purposes of reduction of tuition reimbursement

***M.L. v. El Paso Indep. Sch. Dist.*, 369 F. App’x 573, 258 Ed.Law Rep. 40 (5th Cir. 2010)**

- where parent refused consent for a reevaluation, the court ruled that the parent may not simultaneously claim that the child is entitled to continue to receive special education services<sup>30</sup>

***Hooker v. Dallas Indep. Sch. Dist.*, 56 IDELR ¶ 232 (N.D. Tex. 2011)**

- revocation of consent requires stopping the evaluation but not necessarily deleting the raw data

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<sup>27</sup> For a court decision that reached the same conclusion based on state law, see *J.H. v. Northfield Pub. Sch. Dist.* (*infra*).

<sup>28</sup> Relying on *Conroe*, an impartial hearing officer in Texas granted consent for an initial evaluation of a student where the district showed that it had reason to suspect eligibility as ED. *Mesquite Indep. Sch. Dist.*, 49 IDELR ¶ 208 (Tex. SEA 2007). For similar hearing officer rulings before *Conroe*, see *Tomball Indep. Sch. Dist.*, 43 IDELR ¶ 97 (Tex. SEA 2004); *Northside Indep. Sch. Dist.*, 42 IDELR ¶ 95 (Tex. SEA 2004); *San Marcos Consol. Indep. Sch. Dist.*, 39 IDELR ¶ 52 (Tex. SEA 2002); *Houston Indep. Sch. Dist.*, 36 IDELR ¶ 196 (Tex. SEA 2002); *Dallas Indep. Sch. Dist.*, 37 IDELR ¶ 27 (Tex. SEA 2002).

<sup>29</sup> For an analogous result in terms of revocation of consent for services under the IDEA, see *Letter to Ward* and *Letter to Cox* (*supra*).

<sup>30</sup> The extent of generalizability of the ruling in this case merits careful attention due to its complicated factual boundaries, which included an undisputed determination that the child was no longer eligible under his classification of speech impairment but the district sought to evaluate whether he was eligible in terms of ADHD.

*G.J. v. Muscogee Cty. Sch. Dist.*, 668 F.3d 1258, 277 Ed.Law Rep. 90 (11th Cir. 2012)

- the parents' seven-point addendum to the consent form for the reevaluation made it effectively into non-consent—" [The parents'] conditions vitiated any rights the school district had under the IDEA for the reevaluation process, such as who is to conduct the interview, the presence of the parents during the evaluation, not permitting the evaluation to be used in litigation against [the parents] and whether the parents received the information prior to the school district"

*J.B. v. Lake Washington Sch. Dist.*, 60 IDELR ¶ 130 (W.D. Wash. 2013)

- overrode parents' refusal to consent to evaluation upon moving into the state in circumstances in which the district deemed that eligibility needed determination

*Albright v. Mountain Home Sch. Dist.*, 73 IDELR ¶ 93 (W.D. Ark. 2018)

- district's failure to provide FBA when parent refused consent and its subsequent implementation of FBA and BIP were harmless errors where no loss to student's FAPE or parents' opportunity for meaningful participation

*E.G. v. Elk Grove Unified Sch. Dist.*, 74 IDELR ¶ 254 (E.D. Cal. 2019)

- overrode parents' refusal to consent to reevaluation when needed to update the child's needs to determine eligibility and services

### III. IDEA CRITERIA<sup>31</sup>

- variety of tools and strategies – no single measure or assessment<sup>32</sup>
- technically sound instruments
- not racially or culturally discriminatory
- in child's native language or mode of communication
- valid and reliable
- trained and knowledgeable evaluator(s)
- in accordance with any assessment publisher instructions
- tailored to specific areas of educational need (e.g., not just only a general IQ score)
- reasonable accommodations for students with impaired sensory, manual, or speaking skills
- in all areas of suspected disability<sup>33</sup>

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<sup>31</sup> This section of the outline is limited to a brief summary of the primarily pertinent IDEA regulations, without the full nuances. 34 C.F.R. §§ 300.304(b)–300.304(c). Moreover, other IDEA regulations (*supra* notes 14–15 and 22), are also applicable, and some state laws provide additional criteria.

<sup>32</sup> The difference, which may or may not be significant, is that the variety requirement pertains to both the eligibility and IEP functions of the evaluation, whereas the no-single prohibition is specific to the eligibility determination.

- sufficiently comprehensive to identify all of the child’s special education and related services needs
- completed within 60 calendar days of receiving parental consent unless state law establishes different period<sup>34</sup>

#### IV. PROCEDURAL APPROPRIATENESS OF EVALUATIONS<sup>35</sup>

##### A. OSEP Policy Interpretations

*Letter to Anonymous*, 34 IDELR ¶ 35 (OSEP 2000); *see also Letter to Williams*, 20 IDELR 1210 (OSEP 1993)

- for students suspected of having ADHD and being eligible under OHI or another IDEA classification, the IDEA allows “qualified personnel other than a licensed physician” to make the determination—it is permissible for a state law to require a physician in such circumstances but only at no cost to the parents

*Letter to Mamas*, 42 IDELR ¶ 10 (OSEP 2004)

- although subject to state law or local policies, the IDEA does not “provide a general entitlement for parents of children with disabilities, or their professional representatives, to observe their children in any current classroom or proposed educational placement”

*Letter to Mintz*, 57 IDELR ¶ 290 (OSEP 2011)

- for the regulation that requires reviewing them, as appropriate,<sup>36</sup> the IEP team has the discretion to determine what constitutes “existing data”; however, “[u]nder this regulation, we do not believe that an IEP Team can refrain from reviewing existing evaluation data on the child solely because it determines that the data are not stored in a location that makes them readily available to the IEP Team”

*Letter to Reyes*, 59 IDELR ¶ 49 (OSEP 2012)

- The 60-day timeframe under the IDEA for completion of initial evaluations, in the absence of a different state law, does not stop during school breaks, including summers

*Memorandum to State Directors of Special Education*, 65 IDELR ¶ 181 (OSEP 2015); *Letter to Delisle*, 62 IDELR ¶ 240 (OSEP 2013); *Letter to Anonymous*, 55 IDELR ¶ 172 (OSEP 2010)

- the child find duty for evaluation applies to students who have high cognition, and districts may not use cut-off scores as the sole basis for determining their eligibility for SLD

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<sup>33</sup> The legislation uses this broad language. *See supra* note 14. However, the regulations provide the seemingly narrower scope of “all areas related to the suspected disability.” 34 C.F.R. 300.304(c)(4).

<sup>34</sup> In Texas, the period is 45 school days with specified exceptions. TEX. ADMIN. CODE §§ 89.1011(c) and 89.10011(e).

<sup>35</sup> This section partially overlaps with the Substantive Appropriateness (*infra*). For an example of a decision that treated completion of an assistive technology evaluation and an FBA as substantive violations but analyzed them the way other courts have done so as procedural violations, see *R.P. v. Alamo Heights Indep. Sch. Dist.* (*infra*).

<sup>36</sup> 34 C.F.R. § 300.305(a)(1).

*Letter to Anonymous*, 72 IDELR ¶ 222 (OSEP 2018)

- evaluation is not required for an interstate transfer student if the district's available information is sufficient to determine eligibility or develop the student's IEP

*Letter to Mills*, 74 IDELR ¶ 205 (OSEP 2019)

- screening procedures are a permissible part of child find but they do not excuse the requirement for providing the requisite reply to a parental request for evaluation and they may not be used to delay or deny the evaluation
- the prior written notice for an evaluation does not have to identify the specific personnel who will be conducting the evaluation
- in the case of a child suspected of blindness or visual impairment, it is permissible for the diagnosis to be conducted by medical personnel such as the child's pediatrician, ophthalmologist, or optometrist

*Letter to Anonymous*, 75 IDELR ¶ \_\_\_\_ (OSEP 2019)

- the time for sharing the evaluation report in relation to the start of the IEP meeting is left to district discretion except that (a) parents have to have the opportunity for meaningful participation, and (b) parents also have the right request the under FERPA, which would require making it available for their inspection and review "without unnecessary delay and before any meeting regarding an IEP, and in no case more than 45 days after the request has been made," including the right to a response from the district "to reasonable requests for explanations and interpretations of the records"

## B. Case Law

*Amanda J. v. Clark Cty. Sch. Dist.*, 267 F.3d 877, 157 Ed.Law Rep. 562 (9th Cir. 2001)

- district's failure to furnish parents with copies of child's evaluation reports was prejudicial procedural violation based on need for early detection of autism and for parental participation in planning

*Vasherresse v. Laguna Salada Union Sch. Dist.*, 211 F. Supp. 2d 1150, 168 Ed.Law Rep. 228 (N.D. Cal. 2001)

- procedural violations in evaluation process did not deprive student of FAPE where the court determined that the evaluation was substantively adequate

*Elida Sch. Dist Bd. of Educ. v. Erickson*, 252 F. Supp. 2d 476, 176 Ed.Law Rep. 143 (N.D. Ohio 2003)

- upheld procedural appropriateness of district's evaluation and eligibility determination, including difference between the IDEA-required teams

*N.L. v. Knox Cty. Pub. Sch.*, 315 F.3d 688 (6th Cir. 2003)

- held that failure to include the parent in the multidisciplinary evaluation team and in the

preparation of the draft assessment report, which legitimately concluded that the child was ineligible under the IDEA, did not amount to a denial of FAPE in this case

*New Paltz Cent. Sch. Dist. v. St. Pierre*, 307 F. Supp. 2d 394, 186 Ed.Law Rep. 753 (N.D.N.Y. 2003)

- delayed evaluation contributed to tuition reimbursement where court concluded that substance-abusing ninth grader was eligible as ED (rather than purely socially maladjusted)

*M.H. v. Nassau Cty. Sch. Bd.*, 918 So.2d 316, 206 Ed.Law Rep. 462 (Fla. Dist. Ct. App. 2005)

- district's truncated evaluation of child suspected of OHI based on ADHD violated IDEA where district failed to provide the parent with the procedural safeguards notice (and to complete the full evaluation after obtaining consent for it)

*N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202, 236 Ed.Law Rep. 603 (9th Cir. 2008);

see also *S.P. v. E. Whittier City Sch. Dist.*, 725 F. App'x 320 (9th Cir. 2018); *Monterey Peninsula Unified Sch. Dist. v. Giammanco*, 22 IDELR 1041 (N.D. Cal. 1995); cf. *Orange Unified Sch. Dist. v. C.K.*, 59 IDELR ¶ 74 (C.D. Cal. 2012) (child find standard)

- upheld tuition reimbursement for IEP where district did not evaluate the child with speech impairment in all the areas of suspected disability, i.e., autism (treating it as prejudicial procedural violation)<sup>37</sup>

*Integrated Design & Elec. Acad. Pub. Charter Sch. v. McKinley*, 570 F. Supp. 2d 28, 237 Ed.Law Rep. 194 (D.D.C. 2008)

- failure to complete the evaluation within the applicable period amounted to a denial of FAPE – “There were miscommunications and rescheduled meetings, but the school still had the affirmative duty to evaluate [the student]”

*N.G. v. Dist. of Columbia*, 556 F. Supp. 2d 11, 234 Ed.Law Rep. 660 (D.D.C. 2008)

- failure to review “relevant” and “existing” evaluation information, including medical and historical data, led to flawed decision regarding eligibility (and, thus, FAPE)

*Parker v. Dist. of Columbia*, 577 F. Supp. 2d 68, 238 Ed.Law Rep. 226 (D.D.C. 2008)

- where child was not eligible (as OHI), observation violation was harmless, concluding that “[n]o evidence has been presented that ... the [evaluation team] would have come to a different conclusion had [the student] been observed in the classroom setting by someone other than her teacher”<sup>38</sup>

*JG v. Douglas Cty. Sch. Dist.*, 552 F.3d 786, 240 Ed.Law Rep. 87 (9th Cir. 2008)

- district's evaluation was appropriate and reasonably timely but its procedural violation of not providing parents with notice of the evaluation warranted full reimbursement where parents' refusal to share information was neither prejudicial nor a breached obligation

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<sup>37</sup> For a discussion of this case and related case law, see Mark P. Weber, *All Areas of Suspected Disability*, 59 LOYOLA L. REV. 289 (2013).

<sup>38</sup> For a similar conclusion, see *Ford v. Long Beach Unified Sch. Dist.*, 291 F.3d 1086, 165 Ed.Law Rep. 504 (9th Cir. 2002).

*Reg'l Sch. Dist. No. 9 v. Mr. and Mrs. M.*, 53 IDELR ¶ 8 (D. Conn. 2009)

- district failed to use a variety of assessment tools in determining non-eligibility

*M.M. v. Gov't of Dist. of Columbia*, 607 F. Supp. 2d 168, 244 Ed.Law Rep. 90 (D.D.C. 2009)

- district's refusal to revise IEP was not denial of FAPE where reevaluation was pending, and its failure to include a psychiatric evaluation was also not a denial of FAPE where the psycho-educational evaluation indicated it was not necessary

*James D. v. Bd. of Educ.*, 642 F. Supp. 2d 804, 250 Ed.Law Rep. 194 (N.D. Ill. 2009)

- rejecting alleged procedural violations (e.g., failure to consider IEE or allow evaluator to observe the class with student there) as nonprejudicial in this case

*Jones v. Dist. of Columbia*, 646 F. Supp. 2d 62, 250 Ed.Law Rep. 325 (D.D.C. 2009)

- enforced state law standard for completion of evaluation (120 days) rather than IDEA standard (60 days), thereby dismissing parent's claim of timeliness violation

*L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 242 Ed.Law Rep. 23 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 90 (2009)

- reversed the lower court's ruling of denial of FAPE based on procedural violation concerning parental participation where there was no finding that said violation—limiting observation time for independent evaluator—had significant effect rather than being harmless error (despite violation of state law that required equivalent opportunity)

*P.P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727, 250 Ed.Law Rep. 517 (3d Cir. 2009)

- concluded that an unduly long period to complete evaluation was not procedurally prejudicial violation of FAPE where the child was in private school and the IEP were substantively appropriate

*Dist. of Columbia v. Bryant-James*, 675 F. Supp. 2d 115, 254 Ed.Law Rep. 120 (D.D.C. 2010)

- ruled that district's IEP and inclusionary placement at a charter school was inappropriate due to its failure to reflect the recommendations of the two evaluators whose expertise and whose evaluations were not questioned

*M.B. v. S. Orange/Maplewood Bd. of Educ.*, 55 IDELR ¶ 18 (D.N.J. 2010)

- district's reliance on computer program to determine severe discrepancy in eligibility determination for SLD violated IDEA requirement for variety of sources, rather than a single measure, for evaluation or reevaluation

*Anchorage Sch. Dist. v. D.S.*, 688 F. Supp. 2d 883, 256 Ed.Law Rep. 298 (D. Alaska 2010)

- ruled that three consecutive IEPs failed to provide FAPE to child with autism based on prejudicial procedural violations, including lack of accurate and timely evaluation

*Dracut Sch. Comm. v. Bureau of Special Educ. Appeals*, 737 F. Supp. 2d 35, 263 Ed.Law Rep. 325 (D. Mass. 2010); *see also Carrie I. v. Dep't of Educ.*, 869 F. Supp. 2d 1225, 286 Ed.Law Rep. 268 (D. Haw. 2012)

- unduly delayed vocational assessments (for transition services) was one of sequential procedural violations that cumulatively contributed to denial of FAPE

*K.I. v. Montgomery Pub. Sch.*, 805 F. Supp. 2d 1283, 275 Ed.Law Rep. 702 (M.D. Ala. 2011)

- ruled that failure to perform cognitive assessment and technology assessment as part of the evaluation of this child with multiple disabilities was a prejudicial procedural violation amounting to denial of FAPE

*D.R. v. Dep't of Educ., State of Haw.*, 827 F. Supp. 2d 1161, 279 Ed.Law Rep. 717 (D. Haw. 2011)

- evaluation need not extend to specialized areas that the district had no reason to suspect (here, emotional-behavioral) or that parent did not share (here, submucous cleft palate)

*Danny K. v. Dep't of Educ., State of Haw.*, 57 IDELR ¶ 185 (D. Haw. 2011); *Hailey B. v. Matayoshi*, 57 IDELR ¶ 124 (D. Haw. 2011); *W.H. v. Clovis Unified Sch. Dist.*, 52 IDELR ¶ 258 (E.D. Cal. 2009); *cf. Lauren C. v. Lewisville Indep. Sch. Dist.*, 904 F.3d 363, 358 F.3d 108 (5th Cir. 2018); *C.P. v. Krum Indep. Sch. Dist.*, 64 IDELR ¶ 78 (E.D. Tex. 2015); *Tracy v. Beaufort Cty. Bd. of Educ.*, 335 F. Supp. 2d 675 (D.S.C. 2004); (child find analysis); *Tracy N. v. Dep't of Educ., Haw.*, 715 F. Supp. 2d 1093, 261 Ed.Law Rep. 244 (D. Haw. 2010) (seemingly substantive analysis)

- concluded, with district deference, that parent did not prove that district failed to evaluate the student in all areas of suspected disability

*Aaron P. v. Dep't of Educ., State of Haw.*, 57 IDELR ¶ 251 (D. Haw. 2011)

- failure to include autism-specific assessments upon transition under Part C of preschool child with PDD was procedural violation but not resulting loss of educational opportunities due to autism-specific services in the IEP

*Bellflower Unified Sch. Dist. v. Luna*, 74 IDELR ¶ 231 (C.D. Cal. 2019); *Moorestown Twp. Bd. of Educ. v. S.D.*, 811 F. Supp. 2d 1057, 276 Ed.Law Rep. 196 (D.N.J. 2011); *see also I.H. v. Cumberland Valley Sch. Dist.*, 842 F. Supp. 2d 762, 281 Ed.Law Rep. 1057 (M.D. Pa. 2012) (student enrolled in cyber charter school)

- ruled that district of residence's refusal, upon the parents' request, to evaluate and offer IEP to student whom it knew had a disability based on his enrollment in an out-of-district private school was a denial of FAPE

*J.D. v. Crown Point Sch. Corp.*, 58 IDELR ¶ 125 (N.D. Ind. 2012)

- failure to evaluate hearing impaired child for SLD did not result in denial of FAPE where the IEP was tailored to his individual needs

*M.J.C. v. Special Sch. Dist. No. 1*, 58 IDELR ¶ 288 (D. Minn. 2012)

- district's requirement for parent to provide medical diagnosis of ADHD, which led to delay in evaluating child subsequently found eligible, amounted to denial of FAPE, warranting compensatory education

*I.T. v. Dep't of Educ., State of Haw.*, 59 IDELR ¶ 129 (D. Haw. 2012)

- failure to provide timely evaluation of suspected central auditory processing disorder of student with multiple disabilities was harmless procedural violation where subsequent evaluation determined that the child did not have this disorder

*G.G. v. Dist. of Columbia*, 60 IDELR ¶ 183 (D.D.C. 2013)

- district's delay in completing the evaluation of child with Asperger syndrome entitled parent

to tuition reimbursement for private placement

*A.W. v. Middletown Area Sch. Dist.*, 65 IDELR ¶ 15 (M.D. Pa. 2015)

- a psychiatric evaluation does not fulfill the IDEA requirement of a full and individual evaluation – unnecessary two-step process was unreasonable delay (in case primarily focused on, though overlapping with child find)

*Student v. Sch. Dist. of Phila.*, 115 LRP 33496 (E.D. Pa. Apr. 3, 2015)

- the lack of a formal classroom observation (i.e., by an independent observer) is not a per se violation of the IDEA and the completion of the evaluation a week or so after the requisite period may also not necessitate a remedy if the evaluation is substantively appropriate

*Perrin v. Warrior Run Sch. Dist.*, 66 IDELR ¶ 225 (M.D. Pa. 2015)

- the evaluation needs only to consider, not follow, relevant medical information

*E.E. v. Tuscaloosa City Bd. of Educ.*, 68 IDELR ¶ 45 (N.D. Ala. 2016)

- procedural violations in the evaluation, either alone or taken together, do not render the evaluation inappropriate in the absence of material loss to the child or parents

*Abdella v. Folsom Cordova Unified Sch. Dist.*, 68 IDELR ¶ 74 (E.D. Cal. 2016)

- school's failure to provide the parents with a copy of the teacher's rating scale was procedural violation of records requirement but, in light of the sufficient summary report, did not result in a loss to the student or the parents + reliance on IEEs did not violate obligation to conduct evaluation before exiting student from special education

*Richardson v. Dist. of Columbia*, 70 IDELR ¶ 195 (D.D.C. 2017)

- school psychologist's use of other speech therapist's observations and interviews was not a procedural violation in eligibility evaluation and the use of an outdated test was harmless error where there was no showing that with the updated test the child would have been eligible

*Lawrence Cty. Sch. Dist. v. McDaniel*, 72 IDELR ¶ 8 (E.D. Ark. 2018)

- gifted or other students who lack academic deficits compared to other students may qualify for an eligibility evaluation

*Rosaria M. v. Madison City Bd. of Educ.*, 323 F. Supp. 3d 1, 358 Ed.Law Rep. 165 (N.D. Ala. 2018)

- ruled that district's alleged failure to adequately address student's behavioral and medical issues and to complete the evaluation on time were limited procedural errors that did not compromise the student's FAPE

*Hart v. District of Columbia*, 325 F.R.D. 429, 355 Ed.Law Rep. 1081 (D.D.C. 2018)

- ruled that even if the failure to conduct a new comprehensive psychological evaluation of a student with ED was a procedural violation in this case, it did not result in loss of educational opportunity to the student—no effect shown on appropriateness of IEP

*Y.N. v. Bd. of Educ. of Harrison Cent. Sch. Dist.*, 73 IDELR ¶ 73 (S.D.N.Y. 2018)

- use of erroneously scored test results and lack of classroom observation were procedural

violations but they did not vitiate the substantive appropriateness of the resulting IEP or deprive the parents of meaningful participation

*B.G. v. Bd. of Educ. of City of Chi.*, 901 F.3d 903, 357 Ed.Law Rep. 895 (7th Cir. 2018)

- procedural violations, such as mistakes in administration of the test instruments, do not render the evaluation inappropriate where they are harmless in their substantive effect

*R.Z.C. v. N. Shore Sch. Dist.*, 755 F. App'x 658, 363 Ed.Law Rep. 605 (9th Cir. 2018)

- summarily rejected, as unfounded, parent's claims that the district's reevaluation, which concluded that the child no longer qualified as SLD, (a) omitted information, (b) did not include an adequate observation, (c) dismissed relevant test results, and (d) lacked the requisite accompanying written notice

*In re Butte Sch. Dist. No. 1*, 73 IDELR ¶ 198 (D. Mont. 2019)

- rejected, as unfounded, claims that reevaluation failed to review existing data and to administer evaluation instruments according to producer instructions

*Indep. Sch. Dist. No. 283 v. E.M.D.H.*, 357 F. Supp. 3d 876, 363 Ed.Law Rep. 285 (D. Minn. 2019)

- concluded, incidental to ED eligibility ruling, that the district's evaluation was deficient under state law with regard to requirements for systematic observations and FBA

*L.C. v. Issaquah Sch. Dist.*, 74 IDELR ¶ 132 (W.D. Wash. 2019)

- failure of state law requirement for each member of evaluation team to sign and date the evaluation report harmless procedural violation

*Doe v. Cape Elizabeth Sch. Dep't*, 382 F. Supp. 3d 83, 367 Ed.Law Rep. 767 (D. Me. 2019)

- ruled that district's failure to complete the initial evaluation within the prescribed period was not a violation where the reason was the child's absences and the parent's failure to arrange for the child's presence for the evaluation

*Hoover City Bd. of Educ. v. Leventry*, 75 IDELR ¶ 32 (N.D. Ala. 2019)

- ruled that failure to have sufficient information as to the unique nature and severity of the child's disability (here conversion disorder combined with PTSD) was not a proper evaluation, thus invalidating the team's ineligibility determination (remanding for more complete information to determine whether the child met the disputed need prong)

*G.W. v. Boulder Valley Sch. Dist.*, 75 IDELR ¶ 76 (D. Colo. 2019)

- ruled that failure to conduct reevaluation upon parental request when the only formal assessment within the past year did not meet the criteria for a comprehensiveness was a procedural violation that did not result in a loss to the student parents due to the appropriate placement of the child with TBI

## V. SUBSTANTIVE APPROPRIATENESS OF EVALUATIONS<sup>39</sup>

### A. OSEP Policy Interpretations

*Letter to State Directors of Special Education*, 34 IDELR ¶ 119 (OSEP 2000)<sup>40</sup>

- the IEP team has the authority to determine whether students with disabilities will participate alternate district- and state-wide assessments with or without alternate standards (such as out-of-level testing)

*Letter to Gorin*, 51 IDELR ¶ 104 (OSERS 2006)

- the new regulatory provisions for SLD identification, which reduce the role of cognitive assessment, are not intended to diminish the role of school psychologists in the assessment process

*Letter to Clarke*, 48 IDELR ¶ 77 (OSEP 2007)

- the IDEA evaluation requirement for using a variety of assessment tools/strategies to collect “relevant functional, developmental, and academic information” shows that eligibility is not limited to academic performance

*Letter to Moffett*, 54 IDELR ¶ 130 (OSEP 2009)

- the IDEA does not require a district to evaluate or reevaluate a student to satisfy the eligibility criteria of college admission testing programs (e.g., ETS or ACT)<sup>41</sup>

*Letter to Janssen*, 51 IDELR ¶ 253 (OSERS 2008)

- unless state law provides specific standards, “[i]t is the [district’s] responsibility, working with the state department of education, to provide professional development, in-service training, and technical assistance, as needed, for school staff members to be able to conduct an FBA and provide positive behavioral interventions and supports”

*Letter to Unnerstall*, 68 IDELR ¶ 22 (OSEP 2016)

- an assessment of dyslexia is not required upon parental request – instead, only if necessary to determine the child’s eligibility or the child’s needs, including those related to the child’s reading difficulties, for an appropriate IEP

### B. Case Law<sup>42</sup>

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<sup>39</sup> Overlapping with rather than clearly distinct from procedural appropriateness, this section also broadly includes personnel qualifications and conduct. For pertinent impartial hearing officer decisions in Texas, see *Highland Park Indep. Sch. Dist.*, 58 IDELR ¶ 147 (Tex. SEA 2011) (discrepancies between the school psychologist’s data and her report contributed to the conclusion that the evaluation was not appropriate); *Hooks Indep. Sch. Dist.*, 43 IDELR ¶ 263 (Tex. SEA 2007) (evaluation of child with multiple disabilities was appropriate).

<sup>40</sup> Although only at the margin of coverage here, high-stakes testing has also been the subject of other OSEP policy interpretations. *E.g.*, *Letter to Davis-Wellington*, 40 IDELR ¶ 182 (OSEP 2003) (permissibility of graduation-diploma test if appropriate accommodations).

<sup>41</sup> OSEP cited its commentary accompanying the IDEA regulations. 71 Fed. Reg. 46,664 (Aug. 14, 2006).

<sup>42</sup> For an additional sampling of court decisions concerning the appropriateness of district evaluations, which arose in the context of the multi-part test for reimbursement of IEEs, see Zirkel *supra* note 6. Moreover, this section also does not extend to the specialized issue of racially discriminatory testing in special education.

*J.S. v. Shoreline Sch. Dist.*, 220 F. Supp. 2d 1175, 170 Ed.Law Rep. 254 (W.D. Wash. 2002)

- upheld proposed IEP, using deferential reasonableness approach and applying equities to district's evaluation in light of parents' concealment—extended *Rowley* substantive standard to evaluation per Third Circuit decision in 1986

*Krista P. v. Manhattan Sch. Dist.*, 255 F. Supp. 2d 873, 176 Ed.Law Rep. 641 (N.D. Ill. 2003)

- upheld substantive appropriateness of the district's two successive evaluations that determined that the child was not eligible as SLD based on court's recitation and application of the minimum requirements in the IDEA

*B.L. v. New Britain Bd. of Educ.*, 394 F. Supp. 2d 522, 204 Ed.Law Rep. 169 (D. Conn. 2005)

- upheld substantive appropriateness of district's IEP for student with SLD based on “snapshot” standard—expert's reevaluation report was after the events

*M.T.V. v. DeKalb Cty. Sch. Dist.*, 446 F.3d 1153, 208 Ed.Law Rep. 758 (11th Cir. 2006)

- the district's choice of evaluation personnel is entitled to deference just as long as the chosen personnel meet state standards for certification and IDEA/state standards for required roles—here upholding district's conditioning continued special education services on reevaluation by an expert of its choice

*L.S. v. Abington Sch. Dist.*, 48 IDELR ¶ 244 (E.D. Pa. 2007)

- the key to the substantive appropriateness of an evaluation is the methodology, not the conclusions

***Alvin Indep Sch. Dist. v. A.D.*, 503 F.3d 378, 225 Ed.Law Rep. 183 (5th Cir. 2007)**

- upheld evaluation that child with ADHD was not eligible under the OHI classification based on various sources of academic, behavioral, and social evidence that he did not need special education

*Richardson v. Dist. of Columbia*, 541 F. Supp. 2d 346, 231 Ed.Law Rep. 715 (D.D.C. 2008)

- where parent refused to release the private psychiatric evaluation information that was the missing link (and the reasonable prerequisite for the district to arrange for such an evaluation), court upheld the determination that student was not eligible as ED

*Mendoza v. Placentia Yorba Linda Unified Sch. Dist.*, 278 F. App'x 737, 235 Ed.Law Rep. 808 (9th Cir. 2008)

- upheld substantive appropriateness of district's evaluation and program for student with disabilities, including factors that 1) student's poor attendance gave the district little time to assess the benefits of his IEP; and 2) his parents refused mental health goals and services

*D.B. v. Bedford Cty. Sch. Bd.*, 708 F. Supp. 2d 564, 259 Ed.Law Rep. 608 (W.D. Va. 2010)

- concluding that the evaluation's failure to extend beyond OHI, where it had reason to suspect SLD, led to a denial of FAPE

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*E.g.*, *Larry P. v. Riles*, 495 F. Supp. 926 (N.D. Cal. 1979), *aff'd in part, rev'd in part*, 793 F.2d 969 (9th Cir. 1986), *further ruling sub nom. Crawford v. Honig*, 37 F.3d 485, 94 Ed.Law Rep. 1154 (9th Cir. 1994); *PASE v. Hannon*, 506 F. Supp. 831 (N.D. Ill. 1980); *cf. Lee v. Lee Cty. Bd. of Educ.*, 476 F. Supp. 2d 1356, 218 Ed.Law Rep. 362 (M.D. Ala. 2007) (desegregation context). For a similarly separable issue, see Perry A. Zirkel, *High Stakes Testing Accommodations or Modifications for Students with Disabilities*, 155 Ed.Law Rep. 13 (2001).

*Heller v. Minn. Dep't of Educ.*, 54 IDELR ¶ 260 (Minn. Ct. App. 2010)

- as long as a district uses appropriate evaluation tools and methods, it need not adopt the alternative standards suggested by a parent

*L.R. v. Manheim Twp. Sch. Dist.*, 540 F. Supp. 2d 603, 231 Ed.Law Rep. 197 (E.D. Pa. 2008), *aff'd sub nom. R.R. v. Manheim Twp. Sch. Dist.*, 412 F. App'x 544, 267 Ed.Law Rep. 99 (3d Cir. 2011)

- upheld procedural and substantive appropriateness of IEP for middle school student with SLD and SLI, rejecting parent's principal claim on appeal that the district failed to provide timely comprehensive language evaluation—no proof that it was needed—thus, denying tuition reimbursement

*Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 270 Ed.Law Rep. 664 (D.D.C. 2011); *see also Sch. Bd. v. Brown*, 769 F. Supp. 2d 928, 268 Ed.Law Rep. 197 (E.D. Va. 2010) (also child find and manifestation determination violations)

- ruled that failure to provide FBA/BIP was denial of necessary evaluation that amounted to substantive denial of FAPE

*G.D. v. Wissahickon Sch. Dist.*, 832 F. Supp. 2d 455, 280 Ed.Law Rep. 71 (E.D. Pa. 2011)

- the eligibility evaluation was inappropriate, causing a denial of FAPE, because "[the school psychologist] and the district had an obligation to look beyond simply [the child's] cognitive potential or academic progress and to address the attentional issues and behaviors that [the teacher] had identified as impeding his progress"

*E.M. v. Pajaro Valley Unified Sch. Dist.*, 652 F.3d 999, 271 Ed.Law Rep. 765 (9th Cir. 2011), *further proceedings*, 58 IDELR ¶ 187 (N.D. Cal. 2012)

- after appellate court vacated and remanded previous trial court decision due to failure to consider subsequent IEE, upheld district's decision that bilingual child was not eligible as SLD or, based on child's auditory processing disorder, OHI—reliance on IEE's WISC IQ score, rather than school psychologist's KABC score for lack of severe discrepancy

*Nickerson-Reti v. Lexington Pub. Sch.*, 893 F. Supp. 2d 276, 290 Ed.Law Rep. 79 (D. Mass. 2012)

- rejected claim that evaluation of older student with multiple disabilities was not sufficiently comprehensive without separate independent living skills evaluation

*Torda v. Fairfax Cty. Sch. Bd.*, 517 F. App'x 162 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1538 (2014)

- rejected claim that failure to evaluate auditory processing disorder (APD) of child with intellectual disabilities (ID) amounted to denial of FAPE where 1) failure to prove that child has APD separable from his ID, 2) parent prevented the challenged reevaluation; and 3) district properly accommodated and remediated any auditory processing deficits

*D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 285 Ed.Law Rep. 790 (3d Cir. 2012)

- upheld appropriateness of district's evaluation, in child find context, concluding that an FBA was not legally required and that subsequent evaluation finding student eligible did not render this evaluation necessarily inadequate

*Nalu Y. v. Dep't of Educ., State of Haw.*, 858 F. Supp. 2d 1127, 284 Ed.Law Rep. 325 (D. Haw. 2012)

- upheld district psychologist's evaluation that student did not qualify under autism (though eligible as SLI and OHI) but remanded to determine whether district had reason to suspect (and, thus, evaluate) whether the student had fear of the specific school that was the proposed placement

***R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 288 Ed.Law Rep. 552 (5th Cir. 2012)**

- district's failure to include assistive technology evaluation into the student's IEP was a factor and that its failure to conduct an FBA was not a factor in ultimate FAPE determination, which in this case was in favor of the district based on the *Cypress-Fairbanks* four-factor test

***R.C. v. Keller Indep. Sch. Dist.*, 958 F. Supp. 2d 718, 301 Ed.Law Rep. 212 (N.D. Tex. 2013)**

- upheld substantive appropriateness of evaluation for student with ED and possible autism as meeting applicable IDEA regulations, concluding that the IEP was substantively appropriate regardless of classification label

*M.Z. v. Bethlehem Area Sch. Dist.*, 521 F. App'x 74, 296 Ed.Law Rep. 902 (3d Cir. 2013)

- the reevaluation was not sufficiently comprehensive because the anecdotal method was adequate to specifically to assess the child's progress for the critical IEP goals and the assessment tools did not provide information relative to his continuing eligibility and future services in the new setting

*Timothy F. v. Antietam Sch. Dist.*, 63 IDELR ¶ 70 (E.D. Pa. 2014)

- the tangential use of instruments that were not technically sound was within the judicial deference owed to the school psychologist's specialized expertise

*Meridian Joint Sch. Dist. No. 2 v. D.A.*, 792 F.3d 1054, 320 Ed.Law Rep. 8 (9th Cir. 2015)

- the district's evaluation failed to adequately consider the non-school setting and the broad scope of educational performance in determining that student with Asperger syndrome was not eligible under the IDEA

*Damarcus S. v. District of Columbia*, 190 F. Supp. 3d 35, 338 Ed.Law Rep. 823 (D.D.C. 2016)

- upheld appropriateness of S/L evaluation that adequately identified the child's needs for the IEP team despite the lack of formal testing and also upheld the appropriateness of the school psychologist's evaluation that sufficiently demonstrated the child's specific deficits in working memory, processing speed, and general intellectual disability despite dispute about labeling, scope, and analysis of the evaluation

*T.M. v. Quakertown Cmty. Sch. Dist.*, 251 F. Supp. 3d 792, 347 Ed.Law Rep. 921 (E.D. Pa. 2017)

- upheld evaluation of intellectual potential, functional skills, and problem behaviors of child with autism, apraxia, and ID as reasonable even though not necessarily meeting the gold standard of the parents' expert

*E.P. v. Howard Cty. Pub. Sch.*, 70 IDELR ¶ 176 (D. Md. 2017), *aff'd mem.*, 727 F. App'x 55 (4th Cir. 2018)

- the failure to include a recommended eligibility determination in the evaluation report or all of the subtests of a selected instrument in the assessment does not render an evaluation inappropriate

*Culley v. Cumberland Valley Sch. Dist.*, 758 F. App'x 301, 364 Ed.Law Rep. 84 (3d Cir. 2018)

- rejected district's evaluation of non-eligibility of 10<sup>th</sup> grader with Crohn's disease, concluding that *Rowley* deference does not apply to IDEA eligibility and that "appropriateness" is not the standard for evaluations

*S. v. W. Chester Area Sch. Dist.*, 353 F. Supp. 3d 369, 362 Ed.Law Rep. 850 (E.D. Pa. 2019)

- upheld appropriateness of first evaluation of elementary student with epilepsy as eligible for 504 plan but not IEP even though subsequent evaluation determined that the student was IDEA-eligible

*Bentonville Sch. Dist. v. Smith*, 73 IDELR ¶ 203 (W.D. Ark. 2019)

- ruled that reevaluation upon changing fifth grader's primary classification from autism to emotional disturbance fulfilled the IDEA requirements

*L.C. v. Issaquah Sch. Dist.*, 74 IDELR ¶ 132 (W.D. Wash. 2019)

- concluded that initial evaluation of SLD was appropriate even though it did not specifically assess dyslexia

*A.H. v. Colonial Sch. Dist.*, \_\_\_ F. App'x \_\_\_ (3d Cir. 2019)

- an evaluation that used a variety of tools is not automatically substantively inappropriate just because it lacked an additional test, a neuropsychological or psychiatric evaluation, or an FBA

## VI. INDEPENDENT EDUCATIONAL EVALUATIONS (IEEs)

### A. Regardless of whether at public expense

- consideration requirement<sup>43</sup>

#### 1. OSEP Interpretations

*Letter to Mamas (supra)*

- "if parents invoke their right to an [IEE] of their child, and the evaluation requires observing the child in the educational placement, the evaluator may need to be provided access to the placement"

*Letter to Savit*, 64 IDELR ¶ 250 (OSEP 2014)

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<sup>43</sup> 34 C.F.R. § 300.502(c): "If the parent obtains an [IEE] at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation-- (1) Must be **considered** by the public agency, **if** it meets agency criteria, in any decision made with respect to the provision of FAPE to the child" (emphasis added). The accompanying commentary includes this interpretation: "If a parent obtains an evaluation at private expense, there is nothing in the Act or these regulations that requires a parent to share that evaluation with the public agency. A privately-funded evaluation that is not shared with a public agency would not be considered an IEE under this regulation."

- district must provide the same opportunity for IEE observation as it does for its own personnel

*Letter to Anonymous*, 72 IDELR ¶ 251 (OSEP 2018)

- the time limit for an outside evaluator must not conflict with the district’s criteria for its own personnel’s observations

## 2. Case Law<sup>44</sup>

*Tarlowe v. N.Y.C. Dep’t of Educ.*, 50 IDELR ¶ 286 (S.D.N.Y. 2008)

- contrary to the parent’s claim, district did consider the IEE, but legitimately concluded that it was “incomplete and inadequate”

*Sch. Bd. of Manatee Cty. v. L.H.*, 53 IDELR ¶ 149 (M.D. Fla. 2009)<sup>45</sup>

- upholding hearing officer’s order for the district to allow access for IEE evaluator’s observation of child’s classroom where the district provided access to its own evaluators

*Bolick v. Council Rock Sch. Dist.*, 54 IDELR ¶ 326 (Pa. Commw. Ct. 2010)

- district need not consider IEE that did not meet agency criteria

*Marc M. v. Dep’t of Educ.*, 762 F. Supp. 2d 1235, 267 Ed.Law Rep. 189 (D. Haw. 2010)

- failure to revise the IEP during a sufficient period of time before implementation was a denial of FAPE where the IEE that the parent had provided at the end of the IEP meeting without comment included significant information contradicting the IEP’s present educational levels

*D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 256 Ed.Law Rep. 22 (3d Cir. 2010)

- district’s failure to incorporate specific recommendations of the credible IEEs or provide alternatives reasonably calculated to confer an educational benefit contributed to denial of FAPE

*B.H. v. W. Clermont Bd. of Educ.*, 788 F. Supp. 2d 682, 272 Ed.Law Rep. 45 (S.D. Ohio 2011)

- ruled that district denied FAPE to child with multiple disabilities, including autism, in various ways including failing to consider IEEs for SLT and OT (predetermination, thus violating parent’s right of meaningful participation)

*K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 270 Ed.Law Rep. 479 (8th Cir. 2011)

- district met its obligation to “consider” parent’s IEEs by reviewing and partially incorporating them<sup>46</sup>

*Plainville Bd. of Educ. v. R.N.*, 58 IDELR ¶ 257 (D. Conn. 2012); *see also Dallas Indep. Sch. Dist. v. Woody*, 865 F.3d 303, 345 Ed.Law Rep. 666 (5th Cir. 2017)

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<sup>44</sup> See *James B (supra)* for another claim concerning the consider-IEE requirement where it is combined with other alleged procedural violations.

<sup>45</sup> For other variations on IEE observations, see *L.M. v. Capistrano Unified Sch. Dist. (supra)*; *James D. v. Bd. of Educ. (supra)*.

<sup>46</sup> For early similar federal appellate rulings, see *T.S. v. Bd. of Educ.*, 10 F.3d 87 (2d Cir. 1993); *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942 (1st Cir. 1991). For a recent ruling illustrating that consideration does not necessarily mean adoption, see *Y.N. v. Bd. of Educ. of Harrison Cent. Sch. Dist.*, 73 IDELR ¶ 73 (S.D.N.Y. 2018).

- district’s failure to at all consider parents’ IEE contributed, with other procedural violations to denial of FAPE

#### B. At public expense

- multi-part test analogous to tuition reimbursement<sup>47</sup>– separate comprehensive coverage<sup>48</sup>
- not applicable during RTI<sup>49</sup>

### VII. OTHER RELATIONSHIPS TO RTI<sup>50</sup>

#### A. OSEP Policy Interpretations

- The IDEA does not require parental consent for RTI to the extent that it constitutes screening prior to the evaluation process<sup>51</sup>; “however, parental consent would be required if, during the secondary or tertiary level of an RTI framework for an individual student, a teacher were to collect academic functional assessment data to determine whether the child has, or continues to have, a disability and to determine the nature and extent of the special education and related services that the child needs.”<sup>52</sup>
- The distinguishing core characteristics of RTI are: 1) “high quality, research-based instruction” in general education, 2) continuous progress monitoring, 3) screening for academic and behavior problems, and 4) multiple tiers of progressively more intense instruction.<sup>53</sup>

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<sup>47</sup> Based on the first substantive step of the applicable test, this section overlaps with the preceding, appropriateness sections.

<sup>48</sup> For a systematic synthesis of the relevant OSEP interpretations and court decisions, including those in the overlapping category of the appropriateness of the district’s evaluations, see Zirkel *supra* note 6. For the appropriateness issue, the non-overwhelming majority of these court decisions have been in favor of the district, with a similar split in Texas. Compare *Shafi A. v. Lewisville Indep. Sch. Dist.*, 69 IDELR ¶ 66 (E.D. Tex. 2016), with *S.F. v. McKinney Independent School District*, 58 IDELR ¶ 157, adopted, 59 IDELR ¶ 271 (E.D. Tex. 2012).

<sup>49</sup> *E.g.*, *Letter to Zirkel*, 52 IDELR ¶ 77 (OSEP 2008).

<sup>50</sup> The scope of this document does not otherwise extend to RTI. For hearing officer and court decisions specific to child find in relation to RTI, see, e.g., Perry A. Zirkel, *Response to Intervention and Child Find: A Problematic Intersection?*, 84 EXCEPTIONAL CHILD. 368 (2018). For state laws, see, e.g., Perry A. Zirkel & Lisa B. Thomas, *State Laws and Guidelines for Implementing RTI*, 43 TEACHING EXCEPTIONAL CHILD. 60 (2010). For more comprehensive national coverage, see, e.g., Perry A. Zirkel, *RTI and The Law*, 268 Ed.Law Rep. 1 (2011).

<sup>51</sup> *Letter to Torres*, 53 IDELR ¶ 333 (OSEP 2009).

<sup>52</sup> *Letter to Gallo*, 61 IDELR ¶ 173 (OSEP 2013).

<sup>53</sup> *Questions and Answers on Response to Intervention (RTI) and Early Intervening Services (EIS)*, 47 IDELR ¶ 196 (OSERS 2007); see also *Memorandum to State Directors of Special Education*, 56 IDELR ¶ 50 (OSEP 2011); *Memorandum to Chief State School Officers*, 51 IDELR ¶ 49 (OSEP 2008). Whether intended as a distinction, the second policy document referred to the first characteristic in terms of “high quality, evidence-based instruction.” The professional literature has recognized an additional core characteristic—fidelity.

- RTI is only one part of a comprehensive evaluation.<sup>54</sup>
- RTI may not be used to delay or deny an evaluation of a child suspected of having a disability.<sup>55</sup>
- A state law requiring that students experiencing classroom difficulties “should be considered for all support services available [in general education],” such as RTI, before school referral for special education does not conflict with OSEP policy regarding evaluations under RTI because it does not “prohibit[] school personnel or the child's parent from referring a child suspected of having a disability for an initial evaluation prior to completion of the RTI process.”<sup>56</sup>
- For the duration of RTI and its interplay with the evaluation, OSEP declined to define “an appropriate period” or “adequate progress.”<sup>57</sup>
- If a parent requests an evaluation of a child who is in the district’s RTI process, the district must either 1) proceed to obtain consent within a reasonable period and complete the evaluation within the regulatory timeline, or 2) provide the parent with a written refusal explaining the basis for concluding that it lacks reason to suspect the child has a disability. The parent may challenge this refusal via a due process hearing.<sup>58</sup>
- “The Department does not believe that an assessment of psychological or cognitive processing should be required in determining whether a child has an SLD. . . . The reference to ‘intellectual development’ in [the optional, “pattern of strengths and weaknesses”] provision means that the child exhibits a pattern on strengths and weaknesses in performance relative to a standard of intellectual development such as commonly measured by IQ tests.”<sup>59</sup>
- For the expedited evaluation required for “deemed to know” children who are subject to disciplinary changes in placement, information from the RTI process may be used, but where the child had not participated in the RTI process prior to the consent for evaluation, the district “would need to rely on other assessment tools and strategies to ensure that the evaluation can be conducted in an expedited manner.”<sup>60</sup>
- If a private school refers a parentally placed child to the district of its location for an evaluation for suspected SLD and the district uses RTI for SLD identification, the district is not required to use RTI for the evaluation and must move forward to obtain parental consent and to complete the evaluation within 60 days thereafter.<sup>61</sup>

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<sup>54</sup> *Letter to Zirkel*, 47 IDELR ¶ 268 (OSEP 2007); *Letter to Prifitera*, 48 IDELR ¶ 163 (OSEP 2007); *cf. Letter to Copenhaver*, 108 LRP 16368 (OSEP 2007) (except for rare exceptions, review of existing data would be insufficient).

<sup>55</sup> *Memorandum to State Directors of Special Education*, 56 IDELR ¶ 50 (OSEP 2011).

<sup>56</sup> *Letter to Ferrara*, 60 IDELR ¶ 46 (OSEP 2012) (focusing on **TEX. ADMIN. CODE § 89.1011**).

<sup>57</sup> *Questions and Answers on Response to Intervention (RTI) and Early Intervening Services (EIS)*, 47 IDELR ¶ 196 (OSERS 2007).

<sup>58</sup> *Id.*; *see also Letter to Zirkel*, 56 IDELR ¶ 140 (OSEP 2011).

<sup>59</sup> 71 Fed. Reg. 46,651 (Aug. 14, 2006).

<sup>60</sup> *Letter to Combs*, 52 IDELR ¶ 46 (OSEP 2008).

<sup>61</sup> *Letter to Zirkel*, 56 IDELR ¶ 140 (OSEP 2011); *see also* 71 Fed. Reg. 46,648 (Aug. 14, 2006); *cf. Letter to Brekken*, 56 IDELR ¶ 80 (OSEP 2010) (same for referral from a Head Start program).

- In a permissive state, if a district uses a severe discrepancy approach to determine SLD eligibility, it is not required to implement an RTI process comply with the regulation requiring consideration of continuous progress monitoring data.<sup>62</sup>
- A state’s threshold requirement for a specified score for psychological processing “must be interpreted and implemented in a way that does not use a single measure or assessment as the sole criterion for determining [a child’s eligibility as SLD].”<sup>63</sup>

#### B. Case Law<sup>64</sup>

*M.M. v. Lafayette Sch. Dist.*, 767 F.3d 842, 309 Ed.Law Rep. 155 (9th Cir 2014)

- ruled that the district’s SLD evaluation was appropriate via use of RTI data to corroborate severe discrepancy, but that the district violated the IDEA's procedural requirements by failing to have the IEP team document and carefully consider the RTI data and to provide the data to the parents

*Greenwich Bd. of Educ. v. G.M.*, 68 IDELR ¶ 8 (D. Conn. 2016)

- finding child find violation based on private psychologist’s report, lack of “sufficient” progress, and lack of variety of assessment tools and determining eligibility based on first two factors along with “not achieving adequately to meet grade-level standards”

*Davis v. District of Columbia*, 244 F. Supp. 3d 27, 346 Ed.Law Rep. 859 (D.D.C. 2017)

- remanded to hearing officer to determine whether and how charter school used RTI for SLD eligibility determination, with dicta that severe discrepancy may not be the sole approach for the evaluation

### VIII. MISCELLANEOUS

*Great Valley Sch. Dist. v. Douglas M.*, 807 A.2d 315, 170 Ed.Law Rep. 292 (Pa. Commw. Ct. 2002)

- when parents unilaterally remove the child to a remote, out-of-state private placement, the district is not legally obligated to conduct the evaluation at the child’s location

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<sup>62</sup> *Letter to Zirkel*, 72 IDELR ¶ 131 (OSEP 2018).

<sup>63</sup> *Letter to Breton*, 115 LRP 31185 (OSEP 2015).

<sup>64</sup> Most of the court decisions until recently concern general education interventions that pre-dated RTI and that do not meet its core characteristics. *E.g.*, Perry A. Zirkel, *RTI Confusion in the Case Law and Legal Commentary*, 34 LEARNING DISABILITY Q. 242 (2011). For the latest such case, see *Daniel P. v. Downingtown Area Sch. Dist.*, 57 IDELR ¶ 224 (E.D. Pa. 2011). The majority of the recent cases specific to RTI focus on child find and/or eligibility rather than the evaluation itself, with varying outcomes. *Compare Avaras v. Clarkstown Cent. Sch. Dist.*, 73 IDELR ¶ 50 (S.D.N.Y. 2018) (child find violation for 8 weeks at Tier 3 after previous 7 mos. in RTI); *Artichoker v. Todd Cty. Sch. Dist.*, 69 IDELR ¶ 58 (D.S.D. 2016) (child find violation in the context of deemed-to-know in disciplinary change in placement, ruling that RTI may not delay a special education evaluation for child ultimately determined to qualify as SLD plus ED, *with M.G. v. Williamson Cty. Sch.*, 720 F. App’x 280, 353 Ed.Law Rep. 373 (6th Cir. 2018); *K.W. v. Tuscaloosa Cty. Sch. Sys.*, 73 IDELR ¶ 157 (N.D. Ala. 2018); *Damarcus v. Bd. of Educ.*, 63 IDELR ¶ 13 (N.D. Ill. 2014) (RTI participation contributed to ruling of no child find violation).

*Harris v. Dist. of Columbia*, 561 F. Supp. 2d 63, 235 Ed.Law Rep. 278 (D.D.C. 2008); *see also Cobb Cty. Sch. Dist. v. G.S.B.*, 66 IDELR ¶ 134 (N.D. Ga. 2015)

- an FBA is an evaluation (here, an IEE) where it is essential to addressing a child's behavioral difficulties, thus playing an integral role in the development of the IEP

*Letter to Anonymous*, 113 LRP 14630 (FPCO 2013)

- latest in a series of agency interpretations that parents have a right to inspect but not, with a limited exception, receive copies of their child's test protocol and other personally identifiable evaluation records

**Figure 1. The Role of Evaluation under the IDEA: Overlapping Concepts**

