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MUST IEEs AT PUBLIC EXPENSE BE OBJECTIVE AND IMPARTIAL?

In response to parents' written request for an IEE at public expense, certain school district obligations under the IDEA are crystal clear. In response to such requests, districts must either agree to provide the IEE, or they must file a complaint for a due process hearing to defend its evaluation or reevaluation. 34 C.F.R. §300.502(b)(2). Districts must respond to parents' IEE requests *without unnecessary delay*. (Rule of thumb would be 10 calendar days.) Districts may request that parents provide reasons for their disagreement with the district's evaluation or their reasons for their IEE request, but districts may not require parents to provide them. Districts may establish criteria for IEEs, however criteria for the location of the evaluation and the qualifications of the examiner must be the same as the criteria the district uses for its own evaluations and reevaluations. Districts must provide information about where parents may obtain an IEE and the district's criteria for IEEs. Case law has established that district criteria may include mileage limits, maximum allowable charges, application of criteria established by test publishers and evaluators' holding of relevant state credentials so long as their allowable exceptions to these criteria and so long the criteria do not prevent parents from obtaining an IEE. Districts may not impose conditions or timelines on IEEs.

The IDEA regulations define an independent evaluation as "an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." 34 C.F.R. §300.502(a)(3)(i). Thus, in addition to private practitioners, districts could include, intermediate unit (IU) school psychologists or other related services providers on their lists of IEE evaluators provided to parents requesting an IEE. However, as a practical matter, districts must understand that they have no obligation to adopt the conclusions or recommendations of the IEEs they have agreed to provide and for which they have agreed to pay. Indeed, if a dispute was to arise concerning a district's consideration of an IEE conducted by IU personnel, a district could find itself in an awkward if not adversarial position with regard to the IU employee.

The IDEA is silent with respect to the question of whether evaluators conducting IEEs at public expense must be neutral or objective. From the IDEA's definition of an independent evaluation, the primary consideration is that the evaluator is independent of the school district. If a district has a rational basis to conclude that IEE conclusions and recommendations are not objective and are not grounded in sound theory and data, the district can take this into account when it considers the evaluation as it is required to do under the law. Furthermore, if a district's IEE consideration is challenged in a due process hearing or a court of law, the factfinder will be able to make a ruling as to the appropriateness of the IEE and the amount of weight to attach to its findings. Federal Rules of Evidence support this point. Under Federal Rule of Evidence 702, experts must base their testimony on sufficient facts or data, their testimony must be the product of reliable principles and methods and they must reliably apply the principles and methods to the facts of the case. To the extent that experts stray from these requirements, their testimony is of lesser weight.

In Pennsylvania, when a licensed psychologist conducts an IEE at public expense, especially with the knowledge that it is reasonably likely the IEE will be used in a due process hearing to assist in the determination of a child's FAPE entitlement, the law may provide a mechanism to hold licensed psychologists to standards of fairness, impartiality and absence of bias. In Pennsylvania, the practice of psychology and the title "psychologist" are regulated by the Professional Psychologist Practice Act. 63 P.S. §§1201-1218. (Practice Act). The Practice Act authorizes the Pennsylvania State Board of Psychology to promulgate rules and regulations, including a code of ethics. 49 Pa. Code §41.61. At section 41.61(3)(e) the Pennsylvania ethics code states *inter alia*, "psychologists act in accord with American Psychological Association standards and guidelines related to practice." The Practice Act does not require licensed Pennsylvania psychologists to

SOUTHEAST REGION OFFICE

331 East Butler Avenue, New Britain, PA 18901
PHONE 215 345 9111 | FAX 215 348 1147

CENTRAL REGION OFFICE

P.O. Box 956, Hershey, PA 17033
PHONE 717 641 9025 | FAX 717 641 9026

NORTHEAST REGION OFFICE

2 South Main Street, Suite 303, Pittston, PA 18640
PHONE 570 654 2210 | FAX 570 655 1875

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be members of the American Psychological Association (APA), only that they “act in accord with” the APA’s “standards and guidelines.” For its part, as of 2017, the APA has promulgated sixteen practice guidelines. <http://www.apa.org/about/policy/approved-guidelines.aspx> Pennsylvania’s Commonwealth Court has held that licensed psychologists in Pennsylvania must adhere to APA practice guidelines as a matter of law. *Grossman v. State Board of Psychology*, 825 A.2d 748 (Pa. Cmwlth. 2003). One set of APA guidelines is Specialty Guidelines for Forensic Psychology. <http://www.apa.org/practice/guidelines/forensic-psychology.aspx> These guidelines make it clear that they apply to all psychologists and not just those who consider themselves to be forensic psychology specialists.

For the purposes of these Guidelines, forensic psychology refers to professional practice by any psychologist working within any subdiscipline of psychology...when applying the scientific, technical, or specialized knowledge of psychology to the law to assist in addressing legal, contractual, and administrative matters. Application of these Guidelines does not depend on the practitioner’s typical areas of practice or expertise, but rather, on the service provided in the case at hand...These Guidelines apply in all matters in which psychologists provide expertise to judicial, administrative, and educational systems including, but not limited to, examining or treating persons in anticipation of or subsequent to legal, contractual, or administrative proceedings; offering expert opinion about psychological issues...offering expertise to attorneys, the courts, or others...Such professional conduct is considered forensic from the time the practitioner reasonably expects to, agrees to, or is legally mandated to provide expertise on an explicitly psychological issue.

It is clear that the forensic psychology guidelines apply to licensed Pennsylvania psychologists who conduct IEEs for school districts, particularly when the licensed psychologist can reasonably be expected to be offering an expert opinion in a legal context. Guideline 1.02 of the forensic psychology guidelines requires impartiality and fairness. “When offering expert opinion to be relied upon by a decision maker...practitioners strive for accuracy, impartiality, fairness, and independence. Forensic practitioners recognize the adversarial nature of the legal system and strive to treat all participants and weigh all data, opinions, and rival hypotheses impartially.” If there is evidence licensed psychologist IEE evaluators have not weighed all data, opinions and rival hypotheses impartially, then it can be argued that such IEE evaluators have not adhered to professional standards and their opinions, findings and recommendations should be disregarded or given little weight .

Clients who have questions regarding issues discussed in this article, or any education law matter, should feel free to call us at 215-345-9111.

SOUTHEAST REGION OFFICE

331 East Butler Avenue, New Britain, PA 18901
PHONE 215 345 9111 | FAX 215 348 1147

CENTRAL REGION OFFICE

P.O. Box 956, Hershey, PA 17033
PHONE 717 641 9025 | FAX 717 641 9026

NORTHEAST REGION OFFICE

2 South Main Street, Suite 303, Pittston, PA 18640
PHONE 570 654 2210 | FAX 570 655 1875