
Legally Defensible Assessments

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Evaluations are the foundation on which an IEP is based.



Top 5 Potential Pitfalls

1. Failure to assess
("child find" violation)

2. Failure to conduct
sufficiently
comprehensive
evaluation

3. Inadequate written
reports

4. Allowing parents to
place
restrictions/conditions
on evaluation

5. Failure to pursue
reevaluation over
parent's objection in
timely manner

“Child Find” Under IDEA

Affirmative, ongoing obligation to identify, locate, and evaluate all children with disabilities that either:

Have disabilities and need special education as a result of those disabilities; or

Are suspected of having, disabilities and need special education as a result of those disabilities.

Parent is not required to request that a school assess the child.

LEAs cannot take a passive approach and wait for others to refer a student for special education services — rather; the school must seek out IDEA-eligible students.

“Child Find” Under IDEA

Failure to identify may entitle a student to compensatory education or tuition reimbursement accruing from the time the LEA first should have suspected the disability.

Role of General Education Teachers in Child Find

Some teachers may:

Tell parents that they should take the child to the doctor if they have a concern; or

After learning from a parent about a student's diagnosis, take it upon themselves to provide informal accommodations without referring the student for an evaluation.

Role of General Education Teachers in Child Find

If a teacher suspects a student may have a disability and is in need of special education:

Discuss with school psychologist, counselors who are skilled in evaluating these conditions.

Teacher can describe observations of student

Note: Discipline referrals are not always the best screener for finding students with internalizing behaviors (e.g., depression/anxiety)

Child Find Triggers

Reasons parents provide for choosing charter school or a particular program (including virtual schools and/or independent study) may put school on notice of suspected disability.

Anxiety

School phobia

School refusal

Child Find Triggers

Excessive absenteeism by itself is not a per se basis for suspecting the child has a disability.

A district's child find obligations may be triggered where:

- There are significant absences

- There is reason to believe the absences are linked to a disability, and

- There is a need for services.

Where truancy is the result of social maladjustment, family or social circumstances, unlikely that district has a duty to refer to student for an evaluation.

New Guidance Re: Return To School Roadmap: Child Find Under IDEA (121 LRP 29378, OSERS August 24, 2021)

- LEAs should review current child find policies to ensure they remain effective in light of the impact of the pandemic on students.
- Reconsider policies that rely heavily on teachers' personal observations of students and expand the scope of activities to increase public awareness of pandemic effect on student's academic, behavioral, social-emotional, and mental health needs.
- Example, LEAs may need to increase the number of screenings conducted for children with academic and behavioral challenges.

New Guidance Re: Impact of “Long COVID”

U.S. Dept of Education released guidance on **Long COVID Under Section 504 and the IDEA** (July 26, 2021)

Ongoing symptoms that characterize "long COVID-19," such as difficulty concentrating, mood changes, and difficulty breathing, may trigger child find obligations under the IDEA or Section 504.

Long COVID-19, according to the CDC, is a wide range of new, returning, or ongoing health problems individuals can experience more than four weeks after being infected. Can result in a combination of various symptoms, including fatigue, difficulty thinking or concentrating, shortness of breath, mood changes, sleep problems, and chest or stomach pain.

New Guidance Re: Impact of “Long COVID”

Example:

IEP Team could determine that a child meets definition of Other Health Impairment under IDEA due to difficulty concentrating and anxiety symptoms related to long COVID and may need special education and related services to improve academic engagement, counseling services, and positive behavior interventions and supports to promote on-task behaviors and responses to stress triggers.

Evaluation Components

Review records

Developmental History

Observations, such as:

- in academic activities
- during PE
- during lunch/break time, etc.

Interviews, such as:

- student
- school staff
- parents
- health care providers, etc (exchange information)

Administer tests & rating forms

Evaluations and Information Provided by Parents



Consider relevant information from Student's private providers.



Consider whether school needs to seek parent's permission to exchange information with private providers.

Case Example: San Jose Unified School District (OAH No. 2020090906, Feb. 25, 2021)

- District violated IDEA by conducting an FBA with an 11 year old boy with autism without obtaining information from the parent or addressing the parent's specific behavioral concerns.
- Special education director assumed the father had no desire to speak to BCBA conducting assessment because parent emailed superintendent to express concerns about a voicemail the BCBA. Superintendent instructed BCBA to not follow up with parent. Had the district explained the BCBA's role to the parent and arranged for follow up communication, district might have obtained parent's input on student's behavior.
- Ordered to fund an independent FBA and pay for up to 3 hours of evaluator's attendance at IEP meeting.

Rating Forms – Cautions and Limitations

- Do not rely solely upon rating forms.
- They do not directly measure student functioning...they measure someone's opinion of student behavior.
- Some are too specific, some are too broad.
- Teachers may be unwilling or too busy to be sufficiently careful.

Rating Forms – Cautions and Limitations

- Teachers & parents may exaggerate concerns in effort to obtain help.
- Student may be unwilling to acknowledge problems.
- Student may have distorted perceptions.

All Areas of Suspected Disability

LEAs must assess a student in all areas of suspected disability including, *if appropriate*:

Health and development, vision, hearing, language function, social and emotional status, general intelligence, academic performance, communicative status, motor abilities, self-help, orientation and mobility skills, and career and vocational abilities and interests.

34 CFR 300.304 (c)(4), Ed. Code § 56320

Remember, the threshold for suspected disabilities is *extremely low*.

Challenging Assessments

Failure to assess in all areas of suspected disability typically fall into one of three categories:

Failing to assess altogether

Assessing in some areas, not others

Inadequate assessments

- Failure to follow testing protocols
- Not assessing pupil in primary language
- Not having appropriate persons complete rating scales
- Outdated assessments
- Relying on a single assessment
- Unqualified assessor

Sufficiently Comprehensive Evaluation

The evaluation must be sufficiently comprehensive to identify all of the child's needs for special education and related services whether or not commonly linked to the disability category in which the child has been classified.

34 C.F.R. § 300.304(c)(6).

Sufficiently Comprehensive Evaluation

Letter to Carroll, 116 LRP 46076 (OSEP 10/22/16).



Once a parent requests an IEE, an LEA must either defend its evaluation in a due process hearing or fund an IEE.



There is no third option that allows the LEA to simply conduct the missing assessments.



A parent may seek a publicly funded IEE in the same field assessed by the LEA, if a particular area within that field was not appropriately included in the LEA's assessment. When the LEA refuses to initiate an assessment on request, the parent's recourse is to file for due process, as a result of which the parent may be awarded an independent assessment as a remedy.

Sufficiently Comprehensive Evaluation



Have a multidisciplinary team to draft the assessment plan – not just the case manager or school psychologist.



Be sure to obtain parental input prior to evaluating and develop a sufficiently comprehensive assessment plan.



Correcting flaws after the fact may be an appropriate step, but it won't necessarily relieve the district of its obligation to fund an IEE.



Send legally compliant prior written notice if LEA is going to decline a parent's request for an assessment.

Case Example: E.C. v. Fullerton School District (79 IDELR 17, April 30, 2021)

- District denied FAPE by not allowing a child's pediatric neurologist to observe student in class until after it developed the IEP.
- CA Education Code requires a district to allow an independent evaluator to observe a student with a disability in his current or proposed educational placement if it lets its own evaluators conduct observations.
- Ordered the District to reimburse the parents for the child's unilateral placement.

Input Data

As part of an evaluation, the IEP Team and other qualified professionals, as appropriate, must review existing evaluation data on the child, including:

- Evaluations and information provided by the parents of the child

- Current classroom-based, local, or State assessments, and classroom-based observations

- Observations by teachers and related services provider

34 C.F.R § 300.305(a)(1).

Importance of In-School Observations

LEAs must observe a child in the child's learning environment (including the regular classroom setting) to document the child's academic performance and behavior in the areas of difficulty.

34 C.F.R. § 300.310(a).

Failure to observe students in school setting is one of the main reasons evaluator's testimony is discredited.

If student is absent, come back another time!

Does a School Have Any “Rights” Under the IDEA?



Yes!



The right to:

Select the people who will conduct the evaluations.

Determine how the evaluation process will work, deferring to professional judgment of the evaluators.

Use the evaluation as evidence to defend the quality of its services, not just for the development of the IEP.

Parents Have Rights Too, But May Not Dictate Conditions for an Evaluation

Parents have the right to information about the types of assessments a local educational agency plans to conduct.

Parents may not dictate the terms or set conditions for an evaluation for special education purposes.

Parents Have Rights Too, But May Not Dictate Conditions for an Evaluation

Parents may attempt to include additional conditions with their written consent. Some examples are:

- Parents must be present during the testing

- Parents must approve each of the testing instruments to be used

- The evaluator must discuss the evaluation results with the parents before sharing the results with the IEP team,

- The evaluation cannot be used in litigation with the parents

- Parents would determine who would conduct the evaluation.

Generally, such conditions are considered an effective **denial of consent**. As a result, the school is not required to proceed with the evaluation subject to those conditions.

The Written Report

A written report is required, as appropriate, of the results of each assessment administered. (Ed. Code § 56327)

Written reports must address:

Whether the pupil may need special education and related services

The basis for making the determination

The relevant behavior noted during the observation of the pupil in an appropriate setting

The relationship of that behavior to the pupil's academic and social functioning

The Written Report

Written reports must address (cont.):

Educationally relevant health and development and medical findings, if any

For students with learning disabilities, whether there is such a discrepancy between achievement and ability that it cannot be corrected without special education and related services

A statement concerning the effects of environmental, cultural, or economic disadvantage, if appropriate

The need for specialized services, materials, and equipment for pupils with low incidence disabilities
[Education Code section 56327.]

Eligibility Statements

This is where all of the prior information (records review, interviews, observations, previous testing, and current testing) all come together concluding in your determination on eligibility.

This information **MUST** be compared to the legal requirements for the suspected area of disability.

You **MUST** address **ALL AREAS OF SUSPECTED DISABILITY**, whether they qualify or not under that eligibility category.

This demonstrates that all areas were at least considered.

You **MUST** make a recommendation on eligibility.

What do we take away from this?

Connect the dots in your report. Correlate the assessment data, interview information, and observational data to the legal requirements.

Discuss adverse scores, observations, interview information that goes against your ultimate conclusion. Why is it not determinative?

Make a recommendation regarding eligibility. **YOU** are the **EXPERT!**

“Based on the foregoing, Johnny meets the eligibility requirements for a Specific Learning Disability; however, final determination on eligibility is an IEP team decision”

Suggested Formula for Eligibility Statement

I. R. A. C.

I: Issue Statement

What is the area of suspected disability?

R: Rule

State the legal standard for eligibility

A: Analysis

This is where the rubber meets the road...compare the legal standard to the data (interviews, observations, testing, etc.).

C: Conclusion

Does the student meet eligibility under that definition?

Summary and Recommendations

Arguably, the most important part of an assessment report.

Unfortunately, here's where many reports fall short.

Qualified assessors with appropriate educational background and experience should produce well-founded recommendations, especially instructional recommendations.

Need to make the report relevant for educational programming.

Summary and Recommendations

Assessment data do not automatically yield specific educational recommendations.

Skilled assessors *interpret* the data and make research-based recommendations.

We've answered the questions about “why isn't the student learning” or “why does the student behave that way”, and “what is the appropriate disability category?”

Now it's time to answer “**So what do we do now?**”

Summary and Recommendations

A succinct summary of the most relevant background and assessment information.

Provide **specific** instructional recommendations.

Identify potential barriers in the curriculum

How should the content, methodology, and/or delivery of instruction should be adapted so the student continues to have access to the curriculum?

RECOMMENDATIONS:

1. Findings from this assessment suggest that K. continues to meet eligibility for special education under the categories of Emotionally Disturbed and Other Health Impaired. As a result, goals should be written to address the following areas of need:
 - Basic reading skills (i.e., reading comprehension, reading fluency)
 - Written language
 - Math calculation skills (i.e., single/double digit addition, subtraction, multiplication, division)
 - Spelling
 - On-task behavior
 - Coping strategies

2. will benefit from minimizing her environmental distractions, consistently arriving at school well rested and well nourished. A badly nourished and unfocused brain also wastes time due to poor attention during classes and ineffective hours spent studying.

3. Repetition and practice should be incorporated into all of 's academic classes so as to improve the likelihood that she will retain new information presented. Flash cards and pairing contextually relevant information to new ideas are good examples of techniques, which help improve overall memory skills. Additionally, memory retrieval techniques such as clumping similar items together, mnemonics, repeating in the same order, etc., are other ways she can improve her overall retention when learning new materials. (See attached worksheets)

4. Seat K. in close proximity to the teacher's place of instruction so that redirection can be quick and prompt when is off task. Additionally, use a visual cue that only the teacher and know about to get her back onto task without stopping the forward progression of the class (i.e., 1,2,3 Magic; tapping her desk; or another hand signal).

5. To help be successful in her general education classes, the IEP team should consider the following accommodations:
 - Ability to take tests and quizzes in a small, quiet environment.
 - Due to her struggles with attention, K. should be provided with copies of Power Points, when available, so as to supplement the notes she takes.
 - In general education classes, K. should be provided 2 minutes for every one minute provided to typical peers for all in-class reading, writing, and math related tasks.

Additional Recommendations

The following list of strategies are not required for ██████ to gain educational benefit but rather are presented as a useful set of ideas that could be incorporated at school or in the home.

9. It is recommended that ██████'s parents consider consulting with ██████'s physicians in an effort to implement a regular bedtime and wakeup routine. For example, it might be helpful to gather information on how many hours each night would be optimal for ██████.
10. In an effort to branch out and meet new individuals, it is recommended that ██████ and her parents consider getting her involved in a school club or some type of community activity which pairs her love of drawing, or another preferred activity, with meeting new people.

Other Potential Pitfalls

- Embarrassing or substantive typos.
- Can impact credibility of report/assessor.
- Substantive errors, like incorrect test scores, can call the entire assessment report into question.

“The District’s assessor’s scoring errors raised questions about the integrity and validity of the assessment as a whole.”

Anaheim City Sch. Dist. v. Student (OAH NO. 2010010357)

To Authorize Reevaluation Over Parent's Objection

The law differentiates between an **initial** evaluation and a **reevaluation** (such as a “triennial”).

And for reevaluations, the law also differentiates between a parent's **refusal** to consent and **failure to respond**.

To Authorize Reevaluation Over Parent's Objection

Initial Evaluations

If a parent of a child enrolled in public school does not consent to an initial evaluation or fails to respond to the request for consent, the decision whether to use applicable consent override procedures is optional on the part of the LEA.

These consent override procedures refer to the procedural safeguards (including mediation or due process procedures).

The LEA does not violate its obligation to identify, locate, and evaluate a child suspected of having a disability and needing special education and related services if it declines to pursue an initial evaluation using consent override procedures.

34 CFR §300.300(a)(3)(i)

To Authorize Reevaluation Over Parent's Objection

Reevaluations – Failure to Respond

An LEA may conduct a reevaluation of a child with a disability without using the consent override procedures if:

The LEA can demonstrate that it made reasonable efforts to obtain parental consent for the reevaluation, and
The child's parent has failed to respond to the request for consent.

In order to meet the reasonable efforts requirement, the LEA must document its attempts to obtain parental consent including detailed records of telephone calls made or attempted and the results of those calls, copies of correspondence sent to the parents and any responses received, and detailed records of visits made to the parent's home or place of employment and the results of those visits. [SEP]

34 CFR §300.300(c)(2),

To Authorize Reevaluation Over Parent's Objection

Reevaluations – Refusal to Consent

If a parent refuses to consent to a reevaluation, but requests that the LEA continue the provision of special education and related services to their child, the LEA has the following options:

The LEA and the parent may agree that the reevaluation is unnecessary; or

If the LEA believes that the reevaluation is necessary, and the parent refuses to consent to the reevaluation, the LEA may, but is not required to, pursue the reevaluation by using the consent override procedures (mediation/due process).

The LEA is still required to provide the Student FAPE.

What's Required?

To proceed with a reassessment over a parent's objection, a school district must demonstrate at a due process hearing that:

The parent has been provided an appropriate written reassessment plan to which the parent has not consented, and

The student's triennial reassessment is due, that conditions warrant reassessment, or that the student's parent or teacher has requested reevaluation.

Ed. Code § 56381(a).

What's Required?

The required notice of assessment consists of the proposed assessment plan, and a copy of parental procedural rights under the IDEA and related state laws.

Ed. Code § 56321(a).

The assessment plan must be in a language easily understood by the public and the native language of the student; explain the types of assessments to be conducted; and notify parents that no IEP will result from the assessment without the consent of the parent.

Ed. Code § 56321(b)(1)-(4); see also 34 C.F.R. § 300.9(a).

The district must give the parent at least 15 days to review, sign, and return the proposed assessment plan.

Ed. Code § 56321(a).



ANY
QUESTIONS
?

THANK YOU!

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