



TO: AEA Directors of Special Education; DE Special Education Staff
FR: Thomas A. Mayes
DA: September 26, 2013
RE: Independent Educational Evaluations

The Iowa Department of Education has received several requests for information about independent educational evaluations (IEEs) under the Individuals with Disabilities Education Act (IDEA). The administrative rule governing IEEs (Iowa Admin. Code r. 281 – 41.502) are reproduced in full at the end of this document. IEEs are an important procedural safeguard for parents under the IDEA, and area education agencies and local school districts should respond to IEE requests accordingly. This document sets out some general principals and frequently asked questions about IEEs. If you have any questions, please contact me at thomas.mayes@iowa.gov or 515-242-5614.

General

An IEE is defined 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.” Iowa Admin. Code r. 281 – 41.502(1)“c”(1).

A parent may obtain an IEE at any time at the parent’s own expense. A parent may request an IEE at public expense if the parent disagrees with the evaluation completed by the public agencies. If the parent requests an IEE at public expense, the public agencies shall, without unnecessary delay, either (1) provide the IEE at public expense, or (2) file a due process complaint and prove that the public agencies’ evaluation was appropriate.

Results of an IEE for the child obtained at public expense shall be considered by public agencies, if the IEE meets agency criteria, in any decision regarding that child’s free appropriate public education, and may be used in any due process hearing concerning the child. A child’s IEE obtained at parent expense and shared with the public agencies shall likewise be considered by the public agencies in any decision regarding a FAPE and may be used in any due process hearing concerning the child.

Each AEA shall establish policies and procedures for IEEs. Each AEA may establish its own criteria, tailored to local conditions and resources.

Frequently Asked Questions

Q 1: When may the parent request an IEE at public expense?

A 1: A parent may request one IEE at public expense when the parent disagrees with the public agencies' evaluation. This would mean that the public agencies' evaluation must be complete before the agency is required to consider providing an IEE at public expense. *Letter to Zirkel, 52 IDELR 77 (OSEP 2008)* (no entitlement to IEE until evaluation is complete).

Q 2: May a parent request an IEE when the parent disagrees with data developed during the Response to Intervention (RTI) process or disagrees with Iowa Assessment test results?

A 2: No. The IEE process is available only when a special education evaluation has been completed. If the evaluation or assessment is not a special education evaluation or assessment, the IEE process is not available at public expense. *See generally Letter to Zirkel, 52 IDELR 77.*

Q 3: May a parent request an IEE at public expense when the public agencies use RTI data as part of a special education evaluation?

A 3: Yes.

Q 4: May a parent request an IEE at public expense when the public agencies conclude they will not do a special education evaluation because they do not suspect a child has a disability?

A 4: No. A decision that a district does not suspect a child has a disability is not an evaluation. If a parent disagrees with the decision that the parent's child is not suspected of having a disability, the parent may use the IDEA's procedural safeguards. *Letter to Zirkel, 52 IDELR 77.*

Q 5: May a parent request an IEE at public expense if the parent disagrees with the results of a functional behavioral assessment (FBA)?

Q 5: Yes, if the FBA is an "evaluation" under the IDEA. *See Letter to Sarzynski, 49 IDELR 228 (OSEP 2007).*

Q 6: May a parent withhold consent for an evaluation and demand an IEE?

A 6: No. A parent is entitled to an IEE only after the public agencies' evaluation is completed.

Q 7: May a parent demand that an IEE be used in lieu of the public agency's evaluation?

A 7: No.

Q 8: May a parent have a second IEE if they disagree with the IEE obtained at public expense?

A 8: No. *See, e.g.,* Iowa Admin. Code r. 281 – 41.502(2)“e”; *Letter to Thorne*, 16 IDELR 606 (OSEP 1990).

Q 9: What information must public agencies provide to parents upon request for an IEE?

A 9: The public agencies must tell parents (1) the location where IEEs may be obtained, and (2) the agencies’ criteria applicable to IEEs. *See* Iowa Admin. Code r. 281 – 41.502(5).

Q 10: What are the criteria applicable to IEEs?

A 10: AEAs may set the criteria applicable to IEEs, including location of the IEE and the qualifications of the examiner. Those criteria must not frustrate the parent’s right to obtain an IEE. AEAs may not impose other conditions or criteria.

Q 11: What are examples of criteria that are not permissible?

A 11: The United States Department of Education has disapproved of criteria that required independent evaluators from being free from any association with private schools or advocacy groups or that required independent evaluators to have “recent and extensive experience in the public schools.” *Letter to Petska*, 35 IDELR 191 (OSEP 2001). Other examples of inappropriate criteria are:

- restrictions on use of age or grade level scores in IEE reports, *see Letter to LoDolce*, 50 IDELR 2007;
- restrictions on evaluators who have testified on behalf of parents at due process hearings, *see Letter to Petska*, 35 IDELR 191; and
- licensure requirements for independent evaluators that are higher or different than those for public agency evaluators, *see* 34 C.F.R. § 300.502(e)(1).

Q 12: Who selects the independent evaluator?

A 12: The parent.

Q 13: May an AEA require the parents to select from a list of preferred evaluators?

Q 13: Yes. *Letter to Anonymous*, 56 IDELR 175 (OSEP 2010). If an AEA maintains such a list, it must have a procedure to allow parents to show why special circumstances justify using an evaluator not on the list. *Id.* If it disagrees with the parent’s requested evaluator, it must file a due process complaint to

demonstrate the proposed evaluation would not meet agency criteria and no exception is required.

Q 14: May an AEA have a cost limit for IEEs?

Q 14: Yes, an AEA may impose reasonable cost limits for IEEs, but it must allow the parent the opportunity to justify conducting an evaluation that exceeds the AEA's cost limit. *Letter to Thorne*, 16 IDELR 606. If the parents and AEA disagree on the cost of the IEE, the AEA must file a due process complaint and demonstrate the parent's IEE did not meet agency criteria and no exception is required. *Letter to Petska*, 35 IDELR 191. If the IEE exceeds AEA's cost limit without justification, the AEA must pay for the IEE up to the cost limit. *Letter to Thorne*, 16 IDELR 606.

Q 15: May an AEA have a geographic restriction for IEEs?

Q 15: Yes, an AEA may impose reasonable geographic limits on independent evaluators, Iowa Admin. Code r. 281 – 41.502(5), but must allow parents the opportunity to justify obtaining an IEE from outside the geographic area. *Letter to Anonymous*, 56 IDELR 175.

Q 16: In items 13 through 15, the answers refer to “reasonable” limits. What does “reasonable” mean?

A 16: The word reasonable, as in any place in law or policy where it is used, is dependent on the facts of each case. In this context, what is “reasonable” is that which a prudent, detached educator would consider acceptable in light of the circumstances.

Q 17: May an AEA have a list of criteria that result in only one independent evaluator being available to the parent?

A 17: No.

Q 18: May an AEA impose limits on who may conduct the IEE and how much may be charged if the AEA's IEE criteria do not contain such limits?

A 18: No. Iowa Admin. Code r. 281 – 41.502(5).

Q 19: May an AEA require a parent to prepay for the IEE and then reimburse the parent?

A 19: An AEA may permissibly have, as part of its IEE criteria, a requirement that IEEs will be funded on a reimbursement basis, unless the application of that criterion would deprive the parent of a right to an IEE. *Letter to Heldman*, 20 IDELR 621 (OSEP 1993).

Q 20: May an AEA require a parent to use private insurance coverage or public insurance benefits to defray the cost of an IEE?

A 20: No. An AEA may ask a parent to provide access to public or private health insurance, but cannot compel the parent to use it to fund an IEE.

Q 21: Must an AEA reimburse a parent's travel costs in obtaining a publicly funded IEE?

A 21: Yes. *Letter to Heldman*, 20 IDELR 621 (travel expenses, including meals and lodging). This is because IEEs at public expense must be "at no cost" to the parent, *see* Iowa Admin. Code r. 281 – 41.502(1)"c"(2), even if the parent could otherwise afford the expense, *see Letter to Heldman*, 20 IDELR 621.

Q 22: How long does an AEA have to respond to a parent request for an IEE at public expense?

A 22: The AEA must provide the AEA at public expense or file a due process complaint to defend its evaluation "without unnecessary delay." Iowa Admin. Code r. 281 – 41.502(2)"b". Some delay is allowed, to allow the AEA to thoughtfully consider its options; however, at some point the AEA must make a decision. A delay measured in weeks or months is more likely to be found "unnecessary." *See, e.g., Perry A. Zirkel, Independent Educational Evaluations at District Expense Under the Individuals with Disabilities Education Act*, 38 J.L & Educ. 223, 233-35 (2009).

Q 23: What happens if an AEA does not respond to a parent's request for an IEE at public expense?

A 23: Under precedent from the United States Court of Appeals for the Eighth Circuit, the IEE must be provided. *Evans v. District No. 17*, 841 F.3d 824, 830 (8th Cir. 1988). In other words, an AEA waives its rights under rule 41.502 to contest providing the IEE at public expense if it ignores a parent's request for an IEE at public expense.

Q 24: How long after an evaluation may a parent request an IEE at public expense?

A 24: Again, this depends on the facts of each case. The United States Department of Education has indicated a public agency may deny public funding of an IEE, and need not request a due process hearing, if the IEE is requested over two years after the questioned public evaluation. *Letter to Thorne*, 16 IDELR 606. Please note that this roughly aligns with the two-year period under the 2004 IDEA amendments to file a due process complaint. *See generally* 20 U.S.C. § 1415(f)(3)(C)-(D).

Q 25: May an AEA require a parent to state why the parent disagrees with the public agencies' evaluation?

A 25: No. An AEA may ask the parent to explain the parent's disagreement with the evaluation, but the AEA "may not require a parent to provide an explanation." Iowa Admin. Code r. 281 – 41.502(2)"d".

Q 26: May an AEA require the parent to provide advance notice of an intent to request an IEE?

A 26: No. *Letter to Thorne*, 16 IDELR 606. This means that a parent may permissibly request AEA reimbursement for an evaluation that has already been performed, assuming the evaluation meets AEA criteria.

Q 27: When a parent obtains an IEE at public expense, or provides the results of a privately obtained IEE, what must the public agencies do with it?

A 27: The public agencies must "consider" the IEE results, *see* Iowa Admin. Code r. 281 – 41.502(3)"a"; however, nothing in the IDEA binds the public agencies to uncritically accept, adopt, or "incorporate" the IEE results or recommendations, *see, e.g., K.E. v. Independent Sch. Dist.*, 647 F.3d 795 (8th Cir. 2011).

Q 28: What happens if the parent will not consent to providing the full report or results of a publicly funded IEE to the AEA?

A 28: The public agencies are required to consider the results of any publicly funded IEE. Therefore, the AEA may permissibly condition its payment to the provider or its reimbursement to the parent on receipt of the IEE results. *See, e.g., Letter to Anonymous*, 55 IDELR 106 (OSEP 2010).

Q 29: May an administrative law judge request or order an IEE as part of a due process hearing?

A 29: Yes. Iowa Admin. Code r. 281 – 41.502(4).

Q 30: May IEE results or reports be used in due process hearings?

A 30: Yes. Publicly funded IEEs and parent funded IEEs shared by the parent may be used in due process hearing. Iowa Admin. Code r. 281 – 41.502(3)"b".

Q 31: What happens if a parent obtains an IEE at private expense, does not share it with the public agencies, and then wants to introduce it in a due process hearing? May the parent do that?

A 31: If the parent wants to use the results of an IEE obtained at the parent's expense in a due process hearing, it must provide the results to the public agencies at least five business days before the hearing. If the parent does not do

so, the public agencies may prohibit introduction of those results at the hearing. Iowa Admin. Code r. 281 – 41.512.

Q 32: May an AEA establish a policy requiring a parent to submit IEE reports to the public agencies in advance of an IEP meeting to discuss the IEE?

A 32: Yes. In *Letter to Anonymous*, 58 IDELR 19 (OSEP 2011), the United States Department of Education concluded a local policy requiring parents to provide IEEs results ten days before an IEP meeting was consistent with the IDEA. *Letter to Anonymous* contains the following analysis:

We believe it would be reasonable for a public agency to establish criteria, including a requirement that it receive the entire evaluation report and not just the scaled scores by a certain time, to give the public agency the opportunity to review the report prior to scheduling an IEP Team meeting to discuss that evaluation.

The letter also contains the requirement that the timeline “be provided to parents in advance or otherwise made available publicly so that individuals seeking an independent educational evaluation are fully informed.”

Q 33: Must the public agencies permit the independent evaluator to observe the child in the classroom or other setting?

A 33: While the IDEA does not specifically address this issue, the United States Department of Education issued the following guidance:

If a public agency observed a child in conducting its evaluation, or if its assessment procedures make it permissible to have in-class observation of a child, the independent evaluator has the right to do so. If the agency's procedures do not allow for classroom observation of the child, but the parent believes that an observation is necessary for the assessment, the parent, in lieu of seeking an IEE, could request a hearing ...to challenge the agency's evaluation on the basis that it did not include classroom observation of the child.

Letter to Wessels, 16 IDELR 735 (OSEP 1990) (citation omitted).

Q 34: Some AEAs have a “second opinion” procedure? Is that the same as an IEE?

A 34: The “second opinion” procedure, to be considered an IEE, must meet each of the requirements of rule 41.502. A parent may not be forced to use the second opinion procedure in lieu of an IEE.

281—41.502 (256B,34CFR300) Independent educational evaluation.

41.502(1) General.

a. The parents of a child with a disability have the right to obtain an independent educational evaluation of the child, subject to subrules 41.502(2) to 41.502(5).

b. Each public agency must provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained and the agency criteria applicable for independent educational evaluations as set forth in subrule 41.502(5).

c. For the purposes of this division:

(1) “Independent educational evaluation” means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question; and

(2) “Public expense” means that the AEA either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent.

41.502(2) Parent right to evaluation at public expense.

a. A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the AEA, subject to the conditions in 41.502(2) “*b*” to “*d*.”

b. If a parent requests an independent educational evaluation at public expense, the AEA must, without unnecessary delay, either:

(1) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(2) Ensure that an independent educational evaluation is provided at public expense, unless the AEA demonstrates in a hearing pursuant to these rules that the evaluation obtained by the parent did not meet agency criteria.

c. If the AEA files a due process complaint notice to request a hearing and the final decision is that the AEA’s evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

d. If a parent requests an independent educational evaluation, the AEA may ask for the parent’s reason why the parent objects to the public evaluation. However, the AEA may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.

e. A parent is entitled to only one independent educational evaluation at public expense each time a public agency conducts an evaluation with which the parent disagrees.

41.502(3) Parent-initiated evaluations. If the parent obtains an independent educational evaluation at public expense or shares with a public agency an evaluation obtained at private expense, the results of the evaluation:

a. 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; and

b. May be presented by any party as evidence at a hearing on a due process complaint under this chapter regarding that child.

41.502(4) Requests for evaluations by administrative law judges. If an administrative law judge requests an independent educational evaluation as part of a hearing on a due process complaint, the cost of the evaluation must be at public expense.

41.502(5) Agency criteria.

a. If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent’s right to an independent educational evaluation.

b. Except for the criteria described in 41.502(5) “*a*,” a public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

c. Each AEA shall establish policy and procedures for implementing this rule.