

RIGHTS OF MASSACHUSETTS YOUTH REGARDING SPECIAL EDUCATION EVALUATIONS

**Prepared by the Mental Health Legal Advisors Committee*
April 2015**

What happens during the assessment and evaluation process?

Parents should be actively involved in the process through which a child is evaluated for the need for special education services. Evaluations should assess a child in all areas of his suspected disability and be based on the child's needs. The child should be evaluated in multiple ways. Evaluations should consist of formal and informal assessments, as well as information provided by parents, observation, samples of the child's work, an interview with the child about his abilities, and a full review of the child's record. If a specific learning disability is suspected, evaluators must take further steps. At least one member of the IEP team must observe the child's classroom academic performance.

Evaluations

may include looking at how your child communicates and understands language, your child's educational development, and how your child thinks, behaves, and adapts to changes. Evaluations may look at your child's health, vision, hearing, social and emotional well being, performance in school, how your child uses his/her body, and for older students, what job-related and other post-school interests and abilities your child has.¹

"Understanding Assessment in the Special Education Process" by Joseph Moldover, Psy.D. features a list of specific tests that may be used in evaluations.²

How can I initiate an educational evaluation process for my child?

Any parent, teacher, other school professional who is concerned about a student's performance in school can formally request an initial educational evaluation for special education eligibility.³ A student may also be referred by any other person in a caregiving or professional position concerned with the student's development.⁴

Many school districts require a letter documenting the request for an educational evaluation. The letter should be brief, should include the date and the sender's contact information, and should convey a collaborative tone. It may include brief mention of areas of concern.⁵ For a sample letter, see Mass. General Hospital's web site on Educational Evaluations, at http://www2.massgeneral.org/schoolpsychiatry/classroom_evaluation.asp.

* MHLAC acknowledges the substantial contributions of William Crane, Esq. of Mass. Advocates for Children and Ellen Saideman, Esq. to this flier.

Once the request for evaluation is received, a school district has five school days to provide written notice to the parents of receipt of referral.⁶ The district must obtain written permission to conduct the evaluation from the parent or guardian in order to proceed,⁷ even if the parent has already submitted a written request for evaluation. Upon consent, the district shall provide or arrange for the evaluation by a multidisciplinary team within 30 school days.⁸

What kind of evaluations should I ask my child's school district to do?

The school district must perform assessments in all areas of the child's suspected disability, in addition to a required educational assessment. The educational assessment should include a history of the student's educational progress in the general curriculum, provided by a knowledgeable teacher. It should also include an assessment of the student's attention skills, participation behaviors, communication skills, memory, and social relations with groups, peers, and adults. Furthermore, the educational assessment should thoroughly evaluate and provide a narrative description of the student's educational and developmental potential. If a child is being evaluated for or is already receiving early intervention services, further educational assessment is needed.⁹

Other optional assessments include a health assessment by a physician to identify medical problems or constraints that may affect the student's education, a psychological assessment, and a home assessment. Depending on the child's disability, occupational, physical therapy, and speech and language assessments may also be useful.

If a student will be out of school for more than 60 days for medical reasons (and this has been verified by the student's physician), the school district should examine the student's evaluation needs and revise or develop the student's IEP according to the new situation.¹⁰

If parents are dissatisfied with the proposed scope of the school district's evaluations, they may request that more extensive testing be done. It may be helpful to connect with a parent advocacy group for guidance on what evaluations a child may need that are specific to his/her suspected disability. There also may be useful information about educational evaluations for children with your child's disability available in books, magazines, and websites.

How long does this process take?

Depending on the number and type of tests required, the student's tolerance for testing, and schedules of the specialists involved, an initial educational evaluation may take several months to complete. (This may complicate efforts to meet stipulated timetables for the evaluation process.)¹¹

What should be the result of the evaluation process?

Evaluators must write an assessment report for each component of the evaluation. Assessment reports should state information regarding the possible presence or absence of a disability. Reports should address the child's needs, possible strategies for the child's teachers, and other relevant recommendations.¹²

What is done with the Educational Evaluation?

The Educational Evaluation should be discussed in a team meeting attended by the student's family, school staff (educators, special educators, school psychologists or social workers), and other participants invited by the family. Based on the evaluation, the team will determine whether the student is eligible for special education, and, if eligible, will determine what special education and related services should be provided.

What are Independent Educational Evaluations?

A parent may disagree with the findings of the school district's evaluation for many reasons. In such a case, the parent may request an independent evaluation known as an Independent Educational Evaluation (IEE).¹³ An IEE is an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.¹⁴

Within ten school working days after receiving an IEE, school districts must consider the evaluation results and determine whether to make changes to a student's IEP.¹⁵

Who pays for IEEs?

The parent may obtain an independent education evaluation at private expense at any time.¹⁶ Such an evaluation may be paid for by the parent or by health insurance. For example, in some cases, MassHealth will pay for certain types of evaluations such as neuropsychiatric evaluations.

There are two different ways parents can get public funding for IEEs. First, Massachusetts law provides that parents who meet certain income levels may get fully or partially funded IEEs; this is the 5(c) IEE.¹⁷ Although parents have no obligation to share financial information with the school district,¹⁸ if their children do not already receive free lunch, they will need to share financial information to obtain a 5(c) IEE.

The school district must fully pay for an IEE for a student whose family's income makes him eligible for free or reduced cost school meals or whose family income is less than 400% of poverty guidelines.¹⁹ Other income-eligible families may pay for an IEE on a sliding fee scale.²⁰ This scale applies between 400% and 600% of poverty.²¹

Second, federal law provides for public funding of IEEs if the parent disagrees with the school's assessment unless the school district demonstrates that its evaluation is both appropriate and comprehensive; this is the 5(d) IEE or federal IEE.²² Parents who choose not to disclose financial information to the school district, are not income-eligible, or are seeking an IEE in an area not previously evaluated by the school district may still be able to get an IEE at no cost under this federal law.²³ Because there are some differences in the rules governing the two types of IEEs, it is important to note that parents who are eligible for 5(c) IEEs may also be entitled to a 5(d) or federal IEE.

School districts thus are required to consider providing an IEE at public expense to any family who requests one, even if the family is unwilling to disclose financial information.²⁴ The school district may decide either to provide the IEE at public expense or to prove, through a hearing before the Bureau of Special Education Appeals (BSEA) hearing, that the school district's evaluation was comprehensive and appropriate and a publicly funded IEE is unnecessary.²⁵

What assessments may be requested as part of the IEE?

The parent may request an IEE in one, more than one, or all the areas assessed by the school district whenever a school district has conducted an assessment. The Massachusetts law providing for fully or partially funded IEEs, 5(c), only applies to assessments that a school district has already completed.²⁶

However, a parent may be entitled to an assessment in an area that was not assessed by the school district under federal law, the 5(d) IEE, if the school district's assessment was either inappropriate or not comprehensive because it did not include that assessment.²⁷

For example, Alberto is a student with autism, and the school already did an occupational therapy assessment, but it did not do an assessment to determine whether he had a sensory processing disorder. If his parents were income eligible for a free IEE under Massachusetts law, they would automatically be eligible for an IEE in the area of occupational therapy based on their income under 5(c). However, under federal law, the 5(d) IEE, they would also be entitled to ask for an IEE in the area of sensory processing disorder, which is typically performed by an occupational therapist. The school district would then be required to either fund the IEE in the area of sensory processing disorder or request a hearing and show that the occupational therapy assessment without the sensory processing order assessment was appropriate and comprehensive for Alberto.

Who conducts IEEs?

IEEs are conducted by providers working independently or working at an agency or hospital. When seeking a provider, it may be helpful to talk to other parents whose children have similar disabilities.

It is important to ensure that any independent evaluator has experience with children who have the disability in question and knowledge of programs or services that may be appropriate.

You should also find out whether the evaluator would be willing to attend the IEP meeting to discuss the evaluation, either in person or by telephone or Skype, and whether, if the matter went to a due process hearing, the evaluator would be willing to testify at the hearing.

The school district must provide parents with state requirements pertaining to IEEs and where to get them.²⁸ Sometimes school district provides a list of evaluators. If your school district provides a list of evaluators, you should contact the evaluators listed to see if they are available to do a timely evaluation for your child and if they have experience with your child's disability.

What rates are paid for these evaluations?

Massachusetts has established two sets of state-established rates for certain IEEs, including educational assessments, psychological assessments, neuropsychological assessments, occupational therapy assessments, physical therapy assessments, and speech and language therapy assessments.

EOHHS rate

EOHHS rates apply to IEEs (and other evaluations that are part of the independent evaluation process) conducted by community-based providers.²⁹ These rates are listed in these three sets of EOHHS regulations:

1. Team Evaluation Services regulations which specifically address the rates for IEEs, at 114.3 CMR 30.00.³⁰ These regulations were last revised in 2008.
2. For certain types of evaluations, rates may also be set using the Psychological Services regulations at 114.3 CMR 29.00.³¹ These were last revised in July 2004.
3. For certain types of evaluations, rates may also be set using the Rehabilitation Center Services, Audiological Services, Restorative Services regulations at 114.3 CMR 39.00.³² These were last revised in June 2011.

The three sets of regulations were promulgated by the Division of Health Care Finance and Policy, the agency within EOHHS then responsible. The responsibility has now moved to a new EOHHS agency, Massachusetts Center for Health Information and Analysis (CHIA), but they have not re-promulgated these regulations.³³

Medicaid rate

Medicaid rates apply to evaluations performed by hospital-based providers (such as Boston Children's Hospital). In Massachusetts, the Division of Medical Assistance is responsible for setting Medicaid rates, but the rates may vary by hospital. Hospitals negotiate a hospital rate based upon cost information the hospital provides and then hospitals charge Medicaid that rate. These Medicaid rates are generally higher than the EOHHS rates for IEEs.

Are there potentially evaluations that are not subject to state rates?

The state rates only apply to those evaluations that are specifically listed in the state rates. If the school district does not have any cost criteria, "parents are free to obtain the service of any qualified evaluator."³⁴ Certain evaluations, such as functional behavioral assessments (FBAs) and transitional assessments, are not covered by the state rates. In that case, the school district will be required to pay the evaluator's rate unless the school district requests a hearing and demonstrates that the rate is unreasonably excessive.

What rate will a school district pay?

For IEEs covered by the state rate structure, school districts typically pay the state-established rates, EOHHS rates for private providers and Medicaid rates for hospital-based programs. However, some school districts have paid market rates for at least some IEEs, recognizing that the rate structure can be a barrier to timely and appropriate evaluations.

Further, parents also have the opportunity to show unique circumstances justifying a higher rate.³⁵ For example, a child may have unique needs that required a specialist who charges a higher rate. However, if the school district believes the costs are unreasonable, it can either pay the fees charged to the parents or go to a due process hearing to show that the fee was “unreasonably expensive.”³⁶

If the cost is beyond the school district’s cost cap and the cost cap is found to be reasonable, the school district must still pay the maximum allowable charge, so the parents can get partial reimbursement for the cost.³⁷

What problems exist around accessing evaluations?

Access to evaluators in both the community and in hospitals is difficult for a number of reasons.

Community evaluators

Nearly all non-hospital based evaluators charge rates substantially above the state-set rates for non-hospital evaluations, and very few will accept state rates.

Hospitals

- The hospitals have long wait times, particularly for new patients (for ex. 6 months to a year).
- Hospital evaluators often will not do all the type of assessments needed for a comprehensive evaluation (for example, hospital evaluators will often not observe a child at school).
- Hospital rates are higher than the rates charged by community-based providers.

Are there solutions to these problems?

There are solutions.

- Some evaluators will negotiate a rate somewhat lower than their advertised rate.
- Some school districts have voluntarily paid a rate higher than the state rate for community evaluators.
- A parent can request that the school district fund an evaluation at a rate higher than the state rate for community evaluators because of unique circumstances. Unique circumstances could include the inability to find an evaluator who accepts state-set rates who is able to provide a timely evaluation (within 60 days).

- A parent can request that the school district fund an evaluation at a rate higher than the state rate for community evaluators if the parent is unable to obtain an appropriate evaluation using the state-set rates, and then the school district must either agree to fund the IEE or it must request a due process hearing to show that the state-set rates are reasonable and that the requested rates are unreasonably excessive. Because the Medicaid rate have been approved for IEEs, it would be hard for a school district to argue that a private provider who would accept the Medicaid rate is charging an unreasonably excessive rate.

When do I need to ask for an IEE?

For an IEE based on economic eligibility, 5(c), the request must be made within sixteen months of the school district's assessment.

For an IEE based on federal law, 5(d), the regulations do not set a specific timeframe. Massachusetts DESE has recognized that federal law prohibits the state from setting a sixteen-month limit on requesting IEEs based on federal law.³⁸

DESE has advised school districts that, in the event more than sixteen months have passed since the evaluation, the school district's evaluation may be outdated, and the best practice is for the school district to offer to do its own assessments, and, if the parents consent, the school district will do its own assessments and then, if the parents disagree, they may request an IEE.³⁹ However, the parents are not required to consent to the updated evaluations and may insist on 5(d) IEEs.

What are a student's rights regarding re-evaluations?

School districts conduct re-evaluations of children with IEPs every three years.⁴⁰ At this point, they must request consent from the child's parents to do so with prior written consent.⁴¹

The school district might also recommend that re-evaluation is not necessary. In this case, the school district may believe that current evaluation information is sufficient to know that a child is still eligible and to write an appropriate IEP.⁴² However, parents have the right to request that some or all of the assessments from the child's initial evaluation be conducted again at the re-evaluation if they believe this to be necessary. If requested, school districts must provide these assessments.⁴³

What are a student's rights regarding other assessments?

In addition to initial evaluations and re-evaluations, school districts perform other assessments based on student needs. For example, a school district may provide a functional behavioral assessment (FBA) in response to a significant increase in problematic behaviors. Whenever the school conducts an assessment of a student, the student has a right to an IEE, with public funding available under 5(c) and, under the circumstances discussed above, under 5(d).

Resources for evaluations generally:

DESE, A Parent's Guide to Special Education, http://www.fcsn.org/parents_guide/pgenglish.pdf

DESE, Parent's Notice of Procedural Safeguards, <http://www.doe.mass.edu/sped/prb/>

US DOE, Evaluation and Re-evaluation,
<http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CTopicalArea%2C4%2C>

Resources for independent evaluations:

DESE, Administrative Advisory SPED 2004-1: Independent Educational Evaluations (Oct. 23, 2003), http://www.doe.mass.edu/sped/advisories/04_1.html

SPEDWatch, Independent Evaluations,
http://www.spedwatch.org/files/Independent_Evaluations.pdf

ENDNOTES

¹ The Federation for Special Needs and DESE, *A Parent's Guide to Special Education* 13, http://www.fcsn.org/parents_guide/pgenglish.pdf.

² Joseph Moldover, Psy.D., *Understanding Assessment in the Special Education Process* 7 (2009).

³ 34 CFR 300.301(b).

⁴ 603 CMR 28.04(1).

⁵ Mass. General Hospital, Educational Evaluation, http://www2.massgeneral.org/schoolpsychiatry/classroom_evaluation.asp.

⁶ 603 CMR 28.04(1)(a).

⁷ 603 CMR 28.04(1)(b).

⁸ 603 CMR 28.04(2).

⁹ 603 CMR 28.04(1)(d); 603 CMR 28.04(2)(a)(iv); 603 CMR 28.04(2)(a)(v).

¹⁰ 603 CMR 28.04(4).

¹¹ Mass. General Hospital, Educational Evaluation, http://www2.massgeneral.org/schoolpsychiatry/classroom_evaluation.asp. The state regulation provides that an initial evaluation by the multidisciplinary team is to be completed within thirty (30) school days although that time limit is often not met. 603 CMR 28.04(2).

¹² DESE, *IEP Process Guide* 7 (2001), <http://www.doe.mass.edu/sped/iep/proguide.pdf>.

¹³ 603 CMR 28.04(5); http://www2.massgeneral.org/schoolpsychiatry/classroom_evaluation.asp

¹⁴ 34 CFR 300.502(a)(3)(i).

¹⁵ Massachusetts Department of Elementary and Secondary Education, *Parent's Notice of Procedural Safeguards* 5-6 (2009), <http://www.doe.mass.edu/sped/prb/pnps.pdf>; see also 603 CMR 28.04(5)(f).

¹⁶ 603 CMR 28.04(5)(b).

¹⁷ 603 CMR 28.04(5)(c).

¹⁸ 603 CMR 28.04(5)(c)2.

¹⁹ 603 CMR 28.04(5)(c)1. Families are only eligible for free lunch for their children if their family income is 130% of the poverty level, so there are many families eligible for free IEEs who are not eligible for free lunch.

²⁰ 603 CMR 28.04(5)(c)4.

²¹ 603 CMR 28.04(5)(c)4.

²² 603 CMR 28.04(5)(d); 34 CFR 300.502(b)(1).

²³ 603 CMR 28.04(5)(d).

²⁴ 603 CMR 28.04(5)(d).

²⁵ 603 CMR 28.04(5)(d).

²⁶ *See* 603 CMR 28.04(5)(d).

²⁷ The federal Office of Special Education Programs (OSEP) within the US Department of Education has explicitly rejected the idea that a parent is only entitled to an IEE if the school district has done an evaluation. OSEP letter to New Jersey DOE (March 28, 2012), available at <http://www.specialeducationadvisor.com/memo-to-mcdonald-regarding-independent-educational-evaluations-iee/>.

²⁸ 34 CFR § 300.502(a)(2).

²⁹ EOHHS's responsibility for establishing IEE rates is established by state law. M.G.L. c. 71B, § 3.

³⁰ Available at <http://www.mass.gov/eohhs/docs/eohhs/eohhs-regs/114-3-30.pdf>.

³¹ Available at <http://www.mass.gov/eohhs/docs/eohhs/eohhs-regs/114-3-29.pdf>.

³² Available at <http://www.mass.gov/eohhs/docs/eohhs/eohhs-regs/114-3-39.pdf>.

³³ New rate regulations promulgated by CHIA are at 101 CMR. *See* <http://www.mass.gov/eohhs/gov/laws-regs/hhs/provider-payment-rates.html> (link to rate regulations by service).

³⁴ Letter to Thorne, 16 IDELR 606 (1990).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ DESE, Administrative Advisory SPED 2004-1: Independent Educational Evaluations (Oct. 23, 2003), http://www.doe.mass.edu/sped/advisories/04_1.html.

³⁹ DESE, Administrative Advisory SPED 2004-1: Independent Educational Evaluations (Oct. 23, 2003), http://www.doe.mass.edu/sped/advisories/04_1.html

⁴⁰ 603 CMR 28.04(3).

⁴¹ DESE, *Parent's Notice of Procedural Safeguards 2* (2009), <http://www.doe.mass.edu/sped/prb/pnps.pdf>.

⁴² The Federation for Special Needs and DESE, *A Parent's Guide to Special Education* 16, http://www.fcsn.org/parents_guide/pgenglish.pdf.

⁴³ The Federation for Special Needs and DESE, *A Parent's Guide to Special Education* 16, http://www.fcsn.org/parents_guide/pgenglish.pdf.