

**The Number's Don't Lie:**  
**Practical Tips and Pointers on How to Secure and Ensure the Best Evaluations for Special Education Advocacy**

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**I. Introduction/Background**

This paper will address the critical role Psychological and Psycho-Educational Evaluations play in special education advocacy, and how attorneys can collaborate with clinicians to ensure a student's evaluations effectively support their special education needs.

**II. Abstract**

This paper will provide a clinical and legal overview of the basic elements of an effective Psycho-Educational and Psychological evaluation, and how those evaluations are used in the determining of a child's eligibility for special education and related services, as well as what services the child receives if found eligible for special education and related services. The authors, a clinical psychologist with extensive experience conducting evaluations for school services, and a special education attorney will also discuss the related areas of how to advocate for a comprehensive evaluation when it is done by the school district, what to do if an initial evaluation falls short of the goals of the special education attorney, and what other types of evaluations may be completed. The goal of the session is to provide audience members with an overview of the legal and clinical tools at their disposal to advocate for comprehensive and effective evaluations, as well as to provide them with advocacy strategies for next steps to take when an evaluation is not available but needed, or when the available evaluations fall short.

**III. General Introduction: What Evaluations Parents are Entitled to, and How to Make a Strong Request for One**

The Individuals with Disabilities Education Improvement Act ("IDEIA") does provide several avenues by which parents and advocates can request a student be evaluated for special education and related services. In this overview section, the authors will provide a brief overview of clinical indicators that an evaluation is needed, as well the law that supports a parent's right to have their child evaluated.

## A. Types of Evaluations

Under IDEIA, the Parent has rights to several different types of evaluations under different points of a child's progress through the special education continuum. This section will briefly address the legal support for requesting an evaluation at each stage of a child's evaluation and assessment for special education and related services, as well as including clinical reflections on what to be looking for and providing when making referrals for assessments and working with evaluators.

### *i. The Initial Evaluation, or What Do You Ask for When You Know that Something is Wrong, but You Don't Know What?*

The first evaluation to determine a child's eligibility for school-based services on an IEP is the initial evaluation. All school districts in the United States are obligated to locate, identify and evaluate all children with, or suspected of having, disabilities pursuant to their Child Find obligations. However, if a school district is not affirmatively seeking assessments for a child the Parent believes may be eligible for services, a Parent<sup>1</sup> may request that an initial evaluation be completed of their child to determine their eligibility for special education and related services. *See* 34 C.F.R. § 300.301 (b). It is important to note that, while a school district may later argue that a request was not made because it was not made in writing, the federal regulations do not set any parameters for how a request for eligibility is made. Further, a request for an initial evaluation is distinct from a school district's independent obligation to assess whether or not a particular student, based on their academic performance and behavior, might be eligible for services under Child Find.

While a child's teachers may have the most data to determine whether or not an initial evaluation should be conducted, there are several clinical indicators that a child may need special education and related services that parents should watch for, and reference, if a parent does decide to request an initial evaluation. Although the following list is not exhaustive, it provides some of the subtler indicators of when a child may need to be evaluated for school based services. In younger children, a parent may want to request an initial evaluation for services if: the child struggles with attention, has delayed speech or trouble communicating, is falling behind their peers in one or more academic areas, has problems with peers or teachers (including fighting with or being disrespectful towards peers or teachers), or is struggling with hygiene and basic self care (i.e., brushing their teeth, getting dressed, tying their shoes, etc.) more than other peers their age. In older children and teens, additional red flags that an evaluation is needed include: if the child demonstrates a dramatic, negative change in their academic performance or behavior, attendance issues, or disciplinary issues (multiple suspensions or referrals for in-school suspension, etc.). It is important to note that in requesting an initial evaluation the Parent does not need to *know* that a child has a disability that is impacting them in the school setting, the Parent and the school need only *suspect* that the child may be eligible for services. This is an

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<sup>1</sup> Parental consent is a critical component in the eligibility process as parental consent is required before assessments are initiated. However, any individual working with the child can trigger the "notice" language in Child Find (invoking the school district's obligation to locate, identify and evaluate a child they suspect is eligible) by notifying the school that they believe the child has a disability and is eligible for services.

important distinction to keep in mind in instances where the school district may push back on a request for an initial evaluation because they feel the child does not have a disability.

This paper (and parallel training) will focus on Psycho-Educational and Psychological Evaluations. A Psycho-Educational Evaluation should contain cognitive testing (IQ tests that assess the child's cognitive abilities) and educational testing (academic assessments that assess what grade and age level the child is currently functioning at). A Psychological evaluation should also contain additional testing, which is often inventory-based, and will assess the child's emotional functioning. These two types of evaluations can test for and rule out several common disabilities, including: Attention Deficit/Hyperactivity Disorder (Psychological), a Learning Disability (Psycho-Educational), Depression (Psychological), an Intellectual Disability (Psycho-Educational and Adaptive Testing), Bipolar Disorder (Psychological) and can identify children on the Autism Spectrum. The Parent may certainly request other evaluations be conducted if they are relevant to determining the child's disability and its impact on his or her education.

Even if the initial evaluation and IEP are sufficiently comprehensive to develop a plan that meets a child's special education needs, the question of evaluations remains critical each year the child remains a as a special education student. The following sections provide an overview of what evaluations look like after an initial evaluation has been completed, and when other circumstances may mandate an evaluation for an eligible youth.

ii. *Triennial Evaluations – What Should Be Happening for Children with Individualized Education Programs (“IEP”) Every Three Years*

Once a child has been found eligible for special education and related services, and an IEP is developed for them, that child should be re-evaluated every three years, at a minimum unless the Parent and the school agree otherwise. *See* 34 C.F.R. § 300.303. The re-evaluation must be “sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the category in which the child has been classified.” *See* 34 C.F.R. § 300.304 (b)(6). An appropriate re-evaluation also will not rely on a single assessment or instrument, but should rely on “a variety of assessment tools and strategies.” *See* 34 C.F.R. § 300.304 (b)(1).

In practice, these regulations translate to some key principles in ensuring a child is appropriately evaluated on a triennial basis. Every three years, a child should be evaluated in *all* areas of their disability, which will likely need to include a repeat of all the assessments done as part of a child's initial evaluation, as well as any new assessments that may be required to determine new areas of need. Further, school districts may only be relieved of their obligation to conduct a comprehensive triennial evaluation if the school district *and* the Parent agree triennial assessments are not necessary. *See* 34 C.F.R. § 300.303 (b)(2). Given how much a child can change over a three year period, parents should be very wary of agreeing to waive a triennial evaluation, and ensure that the each of the individual tests that are administered as a part of the evaluation are developmentally appropriate for the child.<sup>2</sup>

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<sup>2</sup> Sometimes, standard instruments may not be appropriate for an individual student, if the test is targeted to a certain developmental or reading ability. The authors will discuss this further during their presentation.

It is also important to note that the symptoms of mood and other mental health disorders can vary based on the child's age and developmental level. For example, depression can manifest as irritability in children and adolescents and posttraumatic stress disorder can manifest as repetitive play of the traumatic event in young children. Age also affects what disorders can and cannot be diagnosed. As an example, the diagnosis of one personality disorder requires that the individual be at least 18 years old. The diagnosis of AD/HD requires that the individual manifested symptoms of the disorder by age 12. *See Diagnostic and Statistical Manual of Mental Disorders* (5th ed.). Arlington, VA: American Psychiatric Publishing. As a result, what the clinician is looking for can change based on the child's age and developmental level. The instruments and techniques that can be used during an evaluation also vary based on the child's age and developmental level. While a teenager will be able to provide potentially useful information during a clinical interview, it is extremely unlikely that a toddler, or someone functioning at the level of a toddler, would be able to.

iii. *“It's Only Been a Year Since My Student's Last Evaluation, but Last Week He Set a Fire at School” or When Do Conditions Warrant a New Evaluation?*

IDEIA also requires school districts to re-evaluate special education eligible children when “conditions warrant” an evaluation. *See* 34 C.F.R. § 300.303 (b). While the federal law is silent as to what “conditions” trigger a school district's obligation to conduct non triennial re-evaluations of a special education student, several circumstances have been identified in subsequent case law, including: when there is a significant change in a student's academic performance or when the student's disabling condition changes (*See Corona-Norco Unified Sch. Dist.*, 22 IDELR 469 (SEA CA 1995); when a school district is changing the child's educational placement (*See Board of Educ. Of City of White Plains*, 20 IDELR 1475 (SEA NY 1994); or when a school district has failed to implement a student's IEP for a prolonged period of time (*See Hagerman (ID) Joint Sch. Dist. No. 233*, 47 IDELR 312 (OCR 2006)).

In making a request that a child's changed circumstances or current condition require a re-evaluation outside of the triennial time line, the authors have found the strongest requests (and the best received at administrative due process hearings) are the ones which include a clinically oriented foundation. In the Matter of Student (Case 2011-0013, SEA DC, March 2011), the Hearing Officer found that an emotionally disturbed student was denied a FAPE when the school district failed to conduct a re-evaluation upon her enrollment, based on the “conditions warrant” language at 34 C.F.R. § 300.303 (b). The Hearing Officer found that the student's progressive academic and emotional problems, her attendance issues, and her expulsion from her prior school for setting a fire on school grounds were all indicators that a new evaluation was warranted for the student, especially given her new behavior of fire setting. Some clinical indicators that parents and advocates should consider when determining whether or not a re-evaluation is warranted include: injury or medical change, the death of a parent or close loved

one, a significant change in behavior inside or outside of school<sup>3</sup> (as noted in the case example above) or another traumatic event. Collaborating with a clinician, even prior to the initiation of an assessment to identify whether or not there are evaluation “red flags” in a child’s educational performance and records can be a helpful tool in laying groundwork for when conditions may warrant a new evaluation of a student, as will be further discussed in the authors’ presentation.

## **B. Best Practices in Supporting School Based-Evaluations**

A parent and advocate’s work is not done once a school has agreed to complete an evaluation. In addition to monitoring the school’s compliance with the timelines for evaluations set by local regulations, parents should also, to the maximum extent possible, provide as much information as possible to ensure the school produces an appropriate and comprehensive evaluation. This support could include: providing records from past schools to the school district or evaluator (even if the school district has received records from prior school placements, sometimes these files are not complete), reaching out to the evaluator directly to provide relevant background information and facilitating interviews between the evaluator and those most knowledgeable about the child (including individuals who work with the child inside and outside of school), and, where appropriate, requesting specific instruments or types of assessments be used. The authors have found there is little to be gained from “hiding the ball” from school-based evaluators, even if the parent anticipates the evaluation will be done poorly or neglect to incorporate information provided by the Parent. A subsequent evaluation done with access to these materials that makes different recommendations may be subject to a “hindsight evidence” attack, as the authors will discuss further in their presentation.

## **C. The Reluctant Child: Best Practices in Supporting Children who are Resistant to Assessments**

A common obstacle to acquiring the best data on a student is the student, and the student’s reluctance to be tested and re-tested, especially if the student perceives that they are being tested because they are “stupid” or “need special education.” A skilled clinician often has strategies to engage students, even if they have been previously unengaged in testing, and this is another area where collaboration between parent, advocate and evaluator can often lead to better results. While this issue will be further explored in the presentation, clinicians have several strategies to support student testing.

Research has repeatedly indicated that the rapport, or the relationship between the clinician conducting the evaluation and the child can significantly affect test results. *See e.g. see Ali, F. & Costello, J. (1971). Modification of the Peabody Picture Vocabulary Test. *Developmental Psychology*, 5(1), 86-91. Doi: 10.1037/h0031077.* There is no one way to develop rapport, but in one of the author’s experience, rapport is most easily developed with students when the examiner ensures the student is informed about the purposes of testing, is

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<sup>3</sup> Examples include, but are not limited to, the child suddenly withdrawing from peers and/or family, a sudden change in the child’s peer group, or a sudden change in school behavior, such as the child skipping classes when he/she previously attended regularly.

honest about the time commitment, and lets the students take the lead, when appropriate. The examiner also shows a genuine interest in what the student has to say; this indicates to the student that what they have experienced and what they think is important. The examiner also makes sure to pay attention to the student's needs; if the student requires a break or a snack, the examiner ensures the students gets what they need. These steps help to develop and maintain a working relationship with the student that helps engage the student in testing. For students who continue to be resistant to the testing process, there are clinical techniques, such as motivational interviewing, that can help. *See* Miller, W.R., & Rollnick, S. (2012). *Motivational interviewing* (3<sup>rd</sup> ed.): *Helping People Change (Applications of Motivational Interviewing)*. New York, NY: Guilford Press

#### **IV. All This Work and All I Got Was a Lousy RIAS? Or How to Solve the Problem of a School Doing a Poor Evaluation, or Failing to Do an Evaluation At All**

Unfortunately, the authors have found that even the strongest request for an evaluation may be rejected or poorly executed by school district, leaving the student and their school team with no data about the student, or limited, or unhelpful data. This next section will address the parents' rights under IDEIA when a school-based evaluation misses the mark, as well as clinical considerations in having a new evaluation completed. At the presentation, the authors will also provide models to the audience for the documents outlined below.

##### **A. Independent Educational Evaluations ("IEE")**

Under IDEIA, a parent has a right to request an independent educational evaluation, funded by the school district<sup>4</sup>, if the parent disagrees with an evaluation completed by the school district.<sup>5</sup> *See* 34 C.F.R. § 300.502(a)(3)(i). The parents are only entitled to one independent evaluation per school district evaluation the parent disagrees with, or in other words, if the parents disagree with a school district evaluation and receive an IEE, they cannot submit a subsequent request for an IEE based on a different disagreement with the same school district evaluation. *See* 34 C.F.R. § 300.502 (b)(5). Once an IEE has been requested, the school district may either authorize the evaluation or challenge the request by filing a complaint for a due process hearing to prove that their evaluation is appropriate and no further evaluations are needed. The school district may not require the parent to provide an explanation of the reason for their request (outside of noting the bases of the request), and cannot ignore the request altogether without taking any further action.

If the school refuses to respond to a parent's request for an IEE, the parent may seek an IEE through an administrative due process hearing. As the burden is on the school district to file a due process complaint *against the parent* rather than ignoring a parent's request, the authors recommend parents and advocates pursuing this remedy consider requesting the burden of

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<sup>4</sup> The Parent always has the right to procure an independent evaluation at their own expense, and request a review of the evaluation by the school. *See* 34 C.F.R. § 300.502 (a)(1); 34 C.F.R. § 300.502 (b)(3).

<sup>5</sup> The authors note that evaluations funded by the school district, but completed by an independent contractor (as in the case of a public charter school contracting out evaluations) still qualify as evaluations completed by the school district, and should not be constructed as IEEs.

production be shifted, or summary judgment. Collaboration with clinicians is also key in both formulating and defending a request for an IEE, as a clinician can provide specific information as to why a prior evaluation is insufficient or inadequate and assist in defending the parents' request at hearing. For example, if a child who has previously been classified as learning disabled starts to show signs of an emotional disturbance (e.g., acting out in class, withdrawing, avoidance) yet on reevaluation the school only reassesses for a learning disability, a clinician can point out the possible symptoms of an emotional disturbance that need to be more thoroughly evaluated. As another example, a student may have initially only been receiving services in one academic area (mathematics, for example) but is now showing difficulty in another subject area. The student should be assessed to determine if he/she meets criteria to receive services in this area as well.

## **B. A Note on "Practice Effect" in Considering an IEE**

In certain areas of psychological testing there is concern about practice effects, or an increase in scores that is attributed to repeated exposure to the psychological assessment instrument rather than to an increase in performance. Practice effect is of the greatest concern with cognitive testing. *See e.g.* e.g., Bartels, C., Wegrzyn, M., Wiedl, A., Ackerman, V., & Ehrenreich, H. (2010). Practice effects in healthy adults: A longitudinal study on frequent repetitive cognitive testing. *BMC Neuroscience, 11*, 118-129. doi:10.1186/1471-2202-11-118. Although cognitive abilities are thought to be stable, mental health professionals recognize that situational factors (e.g., being tired) and emotional factors (e.g., depression, anxiety) can affect cognitive test results. *See e.g.* Wimmer, F., Hoffman, R.F., Bonato, R.A., & Moffit, A.R. (1992). The effects of sleep deprivation on divergent thinking and attention processes. *Journal of Sleep Research, 1*(4), 223-230. doi: 10.1111/j.1365-2869.1992.tb00043.; *see also* Hopko, D.R., Crittendon, J.A., Grant, E., & Wilson, S.A. (2005). The impact of anxiety on performance IQ. *Anxiety, Stress, & Coping: An International Journal, 18*(1), 17-35. doi: 10.1080/10615800412336436. Thus, changes in cognitive testing can reflect changes in mental state. As such, it is vital that psychologists and other mental health professionals consider whether an improvement in cognitive abilities reflects an improvement in mental state, an increase in cognitive abilities, or a practice effect.

There are ways to avoid practice effects. The first, and easiest way, is to ensure there is at least a six month (preferably one year) time gap between testing with the same instrument. *See* Sattler, J.M. (2008). *Assessment of Children: Cognitive foundations, 5<sup>th</sup> edition*. La Mesa, CA: Author. Obviously, in the case of an IEE that was triggered in response to a recent evaluation, this time gap would be impossible and impractical. In this case, a clinician could avoid a practice effect by using another psychological assessment instrument that measures the same psychological area. As an example, if the previous evaluation used a Wechsler Intelligence Scale for Children-IV to assess cognitive abilities, the clinician conducting the IEE could use any of a multitude of other comprehensive cognitive abilities tests, such as a Stanford Binet, a Woodcock Johnson Cognitive Abilities Test, or, depending on the child's age, a Wechsler Adult Intelligence Scale-IV. In order to avoid practice effects, the clinician conducting the IEE needs to review which tests were used in previous evaluations and when the previous evaluations were conducted.

Still, it is important to note that some psychological assessment instruments, due to what they are measuring, are less subject to practice effects. These are tests that assess for fluctuating states, such as emotional functioning testing. As emotional state varies day to day, these tests have been designed to be used repeatedly with the same person. Examples of these tests include the Behavior Assessment System for Children, Second Edition and the Beck Youth Instruments.

### **C. Use of Other Evaluations**

If the school district refuses to authorize an IEE or conduct an evaluation at the parent's request, the parent may want to explore whether or not other data or assessments are available that will support the parent's request for services. Redacted Court-Ordered assessments, recommendations and discharge summaries from psychiatric hospitalizations, and treatment notes are all helpful documents to support a request for different special education and related services.

In addition, the authors also note that parents and advocates should be aware of evaluations a student with a disability may need, outside of school-based assessments, especially as they age. These could include evaluations to ensure the student receives accommodations on college admissions tests, like the SAT, or in college. Colleges and educational testing services use different criteria and standards to determine if someone meets criteria for accommodations and often require a recent comprehensive evaluation. In the same vein, a student with developmental disabilities may require additional information or testing in order to determine if the student could receive training or services through disability services administrations.

### **V. Conclusion**

The quality of a student's special education services often hinge on the quality of the assessments that lay the foundation for those services. Parents and advocates have several legal avenues for requesting assessments, however, the authors have found that teaming between parents, advocates and clinicians can strengthen initial requests for assessments, as well as ensure that students receive high quality school based or independent evaluations. At their companion presentation, the authors will present additional advocacy strategies, as well as models and examples of the advocacy strategies outlined above.