

Initial Evaluations Under the IDEA – Common Questions and Answers for School Districts

With the arrival of the reauthorized IDEA last year, and more recently the final IDEA regulations in October of this year, several changes have occurred that affect school districts' obligations in evaluating students for IDEA eligibility. While most of the new procedures are relatively straightforward, based upon questions we receive from districts on this topic, some confusion still exists.

Following are some initial evaluation basics, as well as some of the more common questions and concerns we receive with respect to initial evaluations under the reauthorized IDEA.

Do we always need to conduct an initial evaluation before starting to provide special education and related services to a student?

Yes. Section 14 (a)(1)(A) of the IDEA specifically states that a school district “shall conduct a full and individual initial evaluation . . . before the initial provision of special education and related services to a child with a disability . . .”

Who exactly should we be evaluating in the first place?

School district child find obligations have changed little between the previous and current incarnations of the IDEA. School districts remain obligated to identify, evaluate, and if eligible for special education, offer a free and appropriate public education to **all** school age children who reside within the district.

What is a school district's evaluation obligation if a child is attending a private school? What if that private school is not even in the district?

The fact that a resident student attends a private school, as opposed to public school, does not affect the child find obligations of the resident school district, nor does the fact that such private school may be located outside district boundaries. Specifically, as part of their obligations under the IDEA and State law, school districts must conduct awareness activities and publish annual public notification in order to alert both public and private school parents of potential rights under the IDEA.

Once a school district is made aware of a resident child who might have a disability – whether the child is attending school in the district or not – an initial Permission to Evaluate should be forwarded to the parents of that child.

Is a request, orally or in writing, by the parents enough to begin the evaluation process, or must the Permission to Evaluate actually be issued and returned indicating parent permission?

A request by a parent, either orally or in writing, for an assessment is **not** enough to begin the actual evaluation process. With rare exception involving children who are wards of the State, the IDEA specifically requires that, prior to conducting an initial evaluation to determine whether a child qualifies as a child with a disability, a school district must obtain “informed consent” from the parents before proceeding.

Under Section 300.9 of the regulations, such consent is defined to include among other things, that “[t]he parent has been fully informed of all information relevant to the activity for which consent is being sought.” A Permission to Evaluate along with a mandatory copy of the procedural safeguards notice (necessary upon initial referral or parental request for an evaluation) provides the required informed consent.

Can a parent simply indicate their consent by phone just to get the initial evaluation started?

No. Again as part of necessary informed consent, the regulations require that “[t]he parent understands and agrees **in writing** to the carrying out of the activity for which his or her consent is sought”. 34 CFR§300.9 (b)

Once we receive parental consent to begin the initial evaluation, how much time are we allowed to complete it?

In Pennsylvania, the answer is 60 **school** days from the receipt of parental informed consent. Note, however, that the IDEA actually states “60 *days*” rather than “60 *school days*” to complete the initial evaluation, but that this particular section of the IDEA also permits States to establish alternate timelines if they so desire. For now at least, because the current version of the Pennsylvania regulations allows for 60 **school** days to complete the initial evaluation, this timeline remains in effect despite the shorter period now afforded by the IDEA.

Are there any exceptions to the initial evaluation timeline?

Yes. The IDEA provides that the relevant timelines shall not apply in two specific situations. The first timeline exception exists where a parent repeatedly fails or refuses to produce the child for the evaluation. The second timeline exception involves the scenario where a child newly enrolls in a school district after the relevant timeline has begun, but before the child’s previous school district was able to make a determination as to eligibility. This exception assumes, however, that the new school district is moving towards a prompt completion of the outstanding evaluation, and requires that the new school district and parents agree to a specific time when the evaluation will be completed.

What if a parent refuses to grant consent for the initial evaluation? Must the school district take the parent to hearing in order to get permission?

Not necessarily. The IDEA statute that went into effect last year merely indicated that a school district “may” pursue permission for an initial evaluation via due process where a parent denies such consent. Perhaps more importantly, the statute left it ambiguous as to a school district’s liability if the district did not choose to take the parent to due process in order to obtain the consent. However, the recently published regulations make it clear that school districts do **not** violate their child find obligations by declining to pursue consent for the initial evaluation through due process.

Notwithstanding, the ability of a school district to seek consent for an initial evaluation through due process remains a “permissive” feature of the IDEA, such that a school district may pursue consent for an initial evaluation through due process if it wishes.

What if, instead of expressly rejecting the Permission to Evaluate, the parent simply never responds? At some point can we proceed with the evaluation if we know the child needs it?

No. Unlike reevaluations, where a series of non-responses by a parent to a request to reevaluate may allow the consent requirement to be “overridden” if it can be demonstrated that reasonable measures were taken by the district to obtain such consent (i.e., the reevaluation may proceed as proposed even without consent by the parents), initial evaluations require affirmative written consent by the parent to begin. However, the school district is permitted – but again not obligated - to request due process in order to gain consent for the initial evaluation.

Assuming a parent consents to the initial evaluation and the child is found eligible, is informed consent again needed to begin providing initial services via the IEP?

Yes. The IDEA statute and regulations are both clear that informed consent is not only needed for the initial evaluation, but for the initial provision of services as well.

What if the initial evaluation finds the child eligible, but the parent either refuses to consent to beginning the initial special education services through the IEP, or simply fails to respond to the request for consent to begin implementing the IEP?

Although school districts must make reasonable efforts to obtain informed consent from parents for the initial provision of special education and related services to a child, unlike initial evaluations, school districts are **not** permitted to pursue due process in order to obtain such consent. Accordingly, the IDEA is also clear that where a parent either rejects or fails to respond to an offer of initial special education services, the school district will not be considered to be in violation of the requirement to provide a FAPE to that student.

Any pitfalls to be aware of in the above scenario?

Yes. First, whenever a parent has rejected initial special education services, the school district must be certain that the parent is actually intending to reject all initial special education services and supports, and not just the initial special education program *being offered by the district*. In other words, there is a big difference between a parent that completely rejects all initial special education services, and a parent that agrees that their child needs special education, but just disagrees with the initial IEP offered by the school district.

Specifically, in the first scenario, where the parent rejects all special education services, such is not subject to a due process hearing, and generally absolves a school district's FAPE obligation to the student. However, in the latter instance, where a parent is simply disagreeing with the district's initial FAPE offer, *but not with the child's need for special education*, the dispute certainly can be heard in due process, and the district's FAPE obligation continues. As such, before "writing off" the need to provide special education to a student, school districts must be careful to clarify a parent's true intent in rejecting services, so as not to inadvertently deny FAPE to a student who otherwise qualifies.

Another pitfall to be kept in mind, of course, is that parents can only fully reject the **initial** provision of special education and related services to a student without school district recourse. Any subsequent rejection of special education services by a parent does not relieve a school district's FAPE obligation to an eligible student.

Does a "speech only" ER / IEP count as the initial evaluation / provision of special education services to a child if that is all they have?

Yes. Some school districts have the mistaken belief that where a student only has a previous "speech IEP," a subsequent, more comprehensive evaluation and IEP actually constitute the initial evaluation and initial provision of service to the student, and therefore if rejected by a parent, the district will be absolved from all FAPE obligations related to the "new" IEP. An IEP is an IEP, and only the first evaluation and IEP for a student, whether speech only or otherwise, can be treated as the "initial" evaluation and service offer for IDEA purposes.

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.