



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

August 23, 2018

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Dear XXXXXX:

This letter responds to your electronic mail correspondence to Lisa Pagano, Policy Specialist in the Office of Special Education Programs (OSEP), U.S. Department of Education (Department). In that letter, you ask whether a public agency may limit the amount of time an independent evaluator is allotted to observe the child in the child's educational setting when the evaluator is paid by the parent and not by the public agency. We regret the delay in responding.

We note that section 607(d) of the Individuals with Disabilities Education Act (IDEA) prohibits the Secretary from issuing policy letters or other statements that establish a rule that is required for compliance with, and eligibility under, IDEA without following the rulemaking requirements of section 553 of the Administrative Procedure Act. Therefore, based on the requirements of IDEA section 607(e), this response is provided as informal guidance and is not legally binding. This response represents an interpretation by the Department of the requirements of IDEA in the context of the specific facts presented, and does not establish a policy or rule that would apply in all circumstances.

In OSEP's February 10, 2014 *Letter to Savit*, OSEP explained:

The IDEA [Individuals with Disabilities Education Act] and its implementing regulations do not provide a general entitlement for third parties, including attorneys and educational advocates, to observe children in their current classrooms or proposed educational placements. The determination of which individuals may have access to classrooms may be addressed by State and/or local policy. See OSEP's *Letter to Mamas*, dated May 26, 2004.¹

However, we also recognized in *Letter to Savit* that there are times when independent educational evaluators may need to have access to classrooms if the parents of a child with a disability invoke their right to an independent educational evaluation (IEE) of their child under 20 U.S.C. §1415(b)(1) and the evaluation requires observing the child in the educational placement.

Under 34 CFR §300.502(a)(3)(i), IEE means an evaluation conducted by a qualified evaluator who is not employed by the public agency responsible for the education of the child in question.

¹ OSEP's *Letter to Mamas* is available at: <https://sites.ed.gov/idea/idea-files/policy-letter-may-26-2004-to-education-law-center-staff-attorney-shari-a-mamas/>

Generally, the purpose of an evaluation under IDEA is to determine whether the child is a child with a disability, and in the case of a reevaluation, whether the child continues to have a disability, and the educational needs of the child. As noted above, depending on the individual needs of the child, an evaluation conducted in accordance with the procedures in 34 CFR §§300.304 through 300.311 may require observing the child in his or her educational placement. In determining whether a child has a specific learning disability, the public agency must ensure the child is observed 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 CFR §300.310(a).

If a parent disagrees with an evaluation obtained by the public agency, IDEA gives parents the right to obtain an IEE at private expense or at public expense (subject to certain conditions). An IEE obtained by a parent, at either public or private expense, must be considered by the public agency when determining the child's continued eligibility for special education and related services or when determining the child's educational needs if the IEE meets agency criteria. 34 CFR §300.502(c)(1). Therefore, it would be inconsistent with the right of a parent to have an IEE considered by the public agency for a public agency to limit an independent evaluator's access in a way that would deny the independent evaluator the ability to conduct an evaluation in a way that meets agency criteria. Such criteria would include the amount of time that the independent evaluator spends with the child.

If you have any further questions, please do not hesitate to contact Ms. Pagano at 202-245-7413 or by email at Lisa.Pagano@ed.gov.

Sincerely,

/s/

Ruth E. Ryder
Acting Director
Office of Special Education Programs