

Independent Educational Evaluations (at Public Expense)

Parents always have the right to their own Independent Educational Evaluation (IEE) and may have one at public expense if the school district evaluation was no “appropriate”. Here is the statute on having an IEE

34 CFR Sec. 300.502 Independent educational evaluation.

(a) General.

(1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) 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 paragraph (e) of this section.

(3) For the purposes of this subpart--

(i) 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

(ii) Public expense means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with Sec. 300.103.

(b) Parent right to evaluation at public expense.

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either--

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

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to Sec. Sec. 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

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

(4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency 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.

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

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

(1) 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

(2) May be presented by any party as evidence at a hearing on a due process complaint under subpart E of this part regarding that child.

(d) Requests for evaluations by hearing officers. If a hearing officer 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.

(e) Agency criteria.

(1) 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.

(2) Except for the criteria described in paragraph (e)(1) of this section, a public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

(Authority: 20 U.S.C. 1415(b)(1) and (d)(2)(A))

The easiest way to show that the school assessment was not “appropriate” is to demonstrate that it violated the statutory requirements. The following regulation should be scrutinized.

Sec. 300.304 Evaluation procedures.

(a) Notice. The public agency must provide notice to the parents of a child with a disability, in accordance with Sec. 300.503, that describes any evaluation procedures the agency proposes to conduct.

(b) Conduct of evaluation. In conducting the evaluation, the public agency must--

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining--

(i) Whether the child is a child with a disability under Sec. 300.8;

and

(ii) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(c) Other evaluation procedures. Each public agency must ensure that--

(1) Assessments and other evaluation materials used to assess a child under this part--

(i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) Are provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer;

(iii) Are used for the purposes for which the assessments or measures are valid and reliable;

(iv) Are administered by trained and knowledgeable personnel; and

(v) Are administered in accordance with any instructions provided by the producer of the assessments.

(2) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(3) Assessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

(4) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;

(5) Assessments of children with disabilities who transfer from one public

agency to another public agency in the same school year are coordinated with those children's prior and subsequent schools, as necessary and as expeditiously as possible, consistent with Sec. 300.301(d)(2) and (e), to ensure prompt completion of full evaluations.

(6) In evaluating each child with a disability under Sec. Sec. 300.304 through 300.306, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.

(7) Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

(Authority: 20 U.S.C. 1414(b)(1)-(3), 1412(a)(6)(B))

IEE at Public Expense, Illustrative Case

Here is an illustrative case found in the archives of the California Special Education Hearing Office database (http://www2.otan.dni.us/seho_search/sehosearch.taf) **Student v Moorpark Unified School District** California Special Education Hearing Office case 98-1021. Remarkably, this case went to hearing on the issue of reimbursement for the costs of an IEE of about \$1,100. At the conclusion of the case, the Moorpark School District was required to pay this bill, and then appealed the decision, the end result of which was payment of more than \$50,000 in attorney fees to the parent attorney who was the "prevailing party" at due process.

This matter was heard before Van T. Vu, Hearing Officer of the California Special Education Hearing Office (Hearing Office), University of the Pacific, McGeorge School of Law, in Moorpark, California, on April 29 and 30, and June 24 and 25, 1999. Moorpark Unified School District (District or Moorpark USD) was represented at hearing by attorney Andrew Arczynski. Also present on the District's behalf was Dolores Allen, special education administrator for Moorpark Unified School District. STUDENT was represented at the hearing by attorney Tom Beltran. STUDENT's parents, PARENTS, were also present on STUDENT's behalf. Kings Canyon Joint Unified School District (Kings Canyon) was represented at hearing by attorney Raymond Dunn. Dr. Lowell Boldt, lead psychologist for Kings Canyon, was also present on Kings Canyon's behalf. Moorpark Unified School District called the following witnesses to testify at the hearing: Jan Mecagni, social worker with Behavioral Health; Richard Jenkins, program specialist for Moorpark USD; Dr. Lowell Boldt, lead psychologist for Kings Canyon; and Jan Van Atta, school psychologist at Moorpark USD. STUDENT called the following witnesses to testify at the hearing: Lisa Melchior, STUDENT's mother; Dr. James Kehr, clinical psychologist; and Dr. John Lutzker, chairman of the Department of Psychology at the University of Judaism. Oral and documentary evidence was received and the record was left open for the submission of closing arguments. Closing arguments were received on August 2, 1999. The record was closed and the matter was submitted for decision.

(portions omitted)**

On the last day of hearing, **STUDENT, through his parents and attorney, withdrew all of his issues except those related to the issue of whether he is entitled to reimbursement for Dr. Kehr's assessment.** The withdrawal of the issues was done on the record. Accordingly, the parties requested that the decision address the sole issue of whether the PARENTS are entitled to reimbursement for Dr. Kehr's assessment of STUDENT.

(portions omitted)**

ISSUES I. Was the District required to conduct a functional analysis assessment (FAA) following the June 9, 1997 incident in when STUDENT kicked a hole in the wall of his residential unit? II. If so, are the PARENTS entitled to reimbursement for the independent assessment conducted by Dr. James Kehr on September 22, 1997?

POSITIONS OF THE PARTIES STUDENT identified **two primary reasons why he should be reimbursed for the independent assessment by Dr. Kehr. First, he argued that his behavior and act of kicking a hole in the wall necessitated that the District conduct an FAA, but that no FAA was performed by the District. Second, STUDENT asserted that the District did not conduct an FAA when one was requested by his parents on August 12, 1997. Thus, because the District failed to perform the FAA timely when one was required and after one was requested by his parents, STUDENT argued he was entitled to seek an independent evaluation at the District's expense to address his behavioral needs.** Accordingly, Respondent requested reimbursement for the independent assessment conducted by Dr. Kehr on September 22, 1997. **The District, on the other hand, made three arguments as to why STUDENT was not entitled to reimbursement for the independent assessment conducted by Dr. Kehr. First, the District argued that STUDENT's behaviors did not constitute "serious behavior problems," which are a requirement for an FAA. Therefore, the District was not required to conduct an FAA and there was no need for STUDENT to procure the independent assessment from Dr. Kehr. Second, the District asserted that, even if an FAA were warranted, Dr. Kehr's independent evaluation fell short of the requirements for an FAA and, thus, is not reimburseable as such. Third, the District argued that it fully and thoroughly assessed STUDENT in his triennial assessment during the fall of 1997. The District also asserted that Respondent procured Dr. Kehr's assessment prior to the District's completing the assessments listed on the assessment plan and that, therefore, no assessments existed with which Respondents could have disagreed. Thus, according to the District, if there were no assessments with which Respondents disagreed, it was premature for Respondent to seek an independent evaluation. Based on the above, the District contended that it is not required to pay for Dr. Kehr's assessment.**

BACKGROUND FACTS STUDENT is a sixteen-year-old tenth-grader who has been qualified for special education since 1994 as a student with a **serious emotional disturbance (ED)**. STUDENT and his parents are residents of the Moorpark Unified School District within Ventura County. At all the dates relevant to the issue of this case, STUDENT was attending Kings View Center, a residential facility in Tulare County. No information was provided at hearing regarding where, or whether, STUDENT currently attends school. **Because of behavior including aggression, violence (which includes an attack of his father with a knife), verbal abuse toward others, refusal to attend school, and destruction of property, STUDENT was hospitalized at Vista Del Mar psychiatric hospital** from January to April 1997. On February 11, 1997, STUDENT's IEP team (which included Ventura County Mental Health) convened and agreed to place him in a special day class at a residential facility. The IEP team also agreed to continue his IEP goals and objectives from his prior November 11, 1996 IEP. Such goals included social and emotional development to promote positive interactions with peers in the school and community setting, as well as work on his arithmetic and written expression. Although STUDENT's placement at a residential facility was agreed to by the IEP team, the specific residential facility placement was to be determined at a later date. Pursuant to a mediated IEP, STUDENT was placed at Kings View Center (Kings View) residential facility on April 1, 1997. While STUDENT was at Kings View, he attended Rio Canyon School, a public school located on the grounds of the Kings View residential facility within the Kings Canyon Unified School District. His psychotherapist at Kings View was Lynn Kliewer. Between April and June 1997 (during STUDENT's first quarter at Kings View), **STUDENT's behavior included "defiance, pushing limits, kicking the walls when angry, leaving the facility without permission or escort, refusing to go to school, threatening others and suicidal ideation."** According to his mother, **he was also engaged in "picking" behavior, picking at his skin and eyelashes to the point of bleeding.** Additionally, STUDENT missed 11 out of 52 days of school during his first quarter at Kings View. On June 9, 1997, while on the residential portion of the Kings View placement, STUDENT became upset after being denied television privileges and kicked a hole in the wall. Kings View staff, apparently following standard

policy for all property damage at the facility, reported the incident to the local sheriff's department. Four days after the kicking incident, STUDENT's therapist, Lynn Kliewer, informed STUDENT's parents about his behavior and the property damage. STUDENT was eventually charged with a misdemeanor, but the charges were subsequently dropped after his parents appeared at the juvenile court proceeding. On August 12, 1997, the PARENTS sent Richard Jenkins, program specialist for Moorpark USD, a letter in which they requested that an independent "psychological and educational" assessment be conducted by Dr. James Kehr. Mr. Jenkins responded to the PARENTS by letter on August 25, 1997, which stated that the District intended to complete a full triennial assessment of STUDENT and, thus, an independent assessment would be unnecessary. **Mr. Jenkins attached an assessment plan to his letter which called for assessments in the areas of academic achievement, health, cognitive functioning, speech and language, psycho-motor development, self-help/adaptive behavior, social emotional functioning, and vocation. The PARENTS responded to Mr. Jenkins by a letter stating that the assessment plan did not include the "psychological assessment" they had requested on August 12.** The PARENTS consented to the assessment plan on September 19, 1997, but attached a letter from their attorney which clarified that they intended to pursue the independent assessment with Dr. Kehr since no FAA had been conducted by the District. Dr. Kehr met with and assessed STUDENT on September 22, 1997. The District performed its various assessments of STUDENT beginning October 20, 1997. According to a report by STUDENT's therapist, Lynn Kleiwer, STUDENT's behavior improved significantly from July 1997 until April 1998. However, by May 1998, STUDENT's behavior had "deteriorated significantly." STUDENT relapsed into refusing to attend school and had increasing difficulties in the residential unit. In mid-May, STUDENT again damaged property when he punched a hole in a wall through to another room. Fearing that STUDENT would harm himself or others, Mental Health was called and STUDENT was hospitalized at a psychiatric facility. After discharge, he was not allowed to return to Kings View Center. In his discharge summary, Lynn Kleiwer recommended that STUDENT be placed in a more restrictive environment than the Kings View residential facility could offer. No information was provided at hearing regarding where STUDENT currently attends school.

On June 19, 1998, **the District filed a request for a special education due process hearing with the Hearing Office to resolve the issue of whether its assessment of STUDENT was appropriate.** The District submitted required supporting information on June 25, 1998. On October 5, 1998, STUDENT, through his parents and attorney, cross-filed a request for hearing. STUDENT's case was consolidated into the District's case on January 12, 1999. On the last day of hearing, Respondent STUDENT withdrew all his issues unrelated to issue of whether the District was required to reimburse the PARENTS for Dr. Kehr's independent assessment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Was the District required to conduct a functional analysis assessment (FAA) following the June 9, 1997, incident when STUDENT kicked a hole in the wall of his residential unit? STUDENT's position is that the District failed to conduct a functional analysis assessment, as is required under the Hughes Bill, after he kicked a hole in the wall of his residential unit at Kings View on June 9, 1997. Thus, **Respondent argued that the District's failure to assess him necessitated that he procure an independent evaluation from Dr. Kehr, for which he should be reimbursed. Because the District never conducted an FAA with regard to STUDENT's behaviors leading up to the June 9 incident, the issue of whether Respondent should be reimbursed for Dr. Kehr's assessment hinges on whether the District's decision not to conduct such assessment was appropriate.** In 1990, California passed Education Code Section 56520 et seq., which is commonly known as the "Hughes Bill." Regulations implementing the Hughes Bill are contained in Title 5, California Code of Regulations 3001 and 3052. According to the Hughes Bill, a functional analysis assessment (FAA) forms the basis of a behavior intervention plan. C.C.R. 3052 (a)(3). Subsection (h) of 3001 states that the "behavior intervention plan" is a written document which is developed when the individual exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the individual's IEP." The regulations define serious behavior problems as "behaviors which are self-injurious, assaultive, or cause serious property damage and other severe behavior problems that are pervasive and maladaptive for which instructional/behavioral approaches specified in the student's

IEP are found to be ineffective." 5 C.C.R. 3001(ah). When members of an IEP team find that the instructional/behavioral approaches specified in the student's IEP are found to be ineffective, an FAA must be conducted. 5 C.C.R. 3052 (a)(6)(b). 1. Serious behavior problem The evidence established that STUDENT's behavior from April 1 to June 9, 1997, was self-injurious, assaultive, and caused serious property damage. According to STUDENT's Treatment Plan dated April 24, 1997, STUDENT made suicidal and homicidal threats, had angry and destructive outbursts, and threw things when he was angry. (Dist. Exh. 15.) According to the Serious Incident Logs from the residential staff at Kings View, STUDENT made suicidal threats and would cut scratches into his arm and pick at his skin and scabs until they bled. (Student's Exh. Z.) STUDENT also made racial, sexual, abusive, and homicidal threats and comments to the staff, his parents, and his peers. The logs also noted that STUDENT banged on walls, tipped over his dresser, destroyed peers' belongings, and scratched his name on the wall. Moreover, the logs indicated that STUDENT kicked a "big hole" in the wall on April 29, 1997, and then kicked another hole in the wall on June 9, 1997. Based on the above, the Hearing Officer finds that STUDENT's behavior during his first quarter at Kings View was self-injurious, assaultive, and caused serious property damage. 2. Significantly interferes with the implementation of the goals and objectives of the IEP For STUDENT's behaviors to trigger an FAA, they must have significantly interfered with the implementation of the goals and objectives in his IEP. As was noted above, STUDENT's February IEP indicated goals to work on his ability to do arithmetic computations, his ability to write legibly, and his social and emotional development to promote peer interaction. (footnote 4) The IEP team also indicated that STUDENT's behavioral needs were extensive, that he participated minimally in his educational program, and that his attendance had been inconsistent. While at his residential placement at Kings View, STUDENT's behavioral needs were addressed by treatment plans developed by an interdisciplinary team of staff at Kings View. The evidence established that STUDENT's behavioral problems interfered with the implementation of his IEP goals and objectives. In his discharge summary, Lynn Kliewer wrote that, during STUDENT's first quarter at Kings View, he missed 11 of 52 days of class, missed half of his individual therapy sessions, and occasionally missed his group therapy sessions. Mr. Kliewer also noted that STUDENT only met a few of his short-term behavior treatment plan goals during this time. (Student's Exh. I.) STUDENT's short-term treatment plan goals included reducing his destruction of property or throwing things when angry to no more than one or two times a week, intruding on other's space or speech to no more than two times most days, and responding to calls from parents, consequences, or limit setting with destructive or defiant outbursts to no more than one or two times a week. In his Serious Incident Logs, STUDENT was noted for being defiant and for leaving the residential facility without consent or escort on numerous occasions and for varying lengths of time. (Student's Exhs. A and Z.) On one such occasion, STUDENT ran away from the residential facility and wandered into a nearby town, where he was recognized by the residential facility staff and returned to Kings View. STUDENT's behaviors and actions resulted in his missing a significant amount of class and therapy time and being away from the residential facility where he was supervised and his behaviors monitored by the residential staff. As such, his behaviors interfered with the implementation of his academic goals because of his significant absences from class. Additionally, his absence from individual therapy and from the supervision of residential staff substantially interfered with his behavior treatment as provided by Kings View. Although STUDENT was placed at the residential facility because of his extensive behavioral needs, his behaviors were relatively uncontrolled during this time, and his social and behavioral development goal on his IEP was rendered virtually ineffective. Based on the foregoing, the evidence established that STUDENT's behaviors significantly interfered with the implementation of his IEP goals and objectives during this time. Although the District asserted that STUDENT's behaviors reflected his adjustment to the facility and not a serious behavior problem, his behaviors during his first quarter at Kings View (from April to July 1997) were similar to behaviors exhibited prior to his psychiatric hospitalization in January 1997. In January, STUDENT was hospitalized because he was aggressive, violent and verbally abusive, he refused to attend school, and he threw things and destroyed property. Such behaviors persisted despite STUDENT's being placed in a more restrictive residential placement where various treatment plans were implemented to address his behaviors. **In summary, STUDENT met the criteria for an FAA. His behaviors were assaultive, self-injurious, caused property damage, and significantly interfered with the**

implementation of the goals and objectives of his IEP. Therefore, STUDENT's behaviors were "serious behavior problems" which would have triggered the need for an FAA and a behavior intervention plan.

B. Are the PARENTS entitled to reimbursement for the independent assessment conducted by Dr. James Kehr on September 22, 1997? California Education Code 56329(b) provides that a parent may obtain an independent educational evaluation from a qualified specialist at public expense if the parent disagrees with the assessment conducted by the educational agency. However, if the educational agency establishes at a due process hearing that its assessment is appropriate, it is not required to pay for the independent evaluation. Id. Based on this code section, the District has the burden at hearing to prove the appropriateness of its actions. In this case, the Respondent procured an independent evaluation because no FAA was conducted by the District. Because no FAA was planned for or conducted by the District when Respondent asserted one should have been conducted, the District must prove at hearing that its decision not to plan for or conduct such assessment was appropriate. As discussed above, the District failed to do so. **Because the District did not plan for or conduct an FAA when one was warranted, Respondent is entitled to reimbursement for the independent assessment procured from Dr. Kehr. (footnote 5) Although the District asserted that it is not required to reimburse Respondents for Dr. Kehr's assessment because such assessment did not meet the formal requirements of an FAA, it provided no authority to support its contention. The Hearing Officer notes that, although it is not a formal FAA, Dr. Kehr's assessment outlined and identified STUDENT's behaviors which were antecedent to his behavioral outbursts. Additionally, Dr. Kehr and Dr. Lutzker testified that Dr. Kehr's assessment contained key components of an FAA. Both doctors are psychologists with extensive experience working with school Districts in conducting FAAs and developing behavior intervention plans. Such information reasonably could have been considered by an IEP team in developing a behavior intervention plan for STUDENT. **The parents' decision to have STUDENT assessed by Dr. Kehr was a reasonable response to the District's failure to conduct any assessment that effectively addressed STUDENT's severe behavioral problems. Because the PARENTS procured an assessment of STUDENT's behavioral problems when the District failed to do so, they are entitled to reimbursement for such assessment. Thus, based on the foregoing, the District is required to reimburse Respondent for the cost of Dr. Kehr's independent evaluation.****

ORDER Moorpark USD shall reimburse PARENTS for the cost of the independent assessment conducted by Dr. James Kehr within one month of the date of this decision.

PREVAILING PARTY ON EACH ISSUE Pursuant to Education Code 56507(d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with this statute: Respondent **STUDENT prevailed on the issue decided.**

RIGHT TO APPEAL THIS DECISION The parties to this case have the right to appeal this decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety (90) days of receipt of this decision. Education Code 56505(i).

DATED: September 8, 1999 _____ Van T. Vu, Hearing Officer
California Special Education Hearing Office