

Legally Defensible Assessments

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Marcy Gutierrez is a Partner in Lozano Smith's Sacramento office. She began her career in education as a public school teacher, and has been advising and representing school districts and other education entities for over ten years. Her areas of expertise include special education, student issues, and litigation.

Ms. Gutierrez has effectively represented school districts in many venues, including cases successfully litigated at the administrative agency level as well as in the federal courts. In addition to special education, she also advises and represents school districts and other education entities with regard to student discipline, public records requests, and the broad spectrum of anti-discrimination and anti-harassment requirements that apply to public education agencies.

Ms. Gutierrez is a frequently requested guest speaker who has presented on many topics, such as Transition Planning, Autism, IEP Facilitation, and other topics related to special education as well as Section 504. She finds her expertise is best used by providing training to staff, where she emphasizes hands-on tools to provide educationally and legally appropriate programs for students with special needs.

Ms. Gutierrez earned her J.D. from University of the Pacific, McGeorge School of Law, and her B.A. from the University of California, Davis.

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Assessments – An Overview

- When is the duty to assess triggered?
- What is required for a legally defensible assessment?
- What are some common mistakes to avoid?.
- What liability is created by inappropriate assessments?
- What is the legal test for eligibility?
- What is an IEE and what are the related obligations?

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Special Education Assessments

- Assessments:
 - They are the foundation for eligibility, services and placement.
 - A weak foundation compromises everything else.
 - A strong foundation sets the course for success.



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Overview

- Child Find
- Assessments
- Eligibility
- IEEs
- Due Process



CHILD FIND

Obligation or Opportunity?

Child Find - Obligation

- IDEA imposes an affirmative obligation on the district to identify and evaluate children with disabilities.
- KEY POINT: The obligation is not dependent upon a request from a parent.



Child Find - Obligation

- Child Find obligation is triggered when...
There is a reason to SUSPECT a disability and reason to SUSPECT that special education services may be needed to address that disability.



Child Find - Obligation

Low Threshold

- District must respond within a reasonable time after receiving notice of a potential disability.
- District deemed to have notice if student's behavior or poor academic performance indicates a possible need for special education.

Child Find - Opportunity

Child Find: Is an *opportunity* to:

- Lay the foundation for appropriate eligibility and services.
- Set course for the IEP team.
- Preserve the right to defend your assessments.

Child Find - Opportunity

- Legal benefits of assessment include:
 - First look at a student.
 - Legally defensible report in file.
 - Independent Education Evaluations (IEE) issues.



Child Find - Reassessment



- Obligation to assess not extinguished by completion of initial assessment:
 - Reassess every three years (Ed. Code § 56381(a)(2))
- If conditions warrant reassessment.

ASSESSMENTS

Assessments

- The IDEA obligates districts to assess students in all areas of suspected disabilities.

(20 U.S.C. § 1414(b)(3)(B) and Ed. Code, § 56320(f).)

- Unique needs are to be broadly construed.



Assessments

Considerations

- Social emotional difficulties.
- Attendance issues.
- Low academic skills.
- Slow progress.
- Atypical development.
- Behavior that may be triggered by disability.
 - Speech disorder leads to frustration leads to behavior problems.

Assessments

- A legally defensible assessment includes:
 - review of records.
 - standardized testing.
 - observations in multiple settings.
 - parent/teacher interview.
 - student interview.

Legally Defensible Assessments

Procedural requirements:

- Are district's responsibility/obligation.
- Staff must know timelines.
- Can make or break a case.
- Follow-up is key.

(20 U.S.C. § 1414(a)(1)(C) and
Ed. Code, §§ 56302.1 and 56043(c).)

Assessments – Potential Blind Spots

Often overlooked areas:

- Behavior.
- Attention.
- Medical.
- Social/Emotional.
- Communication.

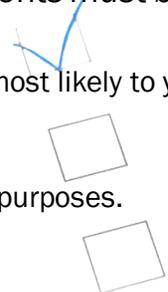


Assessments Requirements

• Tests and other assessments must be:

- In the language and form most likely to yield accurate information.
- Used for valid and reliable purposes.

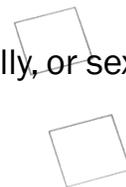
(Ed. Code § 56320)



Assessment Requirements

- Administered by trained and knowledgeable personnel and in accordance with the instructions.
- Cannot be racially, culturally, or sexually discriminatory.

(Ed. Code § 56320)



Assessment Requirements

- Tailored to assess the specific areas of educational need and not just a single general intelligence quotient.
- Do not use a single measure or assessment as the sole criterion.

(Ed. Code § 56320)



Assessments

Observation:

- Observations in the education setting are critical to an appropriate assessment.
- Who should observe?



Assessments

- Observations in other relevant areas:
 - Playground.
 - Lunch room.
 - Assembly/auditorium.
 - Video from home, in some cases.



Assessments

Observation:

- Easy access to the school setting and staff is a key advantage that district assessments have over private assessments.
- Conversely, failure to observe and consult with staff can seriously weaken the credibility of a district assessment.

Assessment Reports

The report shall include,
but is not limited to:

- (1) Need for special education and related services;
- (2) Basis for determination;

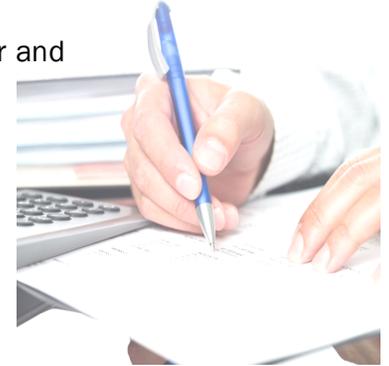
(Ed. Code § 56327)



Assessment Reports

- (3) Relevant behavior observed;
- (4) Relationship between the behavior and student's academic and social functioning;

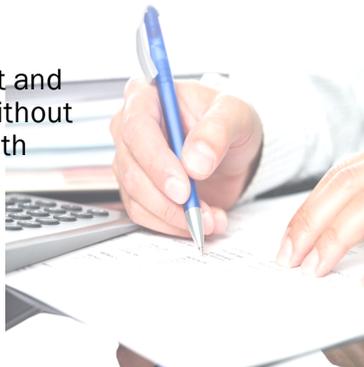
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Assessment Reports

- (5) Health and development, and medical findings;
- (6) Discrepancy between achievement and ability that cannot be corrected without special education (for students with learning disabilities);

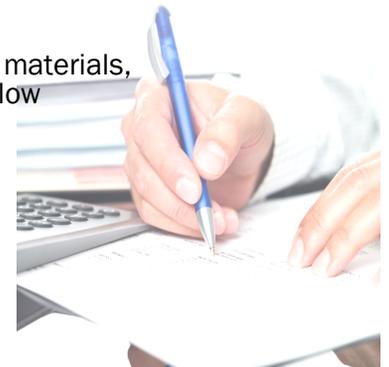
(Ed. Code § 56327)



Assessment Reports

- (7) The effects of environmental, cultural, or economic disadvantage; and
- (8) The need for specialized services, materials, and equipment for students with low incidence disabilities.

(Ed. Code § 56327)



Assessment Reports



- Assessors must prepare a written report and provide to parents.
- Report translated into the parent's primary language.

(Ed. Code § 56329)

Assessment Reports

Should assessment reports summarize disability categories and whether the student qualifies for special education?



Assessment Instruments

- Common **errors** in selection of assessment instruments:
 - Outdated assessment instruments.
 - Standardized cognitive assessments for African-American students.



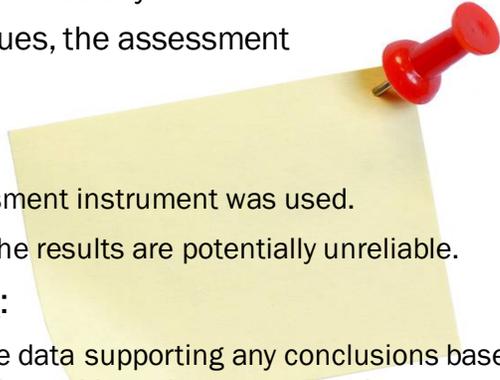
Assessment Instruments

- Common **errors** in selection of assessment instruments
 - Using same instrument less than a year after previous administration.
 - Screening assessments, instead of full-scale, standardized assessments.
 - Using instrument outside normed ages.

Assessment Instruments

If an assessment includes any of the aforementioned issues, the assessment report should:

- Explain:
 - Why the assessment instrument was used.
 - The validity of the results are potentially unreliable.
- Alternative data:
 - Have alternative data supporting any conclusions based in any part upon the problematic assessment instruments.



Assessment Instruments

- Review results for correct scoring

The District's assessor's "scoring errors raised questions about the integrity and validity of the assessment as a whole."

(Anaheim City Sch. Dist. v. Student, OAH No. 2010010357)

Protocols

- Administer assessments in accordance with the instructions provided.

(Ed. Code § 56320(b)(3))



Potential Blind Spots

Problem Areas:

- Failing to assess all areas of suspected disability.
- Poor choice of assessment instruments.
- Improperly completed protocols – basal/ceiling, added incorrectly.

Potential Blind Spots

Problem Areas:

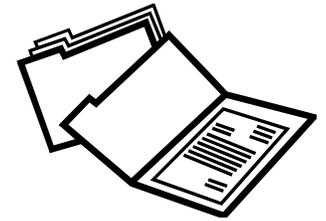
- Failing to observe student and consult with teachers and service providers.
- Unimpressive assessment reports.
- Lack of analysis.



Potential Blind Spots

Problem Areas:

- Appearance of bias.
- Embarrassing or substantive typos – confusing he/she, wrong name in report, listing a test with no scores.
- Not providing the entire picture.



Assessments – Potential Blind Spot

Example:

- Private assessment report included 19 incorrect test scores. Assessor blamed her secretary, but the hearing officer accorded very little weight to the report, and found the assessor to not be a credible witness.

(Manteca Unified Sch. Dist. (SEHO 2002), SEHO SN 02-01151)



Potential Blind Spots

Problem Areas:

- An assessment can be substantively outstanding, but typographical and grammatical errors will impact its credibility. (E.g., use of “its” and “it’s”.)
- Substantive errors, such as incorrect test scores, can call the entire assessment report into question.

ELIGIBILITY

Eligibility

“Child with a Disability” is a two-pronged analysis:

- Does the child meet the criteria associated with one of the disability categories under the law; AND
- Does the child need special education and related services as a result of this disability?

Eligibility

California law:

- An individual with exceptional needs is one who, because of a disability ***“requires instruction and services which cannot be provided with modification of the regular school program in order to ensure that the individual is provided a free and appropriate public education...”***

(Ed. Code § 56026(b).)

INDEPENDENT EDUCATIONAL EVALUATIONS (IEE)

IEEs

- A parent may request an IEE at public expense if the parent disagrees with a school district's evaluation.

(Ed. Code § 56329(b))



IEEs

- In response to a parent's request for an IEE, the district must without undue delay:
 - Initiate due process; OR
 - Provide an IEE at public expense.

(Ed. Code § 56329(c))



IEEs

- FUND OR FILE?
 - Review assessment.
 - Assessment must have all components.
 - Requests for IEEs are time sensitive.



IEE Question



- Can a district seek to conduct its own assessment in response to an IEE request?

IEEs - Observation

- If district agrees to fund the IEE, it must allow independent assessor equivalent opportunity to observe student.

(Ed. Code § 56329(b).)

- Tip: Make sure district staff accompany outside assessor during observation.
- Tip: Make sure to schedule observation when teacher(s) is present. No substitute teachers!

IEEs

- Making the Decision to Fund or File:
 - Review the assessment that the parent disagrees with, including protocols.
 - All components of an appropriate assessment must be present if the District wants to file for due process.
 - Failure to conduct an appropriate assessment eliminates the ability to defend your assessments.

IEEs

- Upon request for an IEE, provide parent information about where an IEE may be obtained; and
- The district may ask for the parent's reasons for objecting to the district's assessment, but the parent is not required to respond.



IEEs

- IEE agency criteria
 - Cost containment.
 - Geographic limitations.
 - Exceptions – options.
 - File for Due Process Hearing.



IEEs

- If the parent obtains an IEE at private expense:
 - Results must be considered; and
 - May be presented as evidence at a due process hearing.



RISKS OF ASSESSING INAPPROPRIATELY

Risks

- Failure to identify needs.
- Loss of education because needs not properly identified.
- Denials of FAPE.
- Loss of credibility of assessor.
- Payment of IEEs.
- Payment of attorney fees.

Assessments – Did We Hit Everything?

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Questions



Disclaimer: These materials and all discussions of these materials are for instructional purposes only and do not constitute legal advice. If you need legal advice, you should contact your local counsel or an attorney at Lozano Smith. If you are interested in having other in-service programs presented, please contact clientservices@lozanosmith.com or call (559) 431-5600.

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