

# MASSACHUSETTS ADVOCATES *for* CHILDREN



## AN ACT TO PROVIDE EQUAL ACCESS TO EVALUATIONS FOR CHILDREN WITH DISABILITIES

Lead Sponsor: Sen. Barbara L'Italien

S. 58

**Testimony of Julia Landau, Esq.**

**December 5, 2017**

My name is Julia Landau. I am the director of the Disability Education Justice Initiative at Massachusetts Advocates for Children (MAC), which provides free legal services and advocacy for low-income children in Massachusetts.

Summary of the bill: The essential purpose of the bill is to reform the rates used to reimburse independent educational evaluations (or IEEs) for students with disabilities so that parents are able to obtain the evaluations which are legally required and which are essential to students receiving appropriate special educational services. Rates would be reviewed (and adjusted as necessary) every three years.

Why this bill is important: It is our experience that parents disagree with the district's testing and seek independent education evaluations in a very small percentage of cases.<sup>1</sup> Yet, when an IEE is needed, there is often much at stake. For example, the student may be struggling at school; the student's disability-related educational needs may be multiple, significant and complex; and the school district may not have staff with sufficient expertise to fully understand the student's particular combination of deficits. Understandably, the parents are likely to be extremely concerned and yet have no ability, on their own, to understand their son or daughter's educational needs or how those needs should be met by the school district. State and federal special education laws require, under these circumstances, that parents have an opportunity to obtain an independent educational evaluation—essentially, a second opinion to help the school district and parents determine how to appropriately educate the student.

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<sup>1</sup> No statistics are available regarding the precise number of requested IEEs. However, data available indicate that parents do not often disagree with a school district evaluation and seldom request an IEE. Over 90% of the parents statewide agree with the school district and accept the IEP.

Evaluations, conducted by a range of professionals (psychologists, special educators, speech therapists, etc.) are critically important to each step of the special education process. For the vast majority of special education issues—such as, the question of what special education or related services should be provided to a particular student—evaluations drive the discussion and decision-making at the school district level. This typically happens in the district’s individualized education program (IEP) Team meeting. State and federal special education laws give parents the right to fully participate, as equal members of the Team that develops their child’s IEP, and independent educational evaluations provide an opportunity for parents to participate effectively in the process of developing their son or daughter’s IEP.<sup>2</sup>

What the law currently requires: Massachusetts and federal special education requirements ensure that a parent has the right to obtain an independent education evaluation at private expense at any time. See 34 CFR 300.502(b)(3); MGL c. 71B, s. 3; 603 CMR 28.04 (5)(b). But, for many parents, public funding of an IEE is essential.

Massachusetts special education law and regulations provide that in certain instances (typically when parents meet income guidelines<sup>3</sup> or when a school district’s evaluation is not comprehensive and appropriate), the school district must pay for a parent’s independent educational evaluation. But school districts are required only to pay for IEEs by evaluators who are willing to accept the rates set by the state, hence the critical importance of IEE rates. See 603 CMR 28.04(5).

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<sup>2</sup> The United States Supreme Court and the federal Court of Appeals for the First Circuit (which includes Massachusetts) have similarly made clear the central importance of special education evaluations, including parents’ right to an IEE. The First Circuit Court of Appeals in *South Kingstown School Committee v. Joanna S.*, 773 F.3d 344, 346-47 (1<sup>st</sup> Cir. 2014) explained as follows:

Evaluations are integral to the way [federal special education law] works... They assist in determining ... [t]he content of the child’s Individualized Education Program, or IEP. The IEP sets forth the services a disabled child will receive and the educational goals for that child. The IEP thus gives practical substance to IDEA’s right to a free appropriate public education. And for that reason, evaluations are a key means—perhaps the key means—for deciding the content of the protections IDEA offers.

The United States Supreme Court in *Schaffer v. Weast*, 546 U.S. 49, 60-61 (2005) explained parents’ right to an independent education evaluation as follows:

IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.

<sup>3</sup> Massachusetts statute and regulations require a school district to pay for the entire evaluation if the student is eligible for free or reduced cost lunch, has family income of 400% or less of the federal poverty guidelines or is in the custody of a state agency with an educational surrogate parent, and require a school district to pay for part of the cost of evaluation if the family income is greater than 400% of the federal poverty guidelines but equal to or less than 600% of the federal poverty guidelines. See MGL c. 71B, s. 3; 603 CMR 28.04(5)(c).

Independent evaluators do not have the same knowledge as school district staff regarding a student's day-to-day education, and they do not seek to replicate evaluations or reports by school district staff. Rather, the evaluator may speak with school district staff, observe the student at school, conduct formal and informal testing, and review school records; and the evaluator will then come to an independent determination of the student's special education needs and how they should be met for the purpose of advising both the school district and the parents. A school district must then consider a parent's independent educational evaluation at an IEP meeting but is not required to implement the evaluator's recommendations.

The bill would not change any of this, but instead focuses on the rates used to reimburse IEEs.

How the current IEE rates preclude parents from obtaining IEEs: The state rates now in effect for independent evaluations were last set in 2004. They are far below the rates customarily charged by evaluators.<sup>4</sup> Of particular concern is the rate for a comprehensive neuropsychological evaluation since this evaluation is often critical to determining how to meet the educational needs resulting from the child's disability.

Current regulations permit a range of 8 to 12 hours at the rate of \$74.94 per hour – that is, total reimbursement from only \$600 to \$900 for a comprehensive neuropsychological evaluation. It is our understanding that these rates continue to be significantly lower than Medicare and BlueCross/Blue Shield reimbursement rates. The overall maximum rate of \$900 is substantially below the rate of \$2,500 or more that is typically charged by private neuropsychological evaluators in Massachusetts.

As a general rule, private neuropsychologists in Massachusetts are unwilling to perform a comprehensive neuropsychological evaluation in special education cases at these rates. Other IEE state rates (for example, the rate for an educational achievement evaluation) are also prohibitively low. Consequently, many low-income and middle-income parents are denied their right to an IEE.

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<sup>4</sup> By statute (MGL c. 71B, s.3), the Massachusetts Executive Office of Health and Human Services (EOHHS) has responsibility to set these rates and delegates the analytical work to the Center for Health Information and Analysis (CHIA). EOHHS Team Evaluation Services regulations specifically address the rates for IEEs (114.3 CMR 30.00). These regulations were last revised in July 2004 when the Division of Health Care Finance and Policy had responsibility to issue these regulations. For purposes of IEE rates, CHIA has also used two other more generic rate regulations for IEE rates regarding certain kinds of evaluations because these more generic rate regulations have been updated more recently than the Team Evaluation Services regulations. These two more generic rate regulations are for Psychological Services (114.3 CMR 29.00) and Rehabilitation Center Services, Audiological Services, Restorative Services (114.3 CMR 39.00). The former of these was last revised in January 2008 (CHIA has recently begun a process of reviewing these regulations) and the latter in June 2011.

The IEE rates that are the subject of this bill pertain only to non-hospital-based evaluators. Separate Medicaid regulations govern hospital rates. Hospital evaluators have been willing to use Medicaid rates to conduct IEEs but there is often an excessive wait time (for example, six months to a year) and the evaluations typically do not include a school observation, which is often a critical component. Hospital rates for evaluations, which vary by individual hospital, are higher than the IEE rates.

How the bill addresses these concerns: The United States Department of Education has explained that to comply with the federal special education law, rates for independent educational evaluations must “allow[] parents to choose from among the qualified professionals in the area and only eliminate[] unreasonably excessive fees”. *Letter to Anonymous*, Office of Special Education Programs, United States Department of Education, 22 IDELR 637 (February 2, 1995).<sup>5</sup>

The essential purpose of the bill is to require Massachusetts to follow this federal standard when it establishes IEE rates in Massachusetts and to require that rates be reviewed (and adjusted as necessary) every three years. The bill also allows the state Bureau of Special Education Appeals to determine that a higher rate may be needed in a particular situation, in order to comply with the above federal standards.

In addition, the bill describes the components of an IEE that would be covered by the state rates. For an IEE to be complete, and therefore useful to parents and school districts, it typically must include such things as an observation of the student at school and information from the student’s teachers, and the evaluator must be able to participate in the IEP Team meeting. The bill ensures that IEE rates will allow this to occur.

Experts obtained by parents for a BSEA hearing: A separate section of the bill addresses the right of parents to recover expert fees when the parent proceeds to an evidentiary hearing at the Bureau of Special Education Appeals. This right only applies in the rare instance where a parent has prevailed at a BSEA hearing—in other words, the BSEA hearing officer determined that the parent’s position, rather than the school district’s position, was correct—and the parent has paid out-of-pocket expert fees.<sup>6</sup>

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<sup>5</sup> Although not considered legally binding, letters from the DOE Office of Special Education Programs (OSEP) are routinely cited and relied upon by the federal courts and BSEA hearing officers. This is particularly true when (as in the present case) there are no federal regulations or statute directly addressing the question of IEE rates, and the courts and hearing officers therefore turn to the OSEP letters for guidance.

<sup>6</sup> According to the BSEA’s most recent statistics which are for FY 2014, parents fully prevailed in seven hearings and partially prevailed in four hearings during the twelve month period. There is no indication of how many of these disputes involved private experts who would be entitled to reimbursement of fees under the bill.

Conclusion: Through independent education evaluations, IEP Teams (including parents) have a more complete understanding of students' needs and how they should be met. Disputes will sometimes be resolved by the expert evaluators themselves—that is, the school district's evaluator and the parent's evaluator may come to an agreement as to how the student's needs should be met. IEEs will help parents evaluate their educational concerns, leading to more meaningful discussions (including negotiations) with the school district. If a dispute does proceed to a BSEA mediation or hearing, the mediator or hearing officer will have a better understanding of the responsibilities of a school district.

Thus, this bill not only helps to level the playing field for low-income and middle-income families, but also will likely reduce litigation and increase the opportunity for all concerned to understand and appropriately educate students with disabilities. Families would be provided the independent education evaluation required by state and federal special education laws, with modest increased annual costs to school districts of approximately \$500,000-\$750,000 statewide.