



DATE DOWNLOADED: Tue Apr 2 10:52:57 2024

SOURCE: Content Downloaded from [HeinOnline](#)

Citations:

Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Bluebook 21st ed.

Ricki Meyer, *Independent and Unequal: How Independent Educational Evaluations Provide a less than Equal Educational Opportunity to Students with Disabilities*, 25 B.U. PUB. INT. L.J. 75 (2016).

ALWD 7th ed.

Ricki Meyer, *Independent and Unequal: How Independent Educational Evaluations Provide a less than Equal Educational Opportunity to Students with Disabilities*, 25 B.U. Pub. Int. L.J. 75 (2016).

APA 7th ed.

Meyer, Ricki. (2016). *Independent and unequal: how independent educational evaluations provide less than equal educational opportunity to students with disabilities*. *Boston University Public Interest Law Journal*, 25(1), 75-100.

Chicago 17th ed.

Ricki Meyer, "Independent and Unequal: How Independent Educational Evaluations Provide a less than Equal Educational Opportunity to Students with Disabilities," *Boston University Public Interest Law Journal* 25, no. 1 (Winter 2016): 75-100

McGill Guide 9th ed.

Ricki Meyer, "Independent and Unequal: How Independent Educational Evaluations Provide a less than Equal Educational Opportunity to Students with Disabilities" (2016) 25:1 BU Pub Int LJ 75.

AGLC 4th ed.

Ricki Meyer, 'Independent and Unequal: How Independent Educational Evaluations Provide a less than Equal Educational Opportunity to Students with Disabilities' (2016) 25(1) *Boston University Public Interest Law Journal* 75

MLA 9th ed.

Meyer, Ricki. "Independent and Unequal: How Independent Educational Evaluations Provide a less than Equal Educational Opportunity to Students with Disabilities." *Boston University Public Interest Law Journal*, vol. 25, no. 1, Winter 2016, pp. 75-100. HeinOnline.

OSCOLA 4th ed.

Ricki Meyer, 'Independent and Unequal: How Independent Educational Evaluations Provide a less than Equal Educational Opportunity to Students with Disabilities' (2016) 25 BU Pub Int LJ 75
Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Provided by:

Fineman & Pappas Law Libraries

INDEPENDENT AND UNEQUAL: HOW INDEPENDENT EDUCATIONAL EVALUATIONS PROVIDE A LESS THAN EQUAL EDUCATIONAL OPPORTUNITY TO STUDENTS WITH DISABILITIES

RICKI MEYER*

| | |
|-----------------------------------------------------------------|----|
| I. INTRODUCTION | 75 |
| II. LEGAL BACKGROUND | 78 |
| A. <i>The Individuals with Disabilities Education Act</i> | 78 |
| B. <i>State Law</i> | 81 |
| 1. Massachusetts Law | 81 |
| 2. Massachusetts and Related Case Law | 83 |
| 3. Instructive Authority from Other Jurisdictions | 86 |
| C. <i>Rate Structure</i> | 88 |
| III. ARGUMENT | 90 |
| A. <i>Legislative Changes</i> | 90 |
| B. <i>State Rate Structure</i> | 96 |
| IV. CONCLUSION | 99 |

I. INTRODUCTION

Federal special education law requires that all students with disabilities receive a “free appropriate public education” (“FAPE”).¹ FAPE includes specialized educational services that are unique to the student and his or her needs, and that are stipulated in a student’s individualized educational program (“IEP”).² An IEP is the document that sets out the educational goals for the student and how the school will meet them.³ It includes an outline of the student’s current levels of performance; measurable goals; descriptions of how the student will meet those goals; special education and related services the school will provide and the frequency of each service; explanations of the extent to which the student will be educated apart from nondisabled children in a segre-

* J.D. Candidate, Boston University School of Law, May 2016; B.A. Social Policy, Northwestern University, June 2010; Ed.M, Harvard Graduate School of Education, May 2013.

¹ 20 U.S.C. § 1415(a) (2012).

² *Id.* § 1401(9).

³ *Id.* § 1414(d).

gated classroom; and any accommodations the school will provide.⁴ To determine the services that a school district (“district”)⁵ will provide for a student, the district conducts a multi-step evaluation process, including an initial evaluation, in which the student must partake.⁶ If the parents disagree with the findings of the initial evaluation, they may request that the district conduct an independent educational evaluation (“IEE”) at the district’s cost.⁷ Parents may also request an IEE if the school did not include a particular type of evaluation in its initial evaluation.⁸ An IEE is “an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.”⁹ Through an IEE, an evaluator may assess not only a child’s academic and cognitive skills but also any skills related to the child’s educational needs, including neurological functioning, adapted physical education, and sensory needs.¹⁰ IEEs can prove critically important to a student’s education and “are a key means—perhaps the key means—for deciding the content of the protections I[n]dividuals with D[isabilities] E[ducation] A[ct] offers.”¹¹ IEEs provide parents with their best opportunity to exercise their protections under the Individuals with Disabilities Education Act and “a remedy when a school district fails to carry out its evaluative responsibilities properly.”¹²

If a district agrees to conduct the IEE, the district must follow state regulations that govern what services are to be included in the evaluation.¹³ The district may present parents with a list of evaluators from which the parents can choose, and ultimately the parent selects the evaluator.¹⁴ The local education agency’s (“LEA”) list must provide the names and addresses of evaluators who meet certain minimum qualifications.¹⁵ The United States Department of Education has determined that “[i]f such a list is maintained and parents are required to use it, the LEA must include in its policy that parents have the oppor-

⁴ *Id.*

⁵ For purposes of this Note, the terms “district” and “local education agency” are used interchangeably.

⁶ 34 C.F.R. § 300.301 (2015).

⁷ *Id.* § 300.502.

⁸ Letter from Melody Musgrove, Dir. of Office of Special Educ. Programs, U.S. Dep’t of Educ., to Debbie Baus (Feb. 23 2015), <http://www.advocacyinstitute.org/resources/OSEPLettertoBausIEEsFeb23-2015.pdf>.

⁹ 34 C.F.R. § 300.502 (2014).

¹⁰ WAYNE STEEDMAN, *Independent Educational Evaluations: What? Why? How? Who Pays?*, WRIGHTSLAW, <http://www.wrightslaw.com/info/test.iee.steedman.htm> (last visited Dec. 8, 2015).

¹¹ *South Kingstown Sch. Comm. v. Joanna S.*, 773 F.3d 344, 347 (1st Cir. 2014).

¹² *Id.*

¹³ MASS. GEN. LAWS ch. 71B, § 3 (2014).

¹⁴ *South Kingstown*, 773 F.3d at 347.

¹⁵ 34 C.F.R. § 300.502 (2014). See also Letter to Young, 39 IDELR ¶ 98 (OSEP 2003), <http://www.ed.gov/policy/speced/guid/idea/letters/2003-1/young032003iee1q2003.pdf>.

tunity to demonstrate that unique circumstances justify selection of an IEE examiner who does not meet the agency's qualification criteria and do[es] not appear on the agency's list of examiners."¹⁶ Thus, a district's list is not entirely restrictive.¹⁷

If a district does not comply with the parents' request, parents may independently procure an IEE with no reimbursement from the state or district; there are no regulations restricting a parent from obtaining additional evaluations.¹⁸ If parents pursue an IEE on their own, they have the ability to dictate the extent to which the child will be evaluated and which assessments the evaluator will include.¹⁹ Because parents who pursue their own IEE tend to have greater financial means than those who rely on the district's evaluation, such parents are more likely to select an evaluator who will provide a more comprehensive and exhaustive evaluation to the hearing officer. The hearing officer in turn determines the services that the district must provide.²⁰ Parents do not need to wait for the district's evaluation before pursuing their own evaluation.²¹ If parents have lost confidence in the district's ability to address outstanding issues, or are seeking a private placement that they believe the district might deny, they will likely pursue their own evaluation.²²

Massachusetts law and regulations currently prevent low-income parents from obtaining equal and effective IEEs for their children, contrary to the purpose of IDEA, because parents of different economic statuses have unequal access to evaluative resources.²³ Part II of this Note examines the federal and state legislation, as well as state case law, which require that all students with disabilities receive FAPE. Part II also explains the current rate structure for the particular services that are included in an independent evaluation under Massachusetts regulations. Part III of this Note analyzes the current laws and proposes recommendations to the Massachusetts legislature for modifying its laws and regulations to lessen the discrepancy in evaluator services available based on income. Part III argues that in order for parents to match "the firepower of the state", they must have access to both well-credentialed, qualified evaluators and an expanse of evaluation services that will match those that a school or district uses.²⁴

¹⁶ Letter to Young, 39 IDELR ¶ 98 (OSEP 2003), <http://www.ed.gov/policy/special/guid/idea/letters/2003-1/young032003iee1q2003.pdf>.

¹⁷ *Id.*

¹⁸ MASS. GEN. LAWS ch. 71B, § 3 (2014). *See also* 603 MASS. CODE REGS. 28.04(5)(b) (2014).

¹⁹ 34 C.F.R. § 300.502 (2014).

²⁰ *See infra* Part III.

²¹ E-mail from Bill Crane, Former Hearing Officer, Mass. Bureau of Special Educ. Appeals, to author (Oct. 14, 2014, 7:34 AM EST) (on file with author).

²² *Id.*

²³ *See discussion infra* Part II(C).

²⁴ *Schaffer v. Weast*, 546 U.S. 49, 61 (2005).

II. LEGAL BACKGROUND

A. *The Individuals with Disabilities Education Act*

Congress passed the Education for All Handicapped Act (“EHA”) in 1975.²⁵ The EHA was the first piece of legislation to guarantee that every student with a disability would receive a public education at no cost.²⁶ There were four main purposes of the EHA: (1) “to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs”; (2) “to assure that the rights of children with disabilities and their parents . . . are protected”; (3) “to assist States and localities to provide for the education of all children with disabilities”; and (4) “to assess and assure the effectiveness of efforts to educate all children with disabilities.”²⁷ A free appropriate public education is statutorily defined as:

[S]pecial education and related services that – (A) have been provided at public expense . . . ; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program²⁸

The law later defines an IEP as “a written statement for each child with a disability” that lists the services he or she will receive, as well as who will provide and/or supervise each of those services.²⁹ The 1990 EHA amendments changed the name of the legislation from EHA to the Individuals with Disabilities Education Act (“IDEA”).³⁰ The 1997 amendments then required that states and districts educate students with disabilities in the “least restrictive environment,” meaning that students with disabilities must be educated with their peers who do not have disabilities to the greatest extent possible.³¹ Congress again amended the law in 2004 and 2007 to require that special education and early intervention personnel be “highly qualified,” among other regulatory changes.³²

1. Procedural Safeguards

IDEA provides procedural safeguards to ensure that parents of children with

²⁵ Education for All Handicapped Children Act, 20 U.S.C. § 1401 (2012).

²⁶ *Id.*

²⁷ U.S. DEP’T OF EDUC., THIRTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA (2010), <http://www2.ed.gov/about/offices/list/ose/idea35/history/idea-35-history.pdf>.

²⁸ 20 U.S.C. § 1401(9) (2012).

²⁹ *Id.* § 1401(14).

³⁰ U.S. DEP’T OF EDUC., *supra* note 27.

³¹ *Id.* at 7.

³² *Id.* at 9.

disabilities are involved in determining the IEP for their children.³³ Such procedural safeguards include due process and notice requirements: parents must be informed of and provide consent for evaluations of their child and must serve as members of their child's IEP team.³⁴ An IEP team consists of: (1) the parents of a child with a disability; (2) not less than one regular education teacher of such child; (3) not less than one special education teacher, or where appropriate, not less than one special education provider of such child; (4) a representative of the LEA who is qualified to provide or supervise the provision of specially designed instruction to meet the unique needs of the child and who is knowledgeable about the general education curriculum and resources within the LEA; (5) an individual who can interpret the instructional implications of evaluation results; (6) other individuals who have knowledge or expertise regarding the child; and (7) the child when appropriate.³⁵ Schools and districts must provide parents with written notice of any changes to their child's IEP.³⁶ Procedural safeguards within the statutory authority also provide parents with the opportunity to obtain an IEE:

An opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child.³⁷

Schools and districts must also provide parents with, and ensure parents receive, written notification of their procedural safeguards.³⁸

2. Right to Obtain an Evaluation at Public Expense

IDEA regulations address the rights of parents to obtain evaluations at public expense, as well as the factors that determine whether a district will cover the cost of the evaluation.³⁹ The regulations provide that “[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 certain conditions that are outlined in the regulations.⁴⁰ If a parent requests an IEE in such circumstances, the public agency must either “file a due process complaint to request a hearing to show that its evaluation is appropriate” or ensure an IEE is provided at public expense.⁴¹ If, however, a parent obtains an IEE before the district

³³ 20 U.S.C. § 1415 (2012).

³⁴ *Id.* §§ 1414(c)(3), 1414(d)(1)(B).

³⁵ 34 C.F.R. § 300.321 (2014).

³⁶ 20 U.S.C. § 1415(b)(3) (2012).

³⁷ *Id.* § 1415(b)(1) (emphasis added).

³⁸ *Id.* § 1415(d)(1).

³⁹ 34 C.F.R. § 300.502 (2014).

⁴⁰ *Id.* § 300.502(b)(1).

⁴¹ *Id.* § 300.502(b)(2).

conducts its evaluation and “the evaluation obtained by the parent d[oes] not meet agency criteria,” the district is not required to provide an IEE at public expense.⁴² If the public agency requests a hearing and the hearing officer establishes that the public agency’s evaluation was appropriate, parents are not entitled to an IEE at public expense, but can still pay for one out-of-pocket.⁴³ A parent is entitled to only one IEE at public expense each time the public agency conducts an evaluation with which the parent disagrees.⁴⁴ Last but not least, if a hearing officer requests an IEE, the district must provide the evaluation at public expense.⁴⁵

In some situations, there is not a bright line that distinguishes a privately-funded evaluation from one that is provided at public expense.⁴⁶ For example, both likely include an analysis of the student’s performance on assessments and a meeting with the student, but the time allocated to each portion of the evaluation is likely shorter for the publicly-funded evaluation.⁴⁷ If a parent obtains an IEE at public expense or obtains an evaluation at private expense and shares the results with a public agency, the agency must consider all aspects of the evaluation, even if the agency did not cover the cost.⁴⁸ Further, either party may use said evaluation as evidence at a hearing on a due process complaint.⁴⁹ For evaluations provided at public expense, federal regulations specify that the criteria school districts use for their evaluations must be the same as the criteria that the public agency uses when it initiates an evaluation; in other words, the district must use the same criteria for IEEs as it uses for its own assessments.⁵⁰ These criteria include the location of the evaluation and the qualifications of the examiner for an IEE.⁵¹ Thus, the federal regulations require subsequent evaluations to be comparable to those that the public agency conducted initially.⁵² The regulations also prohibit public agencies from “impos[ing] conditions or timelines” related to IEEs conducted at public expense.⁵³ The First Circuit has further held that a parent’s failure to express disagreement with the district’s evaluations *before* obtaining his or her own “does not foreclose [his] right to

⁴² *Id.*

⁴³ *Id.* § 300.502(b)(3).

⁴⁴ *Id.* § 300.502(b)(5).

⁴⁵ *Id.* § 300.502(d).

⁴⁶ *See, e.g., In re Gill-Montague Reg’l Sch. Dist.*, BSEA No. 01-1222, 7 Mass. Special Educ. Rep. 194 (August 17, 2001) (finding private and public evaluators implemented similar but not identical evaluations).

⁴⁷ *Id.*

⁴⁸ 34 C.F.R. § 300.502(c) (2015).

⁴⁹ *Id.*

⁵⁰ *Id.* § 300.502(e)(1).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

reimbursement.”⁵⁴

In applying the federal regulations, the Supreme Court affirmed that parents have a right to obtain an IEE at public expense if the parent disagrees with an evaluation that the school district has conducted.⁵⁵ In a majority opinion, Justice O’Connor wrote that through the IEE safeguard, “IDEA [] 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.”⁵⁶ Thus, parents are not expected to evaluate the materials on their own. According to O’Connor, “[parents] 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.”⁵⁷

Special education cases are also decided on the state level.⁵⁸ The Bureau of Special Education Appeals (“BSEA”) is the federally mandated entity within Massachusetts that “conducts mediations, advisory opinions, and due process hearings to resolve disputes among parents, school districts, private schools and state agencies.”⁵⁹ IDEA also provides that BSEA Hearing Officers are responsible for determining whether a student has been receiving and is likely to continue to receive a free appropriate public education.⁶⁰ Because the FAPE determination rests in the power of the hearing officers, “it is virtually impossible in most cases for a BSEA hearing officer to make a fair and balanced decision regarding FAPE if it is only one party (i.e., the school district) that provides effective expert testimony and report.”⁶¹ The hearing officers’ reliance on IEEs in making a FAPE determination shows the importance of not only obtaining an IEE, but also making sure it is thorough and addresses all of the student’s needs.⁶²

B. State Law

1. Massachusetts Law

Massachusetts laws and regulations generally mirror the requirements set forth in IDEA.⁶³ Massachusetts law requires that, per a parent’s request, a

⁵⁴ *Warren G. v. Cumberland Cty. Sch. Dist.*, 190 F.3d 80, 87 (3d Cir. 1999).

⁵⁵ *Schaffer v. Weast*, 546 U.S. 49, 60 (2005). *See also* 34 C.F.R. § 300.502(b)(1) (2014).

⁵⁶ *Schaffer*, 546 U.S. at 60–61.

⁵⁷ *Id.*

⁵⁸ *See generally Bureau of Special Education Appeals*, EXEC. OFFICE FOR ADMIN. & FIN., <http://www.mass.gov/anf/hearings-and-appeals/bureau-of-special-education-appeals-bsea> (last visited Jan. 31, 2015).

⁵⁹ *Id.*

⁶⁰ 20 U.S.C. § 1415(f)(3)(E) (2012).

⁶¹ *See supra* note 21. *See generally In re Lowell Pub. Sch. and Mass. Dep’t of Soc. Servs.*, BSEA No. 08-4003 (Feb. 1, 2008).

⁶² *See generally Lowell*, BSEA No. 08-4003.

⁶³ MASS. GEN. LAWS ch. 71B, § 3 (2014); *see also* 603 MASS. CODE REGS. 28.04(5)

school committee must “provide timely access to parents and parent-designated independent evaluators and educational consultants for observations of a child’s current program and of any program proposed for the child”⁶⁴ Massachusetts law, much like federal law, does not impose any timelines or conditions on the observations, and guarantees parents and their evaluators “access of sufficient duration and extent” to conduct their evaluations.⁶⁵ According to Massachusetts law, initial evaluations must include assessments by: a representative of the local school department on the child’s current educational status; a classroom teacher who has dealt with the child in the classroom; a physician regarding the child’s medical status; a psychologist; a nurse, social worker, or a guidance or adjustment counselor of the general home situation and family history factors; and specialists, as may be required.⁶⁶ A classroom observation is not required.⁶⁷

Pursuant to Massachusetts regulations, and in accordance with federal law, a parent may request an IEE if he or she “disagrees with an initial evaluation or reevaluation completed by the school district”⁶⁸ Massachusetts law provides that parents may obtain an IEE “at school committee expense” after the district completes the initial evaluation.⁶⁹ The school committee may however file for a hearing with the BSEA to show that the district’s evaluation was appropriate under the IDEA.⁷⁰ State regulations specify that the evaluators must be “qualified persons who are registered, certified, licensed or otherwise approved and who abide by the rates set by the state agency responsible for setting such rates.”⁷¹ As is also specified under federal law, state law provides that parents are free to obtain IEEs at their own expense at any time.⁷²

In order to fully understand the breadth of an IEE under Massachusetts law, it is important to acknowledge the assessments that are required as part of an “initial evaluation” and are then included again in a reevaluation and in a district’s IEE.⁷³ State regulations distinguish between two categories of assessments: required and optional.⁷⁴ The required assessments include: an assessment in all areas related to the suspected disability; an assessment of the

(2014). States may provide greater restrictions than those required under federal law; states may not provide fewer restrictions.

⁶⁴ MASS. GEN. LAWS ch. 71B, § 3 (2014).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ 603 MASS. CODE REGS. 28.04(5) (2014).

⁶⁹ MASS. GEN. LAWS ch. 71B, § 3 (2014).

⁷⁰ *Id.*

⁷¹ 603 MASS. CODE REGS. 28.04(5)(a) (2014).

⁷² MASS. GEN. LAWS ch. 71B § 3 (2014). *See also* 603 MASS. CODE REGS. 28.04(5)(b) (2014).

⁷³ 603 MASS. CODE REGS. 28.04(2) (2014).

⁷⁴ *Id.*

student's educational history, including information provided by the teacher; an assessment of the student's attention skills, participation behaviors, communication skills, memory, and social relations (which would likely come from a school observation); a narrative description of the student's educational and developmental potential; an observation of the child's interactions in the child's natural environment (a home visit); and assessments from early intervention teams when appropriate.⁷⁵ State regulations also list the optional assessments that a parent or school administrator may request to be included in the evaluation.⁷⁶ Such optional assessments include a comprehensive health assessment, a psychological assessment, and a home assessment.⁷⁷ When IEE regulations refer to "assessments done by a school district," they likely refer to all assessments the district included in its initial evaluation, which would include all required assessments and any optional assessments that the parents or district requested or required and were covered at public expense.⁷⁸

2. Massachusetts and Related Case Law

State case law has further clarified what types of assessments must be included in an IEE in order to have a compelling case at a hearing.⁷⁹ Hearing officers will strongly consider IEEs that do not merely assesses the child's needs, but rather include appropriate assessments that will maximize the chance that the district will fully address the child's educational needs.⁸⁰ In *M.Z. v. Bethlehem Area School District*,⁸¹ the Third Circuit held that parents are entitled to an IEE that includes a classroom observation.⁸² In this case, the school's assessment did not include a classroom observation.⁸³ In his opinion, Justice Michael Fisher noted: "the most important factor in determining M.Z.'s progress in acquiring pragmatic language skills was how well he was able to apply those skills in peer settings on a daily basis."⁸⁴ Similarly, Massachusetts has recognized the importance of classroom observations by allowing evaluators access to classrooms "if they are compensated for their time and expenses in doing so."⁸⁵

⁷⁵ *Id.* at 28.04(2)(a) (2014).

⁷⁶ *Id.* at 28.04(2)(b) (2014).

⁷⁷ *Id.*

⁷⁸ *Id.* at 28.04(5)(c)(1) (2014).

⁷⁹ See, e.g., *M.Z. v. Bethlehem Area Sch. Dist.*, 521 F. App'x 74, 76 (3d Cir. 2013); *In re Gill-Montague Reg'l Sch. Dist.*, BSEA No. 01-1222, 7 Mass. Special Educ. Rep. 194 (Aug. 17, 2001).

⁸⁰ See generally 603 MASS. CODE REGS. 28.04(2) (2014) (outlining the required and optional assessments included in an initial evaluation).

⁸¹ 521 F. App'x at 76.

⁸² *Id.* at 76.

⁸³ *Id.* at 74.

⁸⁴ *Id.* at 76.

⁸⁵ Letter from Christine Griffin, Exec. Dir., Disability Law Ctr., Inc., to Steven Friedman, Manager of Pricing, Ctr. for Health Info. & Analysis (Oct. 23, 2014) (on file with author).

The BSEA has further held that comprehensive evaluations include consultations with teachers and other school personnel.⁸⁶ In *In re Gill-Montague Regional School District*,⁸⁷ Hearing Officer William Crane found the expert's evaluation and observation to be comprehensive and appropriate because the expert interviewed the student's teachers.⁸⁸ In describing the expert's IEE, Hearing Officer Crane noted:

[The expert] reviewed Student's educational records (including the past psychological and other assessments, and the most recent IEPs), interviewed Student's parents, observed Student in his program at Eagle Mountain School (spending 2 1/2 hours at the School), observed the proposed program offered at Gill-Montague (spending 2 1/2 hours at the program), *interviewed teachers at both places*, interviewed and observed Student, and conducted a number of standardized tests of Student as part of her psychological evaluation of him.⁸⁹

Thus, interviewing teachers is an important part of the IEE process and is taken into account when hearing officers decide whether a district's IEE is sufficient.⁹⁰

The BSEA has further held that an expert has "sufficient understanding of [a student]" when the expert has spoken to the teacher and other personnel involved in a student's education.⁹¹ In *In re Chicopee Public Schools*,⁹² Hearing Officer Crane considered the evaluations from two evaluators.⁹³ He concluded that certain individuals had a better understanding of the student's performance and needs, including the evaluator who conducted an observation for a longer period of time and "had substantive discussions" with the student's teacher, the supervisor of special education at the school, the consultant to the special education program, and the director of special education for the district.⁹⁴ In *In re Northbridge Public Schools*, Hearing Officer Crane reaffirmed the BSEA's position that an expert's opportunity to speak with school staff was "a material part of an independent evaluation, to which Student is entitled."⁹⁵ Hearing Officer Crane agreed with an expert who claimed he could not "complete a thor-

⁸⁶ See generally *In re Gill-Montague*, BSEA No. 01-1222, 7 Mass. Special Educ. Rep. 194 (Aug. 17, 2001).

⁸⁷ *Id.*

⁸⁸ *Id.* at 206.

⁸⁹ *Id.* at 202 (emphasis added).

⁹⁰ See *id.*

⁹¹ *In re Chicopee Pub. Sch.*, BSEA No. 05-2920, 11 Mass. Special Educ. Rep. 87, 98 (June 8, 2005).

⁹² *Id.* at 87.

⁹³ *Id.* at 98.

⁹⁴ *Id.*

⁹⁵ *In re Northbridge Pub. Sch.*, BSEA No. 09-2533, 2008 MSE LEXIS 36 (Oct. 30, 2008).

ough and proper evaluation unless [he] [was] allowed to speak with the personnel who implement [Student's] educational plan."⁹⁶ In this case, the school raised a counterargument, claiming that the evaluator's consultation with the teacher would be disruptive.⁹⁷ The student's attorney addressed this point in oral argument, stating that the evaluator would have arranged to speak with the teacher and other staff at a time that would not have been "disruptive to the classroom activities and instruction and that [would] not have interfere[d] with the integrity of the program."⁹⁸ Hearing Officer Crane also noted the importance of both classroom observations and consultation with school personnel in *In re Southwick-Tolland Regional School District*.⁹⁹ He wrote: "The weight given to her testimony was somewhat reduced by the fact that *she neither observed Student in the classroom nor spoke with those with experience working with Student in the classroom*."¹⁰⁰

The Fourth Circuit has further affirmed the importance of an expert's consultation with school personnel, noting that a hearing officer should consider whether the expert spoke with a student's teachers, assistants, and other service providers when determining how much weight to give a parent's expert testimony.¹⁰¹ In a 2008 BSEA decision, Hearing Officer Rosa Figueroa noted a weakness in the parents' case because their experts did not speak with teachers or school personnel.¹⁰² In addition, courts do not require that districts implement the results of an IEE, but rather that districts "consider" those results while determining the provisions of FAPE.¹⁰³

Similarly, the BSEA has discredited an expert's testimony when the expert did not consult with or ask questions of the student's teachers.¹⁰⁴ In *In re Springfield Public Schools*, Hearing Officer Catherine Putney-Yaceshyn wrote in her opinion that the expert "made assumptions about modifications not being provided to Student based upon her limited observation and *did not ask teachers questions* regarding whether they were providing accommodations."¹⁰⁵ In *Sebastian M. v. King Philip Regional School District*,¹⁰⁶ a First Circuit case, the

⁹⁶ *Id.* at *18.

⁹⁷ *Id.* at *20.

⁹⁸ *Id.*

⁹⁹ *In re Southwick-Tolland Reg'l Sch. Dist.*, BSEA No. 06-6583, 2006 MSE LEXIS 40, at *57 (Oct. 26, 2006).

¹⁰⁰ *Id.* at *56 (emphasis added).

¹⁰¹ *Faulders ex rel. Faulders v. Henrico Cnty. Sch. Bd.*, 190 F. Supp. 2d 849, 853–54 (E.D. Va. 2002), *rev'd on other grounds*, 326 F.3d 560 (4th Cir. 2003).

¹⁰² *In re Pittsfield Pub. Sch. & Cent. Berkshire Reg'l Sch. Dist.*, BSEA No. 08-4603, 2008 MSE LEXIS 31, at *64 (Oct. 3, 2008).

¹⁰³ *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 947 (1st Cir. 1991).

¹⁰⁴ *In re Springfield Pub. Sch.*, BSEA No. 06-2169, slip op. at 19 (Mass. Ct. Spec. App. July 10, 2006).

¹⁰⁵ *Id.* (emphasis added).

¹⁰⁶ 685 F.3d 79 (1st Cir. 2012).

BSEA compared the evaluations of two expert witnesses and discounted both evaluations on the grounds that the evaluators did not speak with the teachers.¹⁰⁷ In this case, the first expert witness reviewed records and student performance but did not talk to teachers or review schoolwork.¹⁰⁸ The other witness spent a significant amount of time with the student but never conducted a formal assessment nor observed him at school.¹⁰⁹ Both witnesses arrived at the same conclusion, that the proposed IEEs were inappropriate.¹¹⁰ The First Circuit discounted both of the expert testimonies and gave more weight to the teachers who actually knew the student.¹¹¹ The Court affirmed that “[t]he valuation of expert testimony is precisely the sort of first-instance administrative determination that is entitled to deference by the district court.”¹¹² The First Circuit more recently affirmed the importance of IEEs in *South Kingstown School Committee v. Joanna S.*¹¹³ Judge David Barron wrote in his opinion: “[E]valuations are crucial to IDEA. They help ensure children receive the free appropriate public education Congress envisioned.”¹¹⁴

3. Instructive Authority from Other Jurisdictions

Other states vary in terms of whether they strictly adhere to federal laws or provide additional requirements in their own regulations.¹¹⁵ Both Maine and Vermont regulations reiterate the federal regulations regarding IEEs; neither provides additional criteria requiring classroom observations or teacher conferences.¹¹⁶ Rhode Island regulations do not include a requirement for teachers to consult with educational personnel.¹¹⁷ New Hampshire and New York regulations do not provide specifications on IEEs outside of federal law.¹¹⁸ In the event that a state has not prescribed more stringent criteria to ensure equal evaluations, districts may do so in their own policies or handbooks.¹¹⁹ One school district in New Hampshire provides criteria for IEEs as follows:

As appropriate, the evaluator shall observe the child in one or more educa-

¹⁰⁷ *Id.* at 86.

¹⁰⁸ *Id.* at 85.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 86.

¹¹² *Id.*

¹¹³ 773 F.3d 344, 356 (1st Cir. 2014).

¹¹⁴ *Id.*

¹¹⁵ 08-010-002 R.I. CODE R. § 300.502 (LexisNexis 2014).

¹¹⁶ 05-071-101 ME. CODE R. § 5 (LexisNexis 2014); 22-000-006 Vt. CODE R. § 2362.2.8 (2014).

¹¹⁷ 08-010-002 R.I. CODE R. § 300.502 (LexisNexis 2014).

¹¹⁸ N.H. CODE ADMIN. R. ANN. Ed. 1107.03 (2014). *See also* N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(g) (2014).

¹¹⁹ *See* MILFORD SCH. DIST., SCHOOL DISTRICT HANDBOOK (2005), <http://milfordk12.org/wp-content/uploads/2012/07/po356512jun18.pdf>.

tional settings and make at least one contact with the child's general education teacher for the purpose of determining how the student is progressing in the general curriculum. In addition and as appropriate, the evaluator is encouraged to make additional contacts with other involved general and special education teachers and related service providers.¹²⁰

This language therefore leaves the evaluator no discretion to determine whether or not to observe the child in his or her educational environment and consult with at least one of the student's educators; rather, it ensures that the evaluator will fulfill these criteria by making them mandatory.¹²¹

Some states, however, do prescribe specific criteria that evaluators must follow when conducting an independent evaluation to ensure that all students receive the most comprehensive evaluation available.¹²² Illinois provides strict guidelines that require an independent evaluator to communicate with school personnel.¹²³ The Illinois regulations state as follows:

An independent educational evaluator or a qualified professional retained by or on behalf of a parent or child must be afforded reasonable access of sufficient duration and scope for the purpose of conducting an evaluation of the child, the child's performance, the child's current educational program, placement, services, or environment, or any educational program, placement, services, or environment proposed for the child, *including interviews of educational personnel*, child observations, assessments, tests or assessments of the child's educational program, services, or placement or of any proposed educational program, services, or placement. If one or more interviews of school personnel are part of the evaluation, the interviews must be conducted at a mutually agreed upon time, date, and place that do not interfere with the school employee's school duties.¹²⁴

California also provides additional guidelines in its state code.¹²⁵ The California regulations essentially mirror federal law, yet articulate that district assessments allow for classroom observations of students.¹²⁶ If the school district observes a child in his or her classroom during an assessment, then an independent evaluator must also be allowed to observe the child in his or her classroom.¹²⁷ The California Code also adds that independent evaluators must be allowed to observe any proposed new school settings.¹²⁸

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² 105 ILL. COMP. STAT. 5/14-8.02(g)(2) (2014) (emphasis added).

¹²³ *Id.*

¹²⁴ *Id.* (emphasis added).

¹²⁵ CAL. EDUC. CODE § 56329(b) (2014).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

C. Rate Structure

IDEA does not set maximum rates available for IEEs.¹²⁹ The federal government has, however, established that districts may set maximum allowable rates for IEEs to “allow[] parents to choose among the qualified professionals in the area and only eliminate[] reasonably excessive fees.”¹³⁰ Massachusetts has codified a rate structure with specific prices allocated to different services that are provided as part of “an evaluation by a multidisciplinary team that consists of assessments in all areas related to the child’s suspected need for special education and services”¹³¹ This authority also controls independent evaluations.¹³² The only reimbursable fees are those listed in the section on “Allowable Fees,” which include: \$80.37 for a Home Assessment, including a written assessment report; \$29.00 per hour for a psychologist’s participation in a TEAM meeting (per request of Administrator of Special Education); \$32.15 for an authorized social worker’s, nurse’s, or counselor’s participation in a TEAM meeting; and \$262.91 for a certified educational personnel’s educational assessment including a written assessment report.¹³³ The regulations also specify the allowable fee for each type of psychological test that might be available for the student.¹³⁴ These rates “tend to apply to independent professionals, group[] practices, and freestanding clinics.”¹³⁵ The regulations governing psychological services allow reimbursement for a comprehensive neuropsychological evaluation for eight to twelve hours at the rate of \$74.94.¹³⁶ These rates are below market rates, and “private neuropsychologists are unwilling to perform a neuropsychological exam at these rates.”¹³⁷

State law and regulations both establish the sliding fee scale by which IEEs are provided at public expense.¹³⁸ State regulations provide districts with criteria to determine to what extent the district must cover the costs of the evalua-

¹²⁹ 34 C.F.R. § 300.502(b)(2).

¹³⁰ Letter to Thorne, 16 IDELR 606, 16 LRP 838 (Feb. 5, 1990), *quoted in* Letter from Christine Griffin, Exec. Dir., Disability Law Ctr., Inc., to Steven Friedman, Manager of Pricing, Ctr. for Health Info. & Analysis (Oct. 23, 2014) (on file with author).

¹³¹ 114.3 MASS. CODE REGS. 30.02 (2014).

¹³² *Id.*

¹³³ *Id.* at 30.04(1).

¹³⁴ *Id.* at 30.02(2).

¹³⁵ E-mail from Kim Smith, Chief Information Officer, Ctr. for Health Info. & Analysis, to Nancy Savoie, Assistant General Counsel, Mass. Exec. Office of Health & Human Servs., (Sept. 18, 2014, 10:27AM EST) (on file with author).

¹³⁶ *See* Griffin, *supra* note 85. These allotments are significantly lower than the market rates of private evaluators. The evaluators to whom I have been referred do not make their rates publicly available.

¹³⁷ *Id.*

¹³⁸ MASS. GEN. LAWS ch. 71B, § 3 (2014). *See also* 603 MASS. CODE REGS. 28.04(5)(c)(2) (2014).

tion.¹³⁹ If a student is eligible for free or reduced price lunch, or is in the custody of a state agency, the district must provide an IEE at full public expense, and the evaluation must be equivalent to the types of assessments the school district conducts in its initial evaluation.¹⁴⁰ In this situation, the parent does not need to provide documentation of family financial status.¹⁴¹ If the family financial status is not known, the district must provide the parent with information about this sliding fee scale and give the parent an opportunity to provide family income information to determine if, and to what extent, the family might qualify for public funding of the IEE.¹⁴² Because providing financial information is voluntary, parents are not required to comply; if they choose not to provide the information, they will not be eligible for public funding of the IEE under 603 CMR 28.04(5)(c), but may still request public funding under 603 CMR 28.04(5)(d).¹⁴³ If a family agrees to provide financial information, the family must include “anticipated annual income of the family, including all sources of income and verifying documents.”¹⁴⁴ Districts must also consider family size and family income information in relation to Federal Poverty Guidelines: if family income is equal to or less than 400% of the federal poverty guidelines, the district must pay 100% of the IEE costs.¹⁴⁵ If a family’s income is between 400% to 600% of the federal poverty guidelines, the amount that the district covers varies depending on the family’s income.¹⁴⁶

Once the regulations determine whether an IEE will be provided at public expense, they next define the general rate provisions for evaluation services requested from the IEP team.¹⁴⁷ The regulations break down the costs for each service, including home assessments, psychological tests, and intelligence tests.¹⁴⁸ Regulations specify that the maximum hourly rate for services is \$62.70.¹⁴⁹ The State Secretary of Health and Human Services determines the rates for psychological assessments, which are commonly included in IEEs.¹⁵⁰

Additionally, if a parent requests an IEE in an area the district did not assess, the student does not meet income eligibility standards, or the family does not provide financial documentation to establish the family income level, the district must act in accordance with IDEA.¹⁵¹ This means that within five school

¹³⁹ 603 MASS. CODE REGS. 28.04(5)(c) (2014).

¹⁴⁰ *Id.* at 28.04(5)(c)(1).

¹⁴¹ *Id.*

¹⁴² *Id.* at 28.04(5)(c)(2).

¹⁴³ *Id.* at 28.04(5)(c)–(d)(2).

¹⁴⁴ *Id.* at 28.04(5)(c)(3).

¹⁴⁵ *Id.* at 28.04(5)(c)(4).

¹⁴⁶ *Id.*

¹⁴⁷ 114.3 MASS. CODE REGS. 30.03 (2014).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 30.03(2)(c).

¹⁵⁰ MASS. GEN. LAWS ch. 71B § 3 (2014).

¹⁵¹ 603 MASS. CODE REGS. 28.04(5)(d) (2014).

days, the district must either agree to pay for an IEE or proceed to the BSEA to show that its evaluation was appropriate.¹⁵² If the BSEA finds the district's evaluation "comprehensive and appropriate," then the district does not need to cover the cost of the IEE.¹⁵³ State regulations require that IEEs be completed and written reports sent no later than thirty days after the parent's request for an IEE.¹⁵⁴ IEP teams must reconvene to discuss the IEE and any potential IEP modifications within ten days from the time the school district receives the IEE report.¹⁵⁵

III. ARGUMENT

To provide all students the federally mandated special education services to which they are entitled, Massachusetts must modify its regulations or introduce new legislation to require all evaluators to include classroom observations and teacher feedback in their evaluations.¹⁵⁶ Based on an analysis of federal and state laws, as well as pertinent cases, this Note proposes that all parents, particularly those who are low-income, must be afforded the opportunity to obtain "an expert with the firepower to match the opposition."¹⁵⁷ This Note recommends potential steps that the Massachusetts legislature may adopt to address the inequity in IEEs.

A. Legislative Changes

To begin, Massachusetts must revise its current system in order to provide low-income parents an equal chance to advocate for and secure the educational services that meet their child's needs.¹⁵⁸ To do so, the state must require all evaluators to include classroom observations and teacher feedback in their evaluations. As the Third Circuit held in *M.Z.*, "the most important factor in determining M.Z.'s progress" was observing her interactions with peers on a daily basis.¹⁵⁹ If an evaluator does not have access to such observations, he or she will have no way to accurately assess whether current treatment plans are working.¹⁶⁰ In order to statutorily require these observations, the legislature should insert the following at the end of 603 CMR 28.04(5)(b): "including an in-person observation of the student in his or her classroom environment."¹⁶¹ By in-

¹⁵² *Id.* See also 34 C.F.R. § 300.502(b)(2) (2014).

¹⁵³ 603 MASS. CODE REGS. 28.04(5)(d) (2014).

¹⁵⁴ *Id.* at 28.04(5)(e).

¹⁵⁵ *Id.* at 28.04(5)(f).

¹⁵⁶ See generally 20 U.S.C. § 1415 (2014) (outlining all mandatory special education services).

¹⁵⁷ *Schaffer v. Weast*, 546 U.S. 49, 61 (2005). See discussion *infra* Part III(A)–(B).

¹⁵⁸ See generally 603 MASS. CODE REGS. 28.04(5) (2014).

¹⁵⁹ *M.Z. v. Bethlehem Area Sch. Dist.*, 521 F. App'x 74, 76 (3d Cir. 2013).

¹⁶⁰ See generally *id.*

¹⁶¹ See 603 MASS. CODE REGS. 28.04(5)(b) (2014).

serting this language, the regulations will therefore ensure that all evaluators—whether their services are rendered at public expense or privately-funded—observe the student, in addition to the other requirements set forth in 603 CMR 28.04.¹⁶²

Next, the state must require that all evaluators consult with teachers and other relevant school personnel.¹⁶³ Case law demonstrates that a strong or credible evaluation that will render a positive outcome for the student is one that incorporates feedback from teachers and school personnel.¹⁶⁴ Massachusetts precedent shows that BSEA hearing officers find evaluations comprehensive and appropriate when experts interview a student's teachers.¹⁶⁵ For example, Hearing Officer Crane found the expert's evaluation in *Gill-Montague* to be comprehensive and appropriate when the expert interviewed teachers at both the student's current and prospective placements.¹⁶⁶ In addition, the *Faulders* case reiterated the importance of requiring evaluators to speak with teachers and other school personnel, because it stated that hearing officers should consider whether an expert spoke to school personnel when the officer decides how much reliance to put on the parent's expert.¹⁶⁷ Further, in *Chicopee*, the hearing officer considered the expert's testimony because the expert had spoken with the student's teacher and other personnel involved in the student's education.¹⁶⁸ In contrast, the BSEA did not give much weight to expert testimony in *Southwick-Tolland*, *Pittsfield*, or *Northbridge* because the expert did not speak with the teachers or personnel who had experience working with the students.¹⁶⁹ These cases illustrate that an evaluation must include documented conversation with, or feedback from, a teacher in order for a hearing officer to take the testimony seriously.¹⁷⁰

¹⁶² *Id.*

¹⁶³ See generally *In re Gill-Montague*, BSEA No. 01-1222, 7 Mass. Special Education Rep. 194 (2001).

¹⁶⁴ See, e.g., *id.*

¹⁶⁵ See, e.g., *id.* at 202; *Faulders ex rel. Faulders v. Henrico Cnty. Sch. Bd.*, 190 F. Supp. 2d 849, 853–54 (E.D. Va. 2002), *rev'd on other grounds*, *JH ex rel. JD v. Henrico Cnty. Sch. Bd.*, 326 F.3d 560 (4th Cir. 2003).

¹⁶⁶ *Gill-Montague*, 7 Mass. Special Education Rep., at 202 (emphasis added).

¹⁶⁷ *Faulders*, 190 F. Supp. 2d, at 853–54.

¹⁶⁸ *In re Chicopee Pub. Sch.*, BSEA No. 05-2920, 11 Mass. Special Education Rep. 87, 98 (2005).

¹⁶⁹ See, e.g., *In re Northbridge Pub. Sch.*, BSEA No. 09-2533, 2008 MSE LEXIS 36, at *11 (Oct. 30, 2008); *In re Southwick-Tolland Reg'l Sch. Dist.*, BSEA No. 06-6583, 2006 MSE LEXIS 36 (Oct. 26, 2006); *In re Pittsfield Pub. Sch. & Central Berkshire Reg'l Sch. Dist.*, BSEA No. 08-4603, 2008 MSE LEXIS 31, at *64 (Oct. 3, 2008).

¹⁷⁰ See, e.g., *In re Northbridge Pub. Sch.*, BSEA No. 09-2533, 2008 MSE LEXIS 36, at *11 (Oct. 30, 2008); *In re Southwick-Tolland Reg'l Sch. Dist.*, BSEA No. 06-6583, 2006 MSE LEXIS 36 (Oct. 26, 2006); *In re Pittsfield Pub. Sch. & Central Berkshire Reg'l Sch. Dist.*, BSEA No. 08-4603, 2008 MSE LEXIS 31, at *64 (Oct. 3, 2008).

A final and particularly clear example of an evaluator's consultation with teachers and other school staff is the case of *Sebastian M.*¹⁷¹ As previously mentioned, two expert witnesses were involved in this case: one who reviewed records and student performance but did not speak with teachers or review school work, and the other who spent time with the student but neither conducted a formal assessment nor observed him at home.¹⁷² Though both experts reached the same conclusion, the hearing officer gave more weight to the teachers who actually knew the student rather than to either of the experts who omitted the teacher's consultation from their testimonies.¹⁷³ This case reiterates that an evaluation does not carry much weight unless it includes a reflection on time spent observing the student in the classroom, speaking with teachers, and ideally also reviewing coursework.¹⁷⁴

The argument against mandatory in-class observations was rejected in the *Northbridge* decision.¹⁷⁵ In *Northbridge*, the school claimed that the evaluator's discussion with the teacher would be disruptive, to which the student's attorney counterclaimed that the evaluator would not have disrupted classroom activities or instruction.¹⁷⁶ To address both the need for teacher consultation and the guarantee that such consultation will not disrupt classroom instruction, state legislators should modify the current law to mirror that of Illinois, which requires that all independent evaluations include interviews of educational personnel.¹⁷⁷ Legislators should consider inserting a new subsection in 603 CMR 28.04(5) that will address IEEs.¹⁷⁸ The new requirement should follow the currently numbered 603 CMR 28.04(5)(a), and should include language similar to that found in the Illinois regulations referenced above.¹⁷⁹ This Note proposes the following language:

(b) The qualified persons as described in 5(a) must include as part of their evaluations access to, and interviews with, the child's educational personnel. The interviews with school personnel must be conducted at a mutually agreed upon time, date, and place that do not interfere with the school employee's classroom duties during the school day. Should the qualified person not be given such access within 30 school days of the initial request, parents may immediately file a complaint with BSEA.¹⁸⁰

¹⁷¹ See *Sebastian M. v. King Philip Reg'l Sch. Dist.*, 685 F.3d 79, 85–86 (1st Cir. 2012).

¹⁷² *Id.*

¹⁷³ *Id.* at 86.

¹⁷⁴ See, e.g., *Pittsfield*, 2008 MSE LEXIS, at *64; *Northbridge*, 2008 MSE LEXIS, at *11.

¹⁷⁵ See generally *Northbridge*, 2008 MSE LEXIS 36.

¹⁷⁶ *Id.* at *20.

¹⁷⁷ 105 ILL. COMP. STAT. 5/14-8.02 (2014) (emphasis added).

¹⁷⁸ See 603 MASS. CODE REGS. 28.04(5) (2014).

¹⁷⁹ See 105 ILL. COMP. STAT. 5/14-8.02 (2014).

¹⁸⁰ *Id.* See generally Regulations of the Offices of the Department of Education 34 C.F.R. §§ 300.515(b), 300.323(c)(1), 300.510(b)(1) (2014).

The proposed language varies slightly from the Illinois version and now requires that interviews do not interfere with the school personnel's current duties.¹⁸¹ The Illinois regulations state as follows: "If one or more interviews of school personnel are part of the evaluation, the interviews must be conducted at a mutually agreed upon time, date, and place that do not interfere with the school employee's school duties."¹⁸² In contrast to the Illinois regulation, the final clause of the proposed language reads: "interfere with the school employee's duties during the school day." Accordingly, the modified language acknowledges that meeting with an evaluator might not be part of the school employee's currently held responsibilities as an instructor and that the employee cannot be pulled from classroom instruction in order to conduct the interview.¹⁸³ That said, meeting with the evaluator is an additional responsibility with which the teacher must comply, just not at a time during which the teacher is already responsible for leading instruction, monitoring the cafeteria or a common space, or carrying out other tasks as previously assigned or as required under the union contract.¹⁸⁴ If an evaluator asks to interview school personnel during a time that is not currently part of the school day and union issues subsequently arise, an evaluator should consult with the school principal to find a preparation period that the evaluator might use for the interview. Alternatively, the school principal can release the personnel from another school duty, such as cafeteria monitoring, in order to conduct this interview.¹⁸⁵ The longer it takes to conduct the interview, the longer it will take to collect and analyze the data necessary to identify the student's needs and potential services. For that reason it is essential that the evaluator have access to the appropriate school personnel in a timely manner. Massachusetts already sets a thirty-day period for completion of the IEE from the date of the parent's request, so there is no need to address an additional time period specifically for the interview with teachers or other school personnel.¹⁸⁶

Another model that state legislators may consider is that employed in the Milford School District in New Hampshire.¹⁸⁷ The Milford School District requires consultations with the teacher and other school personnel "as appropri-

¹⁸¹ See 105 ILL. COMP. STAT. 5/14-8.02 (2014).

¹⁸² *Id.* at 5/14-8.02(g).

¹⁸³ See generally *In re Northbridge*, BSEA No. 09-2533, 2008 MSE LEXIS 36 (Oct. 30, 2008) (acknowledging that the evaluator would not disrupt classroom activities or instruction to interview the teacher).

¹⁸⁴ See generally MASS. DEP'T OF ELEMENTARY AND SECONDARY EDUC., AGREEMENT BETWEEN THE SCHOOL COMMITTEE OF THE TOWN OF WELLESLEY AND THE WELLESLEY TEACHERS ASSOCIATION (2013), <http://educatorcontracts.doemass.org/view.aspx?recno=291>(listing responsibilities of teachers throughout the school day and school year) (last visited Apr. 8, 2015).

¹⁸⁵ *Id.*

¹⁸⁶ 603 MASS. CODE REGS. 28.04(2) (2014).

¹⁸⁷ See MILFORD SCH. DIST., *supra* note 119.

ate.”¹⁸⁸ This district’s language, however, does not go far enough; state legislators should amend Milford’s language by removing the words “as appropriate” to require consultations in all instances. State legislators should also mandate that evaluators make additional contact with other teachers and service providers rather than merely encouraging the evaluators to do so under the district’s current policy.¹⁸⁹ This proposed language, as amended, would most appropriately be inserted after the currently numbered 603 CMR 28.04(5)(a) in place of the language proposed above.¹⁹⁰ This alternate language would read:

The evaluator shall observe the child in one or more educational settings and make at least one contact with the child’s general education teacher for the purpose of determining how the student is progressing in the general curriculum. In addition, the evaluator shall make additional contacts with other involved general and special education teachers and related service providers. The interviews with school personnel must be conducted at a mutually agreed upon time, date, and place that do not interfere with the school employee’s duties during the school day.¹⁹¹

The language in this second proposal includes the same modified language as the first proposal regarding when during the school day this interview may occur, as adapted from the Illinois regulations.¹⁹² The modified language again acknowledges that the observation and interviews might not be part of the school employee’s currently-held responsibilities as an instructor, yet affirms that the employee must comply with these required components at a time that is convenient and that does not conflict with classroom instruction.¹⁹³ By proactively determining that the interviews with evaluators may not detract from the school personnel’s already-held responsibilities, this proposed language addresses potential pushback from legislators who fear that teachers will spend less time with all of their students in order to fulfill additional job responsibilities that benefit only one child.¹⁹⁴

It is essential that state legislators modify state regulations rather than state law.¹⁹⁵ There are several reasons for strategically making this decision. First, the law already requires schools to allow parents and evaluators access to classroom observations.¹⁹⁶ The accompanying regulations state as follows:

¹⁸⁸ *Id.*

¹⁸⁹ *See generally id.*

¹⁹⁰ *Cf.* 603 MASS. CODE REGS. 28.04(5)(a) (2014).

¹⁹¹ *Id.*

¹⁹² *See* 105 ILL. ADMIN. CODE tit. 5, § 14-8.02 (2014).

¹⁹³ *See generally In re Northbridge Pub. Sch.*, BSEA No. 09-2533, 2008 MSE LEXIS 36 (Oct. 30, 2008) (clarifying that an evaluator’s interview with school personnel would not disrupt classroom instruction or activities).

¹⁹⁴ *See* 105 ILL. ADMIN. CODE tit. 5, § 14-8.02 (2014).

¹⁹⁵ *See generally* MASS. GEN. LAWS ch. 71B (2014).

¹⁹⁶ *See id.* § 3.

[A] school committee shall, upon request by a parent, provide timely access to parents and parent-designated independent evaluators and educational consultants for observations of a child's current program and of any program proposed for the child, including both academic and non-academic components of such program. Parents and their designees shall be afforded access of sufficient duration and extent to enable them to evaluate a child's performance in a current program and the ability of a proposed program to enable such child to make effective progress.¹⁹⁷

Because the language as currently worded refers to a child's "program," this term presumably includes the child's education and all related services.¹⁹⁸ The law does not specifically define "program" in its section on definitions.¹⁹⁹ As an extra precaution and to provide additional clarification, state legislators should amend the section on definitions to include a definition of the term "program" between the terms "least restrictive environment" and "regular education."²⁰⁰ This Note proposes the following language:

"Program," all aspects of a child's education and related services provided by the school district at public expense.

Clarifying the meaning of "program" will alleviate any confusion regarding whether particular services are to be included as part of a child's special education services.

Second, regulations as opposed to statutes are more specific and describe how agencies will apply and enforce the legislation, including how LEAs should carry out the law.²⁰¹ Administrators at the district level should already be familiar with state regulations, and should rely on these regulations to specify the implementation of a law.²⁰² By including the additional requirements for teacher consultation in regulations alongside all other requirements, LEAs will be aware of their additional responsibilities.²⁰³ Last but not least, the process for amending regulations should take a shorter period of time as compared to amending legislation.²⁰⁴ The Massachusetts Department of Elementary and Secondary Education oversees implementation of the regulations governing all issues related to education, and therefore this agency holds the authority to make adjustments without approval of both chambers within the state legisla-

¹⁹⁷ *Id.*

¹⁹⁸ *See id.* § 1.

¹⁹⁹ *Id.*

²⁰⁰ Terms are defined alphabetically in the statute. *See id.*

²⁰¹ *See generally* Code of Massachusetts Regulations, MASS. COURT SYSTEM, <http://www.mass.gov/courts/case-legal-res/law-lib/laws-by-source/cmr/> (last visited Mar. 8, 2015).

²⁰² *See generally* Code of Massachusetts Regulations FAQ, MASS. COURT SYSTEM <http://www.mass.gov/courts/case-legal-res/law-lib/laws-by-source/cmr/cmrfaq.html#Whydowe> haveregulationsandwhatauthoritydotheyhavelegally (last visited Mar. 8, 2015).

²⁰³ *Id.*

²⁰⁴ *Id.*

ture.²⁰⁵ If legislators pursued a statutory change to the legislation itself, they would need to identify a sponsor in either the State House of Representatives or State Senate to introduce the bill, the bill would need to pass through both chambers, and then the bill would also need to survive the Conference Committee process before reaching the enactment stage.²⁰⁶ This process could take several months, depending on the other bills on the legislature's docket.²⁰⁷ There is also no guarantee that the House and Senate members would even hear the bill in the current session, which would further impede the implementation process.²⁰⁸ Because of these potential time delays, amending existing regulations will be more successful than pursuing statutory changes.²⁰⁹

Last but not least, a legislative fix must mandate that states and districts give equal weight to evaluators, regardless of whether the district or a private individual has covered the costs of the evaluation.²¹⁰ As mentioned in *G.D.*, federal and New Hampshire laws required that an IEE "must be considered" in a public agency's decision, but not that there be substantive discussion of that opinion.²¹¹ To address the inherent inequity of a state paying more attention to the opinion of an evaluator for which that district has covered the cost, state legislators should statutorily require a cost-blind system of presenting information, such that the hearing officer, when presented with the case, does not receive information on how the experts received payment.²¹² Legislators should insert a new subsection under 603 CMR 28.04(5) that would read:

(g) A hearing officer may not use knowledge of whether the district or family covered the evaluation cost when determining if an expert's testimony is comprehensive.

This proposition might be less likely to be included in legislation, as hearing officers often need to determine when students received evaluations and whether evaluations from the LEAs were sufficient; this means hearing officers would need to know which evaluation came from the district.

B. State Rate Structure

The current rate structure for IEEs does not provide equal access to high

²⁰⁵ See generally MASS. GEN. LAWS ch. 15 (2015).

²⁰⁶ See generally The Legislative Process, MASS. BAR ASS'N, <http://www.massbar.org/legislative-activities/the-legislative-process> (last visited Mar. 8, 2015).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ See generally *In re Pittsfield Pub. Sch. & Cent. Berkshire Reg'l Sch. Dist.*, BSEA No. 08-4603, 2008 MSE LEXIS 31 (Oct. 3, 2008).

²¹¹ *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 947 (1st Cir. 1991).

²¹² See generally *In re Pittsfield Pub. Sch. & Cent. Berkshire Reg'l Sch. Dist.*, BSEA No. 08-4603, 2008 MSE LEXIS 31 (Oct. 3, 2008).

quality evaluations for low- and middle-income parents.²¹³ As stated in IDEA, the federal government establishes that school districts may set maximum allowable rates for IEEs.²¹⁴ Massachusetts has a specific rate structure that allocates certain dollar amounts to particular services that are included as part of a special education evaluation.²¹⁵ State regulations designate that the only reimbursable fees are those listed in the section on “Allowable Fees,” which include: \$80.37 for a Home Assessment, including written assessment report; \$29.00 per hour for participating in a TEAM meeting by psychologist (if requested by Administrator of Special Education); \$32.15 for participation in a TEAM meeting by an authorized social worker, nurse, or counselor; and \$262.91 for an educational assessment by certified educational personnel, including a written assessment report.²¹⁶ The regulations also specify the allowable fees for the different psychological tests that an evaluator might use for the student.²¹⁷ Massachusetts regulations on psychological services allow reimbursement for a comprehensive neuropsychological evaluation for eight to twelve hours at a rate of \$74.94.²¹⁸ These rates are below market rates, and they are well below the rates at which private neuropsychologists are willing to perform neurological exams.²¹⁹ That said, the current rate structure is ineffective because citizens who do not have the means to afford a private neuropsychologist must settle for the publicly provided evaluations, which are not as comprehensive as those obtained through a private provider because the state allocates a smaller amount of money for the test.²²⁰

Proposed legislation to amend the rate structure should establish reasonable rates for IEEs, taking into account the market cost of each service and assessment included as part of the IEE. The legislation should include a clause that requires legislators to review these rates over a set period of time and adjust the rate structure to reflect changes in the cost of services at the time of each review. As background, the legislation should assert that state and federal special education laws provide parents the right to an IEE for their child if the parents disagree with the school district’s evaluation of the child.²²¹ The background section of the legislation should also state that the current rates for IEEs are below the rates that evaluators actually charge.²²² The bill should reiterate that federal requirements provide parents the choice of qualified evaluators and

²¹³ See 34 C.F.R. § 300.502(b)(2).

²¹⁴ See discussion *supra* Part II(A). See also *supra* note 130.

²¹⁵ See 114.3 MASS. CODE REGS. 30.04(1) (2014).

²¹⁶ *Id.*

²¹⁷ *Id.* at 30.02(2) (2014).

²¹⁸ See *supra* note 85.

²¹⁹ *Id.*

²²⁰ See generally 114.3 MASS. CODE REGS. 30.02 (2014).

²²¹ H.D. 1027, S.D. 1626, An Act to Provide Equal Access to Evaluations for Children with Disabilities, 189th Gen. Ct. (Mass. 2015).

²²² See *supra* note 85.

should also restate the various components of an IEE as stated under federal law including, but not limited to, a classroom observation.²²³ A strong bill would also provide discretion for hearing officers to adjust the pre-assigned rates as they deem necessary, on a case-by-case basis.²²⁴

A bill introduced in early 2015 in the Massachusetts House and Senate addresses several of these concerns and provides additional protections for parents as they pursue IEEs for their children.²²⁵ The bill explains that parents have a right to “full participation in the planning and development of special education services for their child” under state and federal law.²²⁶ It also explains that IEEs “provide the only way for parents to participate effectively in special education planning in the unusual situation where they disagree with a school district evaluation,” though the right to an IEE is “meaningless if the rates established by the state are so low that evaluators will not perform these evaluations.”²²⁷ In explaining the goals of the bill, the drafters state: “Therefore, it is imperative to establish a reasonable rate structure that is fair to school districts and, at the same time, allows low- and moderate-income parents access to independent educational evaluations.”²²⁸ The bill amends current law to require the State Secretary of Health and Human Services to establish specific IEE rates “at levels that provide parents with a choice of evaluators who can complete the evaluation,” and further specifies the types of assessments that such rates will cover.²²⁹ These include but are not limited to: formal and informal testing; reviewing the child’s schoolwork; observing the child at school, at home, at a workplace and in the community; and obtaining and reviewing relevant information from the child’s teachers.²³⁰ Further, the proposed bill states: “A parent may file a request with the [B]ureau of [S]pecial [E]ducation [A]ppeals and a hearing officer may order a higher rate for a particular independent evaluation if necessary to meet the rate standards in this paragraph.”²³¹ The autonomy awarded to hearing officers provides them with the flexibility to adjust the rate structure as they see fit.²³² The bill also requires the State Secretary of Health and Human Services to “review the rates for independent evaluations and adjust the rates as necessary,” at least every three years.²³³

The legislature should support this bill because it not only specifies a rate

²²³ See *supra* note 15.

²²⁴ See *generally supra* note 130.

²²⁵ H.D. 1027, S.D. 1626, An Act to Provide Equal Access to Evaluations for Children with Disabilities, 189th Gen. Ct. (Mass. 2015).

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ See *id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² See *id.*

²³³ *Id.*

structure but also emphasizes the importance of student observations and teacher consultations in the IEE process.²³⁴ The three-year period for re-adjusting the rate structure seems appropriate and reasonable. Five years would likely be too long, while two years would likely not be long enough to see a market change.²³⁵ The legislature should further support this bill as drafted because it provides additional protection to parents in the form of a reimbursement for expert fees.²³⁶ The inclusion of expert fees is particularly important for low- to middle-income families who otherwise might not advocate for their children, because they often lack the financial means to pursue legal action or their own independent evaluator.

IV. CONCLUSION

Current state law and regulations do not provide all students with disabilities a free appropriate public education.²³⁷ The disparities in services and assessments included in IEEs for low-income families, as compared to upper-middle class families, force hearing officers to make decisions on an unequal foundation of knowledge.²³⁸ Evaluators who are paid to observe students in the classroom and consult with teachers and other school personnel are often able to create a more robust case for their clients, and present a stronger, more comprehensive understanding of the child and the child's needs to the hearing officers.²³⁹ An evaluator provided at public expense will conduct only the minimum evaluations and observations as required under state and federal law, leaving the hearing officer with only minimal information on which to base a decision of what will constitute appropriate services for a student.²⁴⁰

For these reasons, it is essential that Massachusetts legislators amend the existing law and regulations to require all independent evaluators to observe children in the classroom and also consult with the child's teacher and other school personnel.²⁴¹ Massachusetts must also consider adopting the already-introduced legislation to adjust the rate structure for services included in an independent evaluation, and re-evaluate that rate structure periodically to reflect changes in the market.²⁴² By adopting these changes, Massachusetts will ensure that parents of students with disabilities are afforded their procedural safeguard of receiving an independent educational evaluation for their child, as

²³⁴ *Id.*

²³⁵ *See generally id.*

²³⁶ *Id.*

²³⁷ *See supra* Part II(B).

²³⁸ *See supra* Part II(B)(ii).

²³⁹ *See supra* Part II(B)(ii).

²⁴⁰ *See supra* Part II(B)(ii).

²⁴¹ *See supra* Part III(A).

²⁴² *See supra* Part III(B).

required under federal law.²⁴³

²⁴³ See *supra* Part II(A)(i).