

Legally Defensible Assessments

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Presented by:
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Marcy Gutierrez, Attorney at Law



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.

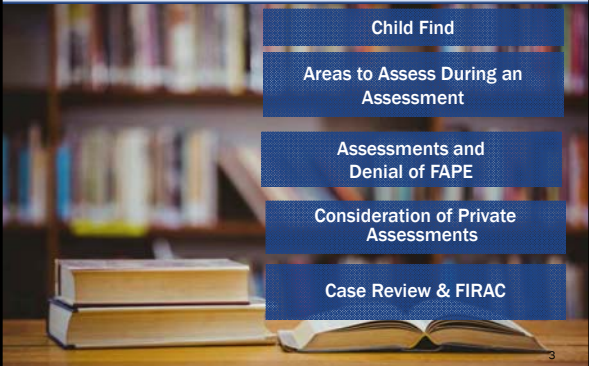
Ms. Gutierrez has effectively represented school districts in many venues, including cases successfully litigated at the administrative agency level as well as in the federal courts. In addition to special education, she also advises and represents school districts and other education entities with regard 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.



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AGENDA



- Child Find
- Areas to Assess During an Assessment
- Assessments and Denial of FAPE
- Consideration of Private Assessments
- Case Review & FIRAC


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OVERVIEW OF ASSESSMENTS

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Special Education Assessments

- Assessments:
 - They are the **foundation** for eligibility, services and placement.




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Referral for Assessment

Question:

- When is it time to refer a child for a special education assessment?



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Child Find - Opportunity

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



Child Find - Reassessment



- Duty to identify children where there is reason to 'suspect' disability
- Obligation to assess not extinguished by completion of initial assessment:
 - Reassess every three years
(Ed. Code § 56381(a)(2))
- If conditions warrant reassessment.

Assessments – Areas to Assess

- 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.



**Talk to a Partner:
How do you determine what
areas you will assess?**

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Watch Out for Displayed Symptoms



- 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

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What Areas Do We Assess?

Assess in all areas related to a suspected disability.

Often overlooked areas:

- Behavior
- Attention
- Medical
- Social/Emotional
- Sensory
- Executive Functioning



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Options When Disagreeing With Suspicion of Disability

- Pre-referral procedures;
- Deny assessment and provide prior written notice; or
- Assess.*

*Most conservative and defensible approach



ASSESSMENT REQUIREMENTS

**Talk to a Partner:
What is required by
34 C.F.R. 300.305(a)(1)**

Assessments – IDEA Regs

- Definition of Assessment - 34 CFR 300.15
- Procedures - 34 CFR 300.304
- Existing Data - 34 CFR 300.305 (a) (1)
- Basic Requirements – 34 CFR
 - 300.301
 - 300.303



Assessments

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



Assessments Requirements – The Big 6

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 - The Big 6



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

(Ed. Code § 56320)

Assessment Requirements - The Big 6

- 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)

Substantive and Procedural Violations: Assessments

Substance vs. Procedure

Substance	Procedure
Assessed in all areas of need	Report and IEP meeting to review report within 60 days
Contains all legally required elements	Contains all legally required elements
No single instrument was used/not discriminatory	Protocols were followed in administration of assessment instruments
Includes review of records, interviews and observations	Assessment instruments proper for use
Summarizes disability categories and recommendation regarding eligibility	Protocols were completed
Contains no errors (typographical or otherwise)	Protocols were completed correctly (i.e. no errors)

Role Observations

- Observations are critical – and mandatory!
- Who should observe?
- Where?
- How many times?



Assessments

Observations in other relevant areas:



- Playground
- Lunch room
- Assembly/auditorium
- Video from home, in some cases
- Bus

Assessments

Observation:

- Failure to observe and consult will **seriously** weaken the credibility of a district assessment



When Do Procedural Violations = Substantive Denial of FAPE?



- Case Examples:
 - Waiting too long to conduct assessment
 - Failing to timely convene an IEP meeting
 - Failing to timely fund or file on IEE

Case Example: Timothy O. v. Paso Robles USD

Facts

- Receiving speech and OT from Regional Center
- Parents requested District assessment
- AP was for:
 - Academic/pre-academic;
 - Sensory/motor development;
 - Communication development; and
 - Health issues

Case Example: Timothy O. v. Paso Robles USD

Facts

- Unsuccessful in administering standardized assessments due to "compliance" issues
- RSP and SLP tried to engage in play unsuccessfully
- Psychologist observed for 30-40 minutes
- Psychologist determined no need to assess for autism

Case Example: Timothy O. v. Paso Robles USD

- What was the reasoning behind decision not to assess further for autism?



So what happened?

ASSESSMENT REPORTS

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Assessment Reports – The Big 8

The report shall include, but is not limited to:

- (1) Need for special education and related services
- (2) Basis for determination
- (3) Relevant behavior observed,



(Ed. Code § 56327)

Assessment Reports – The Big 8

- (4) Relationship between the behavior and student's academic and social functioning
- (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 – The Big 8

- (7) The effects of environmental, cultural, or economic disadvantage,
- (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

Assessment Instruments

- Assessors must use "technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors."



(20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304 (b)(3).)

Assessment Instruments

- “Technically sound instruments” generally refers to assessments that have been shown through research to be valid and reliable.



(Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46540-46541, 46642 (Aug. 14, 2006).)

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

- 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

Other 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

Other Problem Areas:

- Failing to observe student and consult with teachers and service providers.
- Failing to consider information from outside medical/mental health providers.
- Unimpressive assessment reports.
- Lack of analysis.



Potential Blind Spots

Other Problem Areas:

- Appearance of bias.
- Embarrassing or substantive typos.
- Not providing the entire picture.



Potential Blind Spots

Other Problem Areas:

- An assessment can be substantively outstanding, but typographical and grammatical errors will impact its credibility.
- Substantive errors, such as incorrect test scores, can call the entire assessment report into question.

But, What Should We Do If...

- Parent asks for specific tools
- Parent will not consent to certain tools
- Parent asks to be present during testing
- Timeline concerns
- Lack of cooperation re: rating scales/interviews



**CONSIDERATION OF
PRIVATE ASSESSMENTS**

Risk of Improper or No Assessments: IEEs



- A parent may request an IEE at public expense if the parent disagrees with a school district's evaluation
- In response to an IEE request, the district must without undue delay:
 - Initiate due process; **OR**
 - Provide an IEE at public expense

(Ed. Code § 56329(b), (c))

Private Assessment Consideration

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



Private Assessment Consideration

Before IEP meeting:



- Analyze private assessment report with District professional
- Craft questions to ask at the IEP meeting

Private Assessment Consideration

During IEP meeting:

- Have District school psychologist attend
- Encourage discussion regarding recommendations
- Encourage meaningful parental participation
- Get to the “why”



Takeaways



- Assessments set the foundation.
- Carefully review assessment reports.
- Consider whether assessments are defensible.

Andrew F.

Questions