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Limits on payment for IEEs . . . again

Parents in *Hudson Public Schools*, 16 MSER 45 (2010), having obtained evaluations of their two children by a private evaluator at the cost of $3,100 per evaluation, tried to find a way around the state-set limits on what districts may pay for independent evaluations in the federal provisions that require funding of such independent evaluations "at no cost to the Parent." (34 CFR §300.502.) The district argued that it could require the Parents to use evaluators who agree to abide by publicly set rates without violating those federal provisions.

The federal regulations contain an additional provision precluding districts from setting conditions different from those that they impose on their own evaluations regarding such elements as the location and qualifications of an independent evaluator. Parents argued that this meant that districts could not require independent evaluators to abide by state-imposed rates. (See 34 CFR §300.502(e).)

The Hearing Officer found the regulations ambiguous and noted that no judicial precedent had been found on the point. He turned, accordingly, to the federal Department of Education's comments on its regulations to support his conclusion that a district may restrict evaluators to those who will accept state rates. There he cited the Department's statement: "It is the Department's longstanding position that public agencies should not be required to bear the cost of unreasonably expensive IEEs¼. Although it is appropriate for a public agency to establish reasonable cost containment criteria applicable to personnel used by the agency, as well as to personnel used by parents, a public agency would need to provide a parent the opportunity to demonstrate that unique circumstances justify selection of an evaluator whose fees fall outside the agency's cost containment criteria." 71 Fed. Reg. 156, at 46689-90 (Aug. 14, 2006).

The Parents in *Hudson* did not attempt to argue that there were "unique circumstances" warranting the application of rates outside of those set by the state agency and, accordingly, the Hearing Officer dismissed their request for an order that their IEEs be paid at their higher rates.

We have commented previously on the effects of the rate-setting limitations on parents' access to experts. In sum, the allowed rates tend to be significantly lower than what many of the more experienced and qualified experts outside of hospital settings charge (and probably don't cover the costs of performing competent evaluations in hospital settings either) and, pro bono work aside, those experts become effectively unavailable to parents without means; the practical ability of evaluators to combine forces and provide the rate-setting agency (the Division of Health Care Finance and Policy) with the necessary evidence to support a rate increase is limited—and for the more experienced and well known of the evaluators, there is little incentive to try, since parents who can afford to pay their rates will ignore the process for requesting district payment. (Moreover, in a fiscal climate like ours over recent years, the odds against rate-setting agencies approving increases are steep.) Hearing Officers typically look closely at the credentials, the experience, and the particular expertise of experts in assessing the credibility of their testimony, and they also want to hear from experts about their observations of programs—tasks that are often not counted in the costs that are reimbursable by districts. A system that limits parents without means to experts who accept public rates (and who often cannot afford to go the extra mile required to make a case—attending Team meetings, observing programs, etc.) tilts heavily against such parents. This, we think, is not what the framers of IDEA and its state counterparts intended.