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How to Handle Requests for Special Ed Evaluations When Expulsion Proceedings Are Pending

We have noticed a seemingly greater number of due process hearings around the country related to student discipline and manifestation determinations. This Legal Update will address the “11th hour referral,” a common but complex scenario which triggers several intertwined sets of procedural requirements related to student discipline and manifestation determinations under the Individuals with Disabilities Education Act (IDEA).

Suppose a regular education student engages in misconduct subject to expulsion. The school district suspends the student and sends the notice of expulsion hearing. Before or at the expulsion hearing, the parent or parent’s attorney requests a special education evaluation. How should the district proceed?

School districts generally have two options when a student not currently identified as having a disability under the IDEA is referred for a special education evaluation while expulsion proceedings are pending:

1. Hold the expulsion hearing in abeyance, pending an expedited evaluation.
 - a. In exchange for holding the expulsion hearing in abeyance, the district should ask the parent (or adult student) to agree, in writing, that the student shall not be on district premises or attend district-sponsored events on or off school premises. The district should continue to provide regular education services off-site. For example, the student could attend virtual school, or the district could send assignments home and make teachers available by phone if the student has questions.
 - b. If the student is found eligible under the IDEA, a manifestation determination review must be conducted only if the school district is deemed to have knowledge that the student was a student with a disability before the behavior occurred. A school district is deemed to have such knowledge if, before the conduct occurred:
 - i. The parent of the child expressed concern in writing to district supervisory or administrative personnel, or a teacher, that the child was in need of special education and related services;
 - ii. The parent requested a special education evaluation; or
 - iii. The teacher of the child, or other district personnel, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education or to other supervisory personnel.

c. If none of the above criteria are met, then a manifestation determination review is not required, and the expulsion may proceed. However, the district must provide educational services so as to enable the expelled student to continue to participate in the general educational curriculum and to progress towards meeting the goals in the student's IEP.

d. If a manifestation determination review is completed and the conduct is determined not to be a manifestation, then the expulsion may proceed. However, the district must provide educational services so as to enable the expelled student to continue to participate in the general educational curriculum and to progress towards meeting the goals in the student's IEP.

e. If a manifestation determination review is completed and the conduct is determined to be a manifestation, then the District cannot proceed with expulsion. However, the IEP Team may consider the student's behavior when developing the IEP and placement offer, subject to the least restrictive environment (LRE) requirements of the IDEA. See 34 CFR § 300.534 and DPI Bulletin 6.02.

2. Proceed with the expulsion hearing and then complete the evaluation. Whether the expulsion may remain in effect or must be expunged will depend on the outcome of the evaluation and manifestation determination review (if a manifestation determination review is required).

Before deciding how to proceed, the district should consider a number of factors, such as the timing of the referral, the nature of the student's misconduct, whether the parents will agree that the student's educational programming will take place off-site pending the evaluation, and district policies and procedures.

Finally, it should be noted that this Legal Update only addresses students who are referred and found eligible under the IDEA. Requirements related to manifestation determination reviews and the provision of services to expelled students will differ for students only found eligible under Section 504 of the Rehabilitation Act. Section 504 (only) students are subject to disciplinary action pertaining to the use or possession of illegal drugs or alcohol to the same extent as students without disabilities and without regard to any manifestation determination. In addition, an expelled Section 504 (only) student is not necessarily entitled to receive alternate educational services, depending upon the practices or policies in effect for students without disabilities

If you have any questions about this Legal Update or would like assistance navigating through a student disciplinary issue, please contact Alana Leffler at aleffler@buelowvetter.com or 262-364-0267 or Gary Ruesch at gruesch@buelowvetter.com or 262-364-0263 or your Buelow Vetter Attorney.