



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

January 29, 2019

Judy Nathan
Executive Deputy Counsel for
Risk Management and Litigation
Office of Legal Services
52 Chambers Street, Room 308
New York, NY 10007

Dear Ms. Nathan:

This letter responds to your correspondence to the U.S. Department of Education (Department), Office of Special Education Programs (OSEP). In that letter, you asked OSEP to provide clarification on a series of questions regarding the protections for children not yet determined eligible for special education and related services under the Individuals with Disabilities Education Act (IDEA). Each of your questions is answered separately below in this response. We regret the delay in responding.

We note that section 607(d) of IDEA prohibits the Secretary from issuing policy letters or other statements that establish a rule that is required for compliance with, and eligibility under, IDEA without following the rulemaking requirements of section 553 of the Administrative Procedure Act. Therefore, based on the requirements of IDEA section 607(e), this response is provided as informal guidance and is not legally binding. This response represents an interpretation by the Department of the requirements of IDEA in the context of the specific facts presented, and does not establish a policy or rule that would apply in all circumstances.

Question 1: Once it has been established that a child is a child who the local educational agency (LEA) is deemed to know is a child with a disability; can the LEA postpone the manifestation determination meeting until after the completion of the initial evaluation or the initial individualized education program (IEP) Team meeting? Must the evaluation, in these cases, be expedited?

Response: Under 20 U.S.C. § 1415(k)(5)(B), 34 C.F.R. § 300.534(b), a school is deemed to have knowledge that a student has a disability when –

- (i) the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;
- (ii) the parent of the child requested an evaluation of the child pursuant to section 1414(a)(1)(B) of this title; or
- (iii) the teacher of the child, or other personnel of the LEA, has expressed specific concerns about a pattern of behavior demonstrated by the child directly to the

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director of special education of such agency or to other supervisory personnel of the agency.¹

If a child engages in behavior that violates a code of student conduct prior to a determination of his or her eligibility for special education and related services and the public agency is deemed to have knowledge of the child's disability, the child may assert the disciplinary protections under IDEA, including the manifestation determination review (MDR) provisions under 20 U.S.C. § 1415(k)(1)(E) and 34 C.F.R. § 300.530(e) even if the child has not been found eligible for special education and related services. Thus, within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP team (as determined by the parent and the LEA) must conduct an MDR. This provision does not include an exception to allow additional time to complete an evaluation prior to conducting the MDR.

While an LEA may choose or find it necessary to expedite evaluations in these circumstances, under IDEA expedited evaluations are only required in situations where the LEA is not deemed to have knowledge that the child may have a disability and a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under 34 C.F.R. § 300.530. See 20 U.S.C. § 1415(k)(5)(D).

Question 2: If the LEA cannot postpone the MDR pending completion of the initial evaluation, how should the LEA conduct the MDR, given the fact that: 1) the LEA may have little to no information about the student's disability; and 2) the purpose of the MDR is to determine whether the behavior is the result of the student's disability?

Response: Under 20 U.S.C. § 1415(k)(1)(E)(i) and 34 C.F.R. §300.530(e)(1)(ii), when conducting the MDR, the LEA, the parent, and relevant members of the IEP Team (as determined by the parent and the LEA), must review all relevant information in the child's file, including any teacher observations and any relevant information provided by the parents, to determine if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability.² We appreciate that the LEA would not have the IEP to use in its assessment of whether the behavior was a manifestation of the child's disability in these situations. See 20 U.S.C. § 1415(k)(1)(E)(i)(II). Nevertheless, it would still be possible for the LEA to convene a group of knowledgeable persons, as determined by the parent and the LEA, who would be able to conduct the MDR even before the LEA has made its eligibility determination, if the LEA cannot conduct the evaluation before the MDR. The group would

¹ Under 20 U.S.C. § 1415(k)(5)(C), the LEA is considered not to have knowledge that a child is a child with a disability if the parent has not allowed the evaluation of the child under Part B of the IDEA, the parent has refused services, or if the child is evaluated and determined not to be a child with a disability under Part B of the IDEA. In these instances, the child would be subject to the same disciplinary measures applicable to children without disabilities.

² Because the LEA has not yet developed an IEP for the child, the LEA would be unable to determine whether the child's conduct was the direct result of the LEA's failure to implement the child's IEP. See 20 U.S.C. § 1415(k)(1)(E)(i)(II) and 34 C.F.R. § 300.534(e)(1)(ii).

likely consider the information that served as the LEA's basis of knowledge that the child may be a child with a disability under IDEA, such as concerns expressed by a parent, a teacher or other LEA personnel about a pattern of behavior demonstrated by the child. Based upon its review and consideration of the available information, the group would determine whether the conduct in question was caused by, or had a direct and substantial relationship to the child's suspected disability. There is nothing in IDEA that would prevent the LEA from conducting the MDR in connection with its evaluation and eligibility determination, so long as the MDR is conducted within 10 school days of the decision to change the student's placement due to a violation of a student code of conduct.

Question 3: Does posting the Procedural Safeguards notice on the LEA's web site and providing a link in the suspension notice letters constitute sufficient notice of a parent's rights to assert the due process protections?

Response: Under 20 U.S.C. § 1415(k)(1)(H) and 34 C.F.R. § 300.530(h), on the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the LEA must notify the parents of that decision, and of all procedural safeguards accorded under Part B of IDEA. This is accomplished by providing the parents a copy of the procedural safeguards notice described in 20 U.S.C. § 1415(d) and 34 C.F.R. § 300.504(a). 34 C.F.R. § 300.504(a)(3). Although IDEA permits an LEA to post a copy of the procedural safeguards notice on its web site, the public agency would not meet its obligation to provide a parent the notice of procedural safeguards by simply directing a parent to the web site. Rather, a public agency must still offer parents a printed copy of the procedural safeguards notice. If, however, a parent declines the offered printed copy of the notice and indicates a clear preference to obtain the notice electronically on his or her own from the agency's web site, it would be reasonable for the public agency to document that it offered a printed copy of the notice and that the parent declined.

Posting the procedural safeguards notice on a public agency's web site is clearly optional and for the convenience of the public and does not replace the distribution requirements in IDEA. See Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children With Disabilities; Final Rule 71 FR 46540, 46693 (August 14, 2006) available at: <https://www.gpo.gov/fdsys/pkg/FR-2006-08-14/pdf/06-6656.pdf>.

Please note that by copy of this letter, we are notifying Michael Scheinkman of this information. Mr. Scheinkman also wrote to this Office requesting guidance on the same issues raised in your correspondence related to the conduct of MDRs for children in asserting the protections under 20 U.S.C. § 1415(k)(5). In addition, by copy of this letter we are notifying the New York State Education Department of the information in this letter for their follow up on your inquiry and our response.

If you have any further questions, please do not hesitate to contact Lisa Pagano of my staff at 202-245-7413 or by email at Lisa.Pagano@ed.gov.

Sincerely,

/s/

Laurie VanderPloeg
Director
Office of Special Education Programs

cc: Michael Scheinkman
Davis Polk & Wardwell, LLP

Christopher Suriano
State Director of Special Education