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I. Introduction

II. Top Tips Related to Child Find

A. Child Find also includes children who are suspected of being a child with a disability and in need of special education, even though they are advancing from grade to grade. 34 C.F.R. § 300.111(c).

B. Any teacher, social worker, nurse, or psychologist who reasonably believes that a child has a disability must refer the child for an IDEA evaluation. Any other person, including parents, may make a referral.

C. School districts also have an obligation to individually inform parents of their right to make referral and how to make a referral.

D. If a parent requests a special education evaluation, the parent need not use "magic words" to trigger the school district's Child Find obligations.

E. Even if a parent does not request a special education evaluation, but school staff member(s) have reason to suspect that the child has a disability, the district has an obligation to initiate the referral. A belief that the parent will not ultimately consent to the evaluation or special education or related services is not a sufficient reason not to make a referral.

F. A certain level of academic performance may not be used as a gatekeeper to delay or deny a referral.

> "[The district's] expert, Special Education Coordinator, attributed the school's decision not to conduct a special education eligibility evaluation in part to the fact that the Student was getting everything Student needed in the Section 504 plan. However, whether Student was able to make academic progress with a Section 504 Plan has no bearing on Student's special education eligibility. Providing a Section 504 Plan does not suffice for a student who is entitled to an IEP. The requirements of the IDEA cannot be met through compliance with Section 504 because the IDEA requires an individualized program while Section 504 is a board anti-discrimination statute. Moreover, the fact that Student achieved satisfactory grades did not relieve DCPS of conducting the requested evaluation."
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> *District of Columbia Public Schools*, 118 LRP 35382 (SEA DC 2018).

G. Unsuccessful progression through the RTI levels is not a prerequisite to an SLD referral. "The use of RTI strategies cannot be used to delay or deny the provision

of all full and individual evaluation, pursuant to 34 CFR §§300.304-300.311, to a child suspected of having a disability under 34 CFR §300.8." *OSEP Memorandum to Directors*, January 21, 2011.

The special education evaluation can be done concurrently with RTI interventions, and the data from the interventions can be used as part of the evaluation. An extension to complete an evaluation once a referral has been processed, using DPI Form M-3, is an option.

H. Behavioral concerns alone may be a basis for referring a child for a special education evaluation and finding a child eligible.

III. Mental Health Concerns May Trigger Child Find Obligations

A. "Based on the facts in this case, the district had an independent obligation to refer the student for a special education evaluation. Independently, failing grades, behavioral issues, and poor attendance do not trigger a district's obligation to refer a student for a special education evaluation; however, in the aggregate, these factors may give rise to such an obligation. The student was enrolled in the district's high school for nearly two years. During that time, the student experienced periods of low and failing grades. Also, the student incurred excessive absences, including hospitalization and regular outpatient mental health treatment. District personnel were aware that the student received regular mental health treatment and had been hospitalized for mental health issues. Finally, the student exhibited behavior which resulted in multiple suspensions. Combined, these factors triggered the district's obligation to refer the student for a special education evaluation."

Unnamed School District, IDEA Complaint Decision 15-002 (Wisconsin Department of Public Instruction, 2015).

B. Practice Tips

1. Systemize the communication and documentation of relevant student data and information so that the District is able to consider, as a whole, comprehensive student information in consideration of its Child Find obligations.

2. Consider taking the following steps upon learning that a student has been admitted to a mental health treatment facility (the particular steps taken will depend on the child's unique needs):

    a. Ask the parents for consent to obtain relevant, limited information from the treatment facility. In particular, the school district should ask for evaluation reports and/or exit reports containing diagnoses and recommendations that would assist the school in educating the child and ensuring the child's needs are met.

b. Parents may be hesitant to provide the requested information, as it may contain sensitive medical information relating to the student and family members. Engage in a dialogue with the parents and explain why the requested information will help the school educate their child. If the parents refuse to give consent, document the requests for consent and the parents' refusal.

c. Ask the parents whether the child is able to receive academic work at the hospital and send work as appropriate.

d. Consider a Section 504 or IDEA referral. The evaluation should consider any information obtained from the treatment facility, and additional assessments should be conducted if appropriate (particularly if it was not possible to obtain information from the treatment facility).

e. If the student already has a Section 504 Plan or IEP, the team should reconvene to consider the need for a re-evaluation, as well as the development or revision of a BIP.

f. The Section 504 or IEP team should also discuss and develop a plan for the child's transition back to school after he or she is released from the treatment facility. If the student does not have a Section 504 Plan or IEP, the transition plan should be developed by a team of people with knowledge about the student, with input from the parents.

3. Communicate and coordinate with other service providers and entities (e.g., private therapist, county case worker) to the extent possible and appropriate.

IV. Understanding and Being Able to Explain the Interrelationship between Behavior and Placement is KEY.

A. Academic Achievement And Disruptive Behavior Are Inextricably Connected.

"The Court has carefully reviewed each criticism B.M.'s parents have levied at the education he has been afforded, but the Court agrees with the hearing officer that the educational program the District crafted for him for his first two years -- once it appropriately addressed his disruptive behaviors that interfered with his learning -- was reasonably calculated to enable B.M. to make appropriate progress." (emphasis supplied) *Brandywine Heights Area School District v. B.M. and J.M.*, IDELR 212 117 LRP 11587 (U.S. Dist. Ct., E.D. of PA 3/28/17).

B. Disruptive Behavior in the Classroom Affects Everyone.

"Student's behavior has resulted in injury to her classmates and injury to herself. It has interrupted and interfered with her learning process and interrupted and interfered with that of her classmates both because of disruptions in the classroom and because the teachers have often had to remove the other students from the classroom in order for another adult to address Student's behaviors [and] calm her down….Student has been unable to participate completely in her kindergarten class and, as a result, is not able to access her education."

La Mesa-Spring Valley School District, 110 LRP 28786 (SEA Ca. 04/30/2010)

C. When is an Alternative Placement the LRE for a Child?

"Alternative placements (e.g., as a self-contained classroom, a separate school, or a residential setting) are appropriate if "the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. § 300.114(a)(2)(ii). "The courts have generally concluded that, <u>if a child with a disability has behavioral problems that are so disruptive in a regular classroom that the education of other children is significantly impaired, then the needs of the child with a disability generally cannot be met in that environment.</u>" 71 Fed. Reg. 46540, 46589 (August 14, 2006). When determining whether the child's disruptive behavior significantly impairs the education of other children, one factor to consider is the extent to which the child's behavior unreasonably occupies the teacher's time." *See Sacramento City Unified Sch. Dist. V. Rachel Holland*, 786 F. Supp. 874, 878-79 (E.D. Cal. 1992).

V. Tips for Conducting Manifestation Determinations.

A. Be sure to Discuss the Specifics of the Conduct.

"The manifestation determination team also did not consider any specifics regarding the incident in question, or specifics about Z.B.'s behavior as a manifestation of his disability. Although the worksheet provided a space for a detailed description of the incident and the behavior in question, all the team considered was that Z.B. had engaged in 'aggressive assault behavior.' Dr. Newsham candidly explained, "To be quite honest, we looked at it more from a global pictures. We didn't [dive] into the specifics. We weren't looking at what occurred during that specific incident. We were looking at does [Z.B.'s] disability have anything to do with aggressive behaviors? And the team absolutely did not feel that.

This failure to consider the specific circumstances of the incident and the alleged conduct renders the manifestation determination deficient because it precluded any

meaningful discussion of whether Z.B.'s behavior was a manifestation of his disability."

Bristol Township School District v. Z.B., 67 IDELR 9 (E.D. Penn. 2016).

B. Break down the Components of the Conduct for which Discipline is Being Considered.

"In the case before us, the District counters Parents' argument that the conduct was a manifestation of Student's disability with a similar argument – that the conduct was planned. Student placed the knife in a zippered compartment of his backpack, carried the knife in his backpack for the most of the day, sent, and then attempted to delete, an e-mail threatening to harm himself with the knife. He admitted to knowing that this conduct was wrong and that he would get in trouble with it."

Miller R-II School District v. Missouri State Educational Agency, 119 LRP 24939 (June 24, 2019).

C. The Normal IEP Team Consensus Rules Apply to Manifestation Determinations.

"The Parent's argument that the MDR decision is determined by majority rule is rejected. While parents have the right to invite additional participants to the MDR, they do not have the right to veto a district's choice of team members or the MDR team's determination that the child's misconduct is unrelated to his disability. *Fitzgerald v. Fairfax County Sch. Bd.*, 50 IDELR 165 (E.D. Va. 2008). The school district may make the final decision; the decision is not made by a tally or formal vote of the members present even if most members hold the opinion that the behavior was a manifestation. *Id.*

Manchester Bd. Of Educ., 119 LRP 42468 (SEA CT 05/14/19).

D. Some Circumstances Don't Require a Manifestation Determination.

1. "Empire Springs required all of its students to complete either California Assessment of Student Performance and Progress or an alternative exam for the 2018-2019 school year, unless the student had an IEP or a 504 Plan. Student and Mother entered into a contract with Empire Springs by signing a Student Agreement, agreeing to fulfill that requirement. Student was a general education student and did not have an IEP at the time the mandatory tests were administered for the 2018-2019 school year. Student's failure to complete the mandatory testing was not a misconduct on his part. Rather, it was a failure on Mother's part to fulfill her contractual obligation under the Student Agreement to allow Student to complete the tests required for his continued enrollment at Empire Springs."

Empire Springs Charter Sch., 119 LRP 32343 (SEA CA 07/19/19).

2. **Discipline under Section 504 for Drugs and Alcohol**

"For purposes of programs and activities providing educational services, local educational agencies may take disciplinary action pertaining to the use or possession of illegal drugs or alcohol against any student who is an individual with a disability and who currently is engaging in the illegal use of drugs or in the use of alcohol to the same extent that such disciplinary action is taken against students who are not individuals with disabilities. Furthermore, the due process procedures at section 104.36 of title 34, Code of Federal Regulations (or any corresponding similar regulation or ruling) shall not apply to such disciplinary actions." 29 U.S.C. 705(8)(iv).

VI. IEP Development & Implementation

A. Consider and Explain Each Staff Member's Role.

115.78(1)(m) Appointment of Team: The local educational agency shall appoint an individualized education program team for each child referred to it under s. 115.777. Each team shall consist of all of the following:

i. The parents of the child.

ii. At least one regular education teacher of the child if the child is, or may be, participating in a regular educational environment.

iii. At least one special education teacher who has recent training or experience related to the child's known or suspected area of special education needs or, where appropriate, at least one special education provider of the child.

iv. A representative of the local educational agency who is qualified to provide, or supervise the provision of, special education, is knowledgeable about the general education curriculum and is knowledgeable about and authorized by the local educational agency to commit the available resources of the local educational agency.

v. An individual who can interpret the instructional implications of evaluation results, who may be a team participant under pars. (b) to (d) or (f).

vi. At the discretion of the parent or the local educational agency, other individual who have knowledge or special expertise about the child, including related services personnel as appropriate.

vii. Whenever appropriate, the child.

viii. If the child is attending a public school in a nonresident school district under s. 118.51 or 121.84(1)(a) or (4), at least one person designated by the school board of the child's school district of residence who has knowledge or special expertise about the child.

B. Free Appropriate Public Education (FAPE)

1. Children found eligible under the IDEA are entitled to receive a "free appropriate public education" (FAPE).

2. The IDEA and Chapter 115 of the Wisconsin Statutes define FAPE as special education and related services that are provided at public expense and under public supervision and direction, meet the standards of the department, include an appropriate preschool elementary or secondary school education, and are provided in conformity with the student's individualized education program (IEP).

3. The Supreme Court of the United States has had a major voice in the development and interpretation of the IDEA, particularly the standard for FAPE.

4. **What is "Appropriate?" From *Rowley* to *Endrew F*.**

a. The *Rowley* Standard

> "According to the definitions contained in the Act, a 'free appropriate public education' consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." *Bd. of Educ. Of the Hendrick Hudson Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

b. Courts variously described the *Rowley* standard as requiring, for example:

i. Some educational benefit;

ii. A meaningful educational benefit;

iii. A more than de minimis educational benefit; and

iv. In the 7th Circuit, an IEP that is "reasonably calculated to enable the child to receive educational benefits, or in other

words, one that is likely to produce progress, not regression or trivial educational advancement."

c. The *Endrew F*. Standard:

"To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." A student's "IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular education classroom. The goals may differ, but every child should have the chance to meet challenging objectives." *Endrew F. v. Douglas County School District RE-1*, 69 IDELR 174 (U.S. 2017).

d. Executive Summary of *Endrew F*. & IEP Team Practice Tips

i. An IEP Team must offer an IEP reasonably calculated to enable a child to make progress appropriately ambitious in light of the child's circumstances.

ii. The standard requires the IEP Team to make a prospective judgment.

iii. This judgment is based upon the expertise of team members, including the parents.

iv. When the IEP provides that the student is fully integrated in the regular classroom, the IEP typically will provide a level of instruction reasonably calculated to permit advancement in the general curriculum.

v. A reviewing court will give deference to school officials based upon the application of expertise and exercise of judgment.

vi. This expertise and judgment should be grounded in a written explanation of any areas of disagreement that is cogent and responsive.

vii. A reviewing court will measure the IEP on the basis of whether it is reasonable, not whether it is ideal.

viii. The IDEA cannot and does not promise any particular educational outcome. No law could do that for any child.

C. IEP Development

1. Required IEP Components.

a. Present Levels. A statement of the child's present levels of academic achievement and functional performance, including:

i. How the child's disability affects the child's involvement and progress in the general education curriculum; and

ii. For preschool children, as appropriate, how the disability affects the child's participation in appropriate activities. Wis. Stat. 115.787(2)(a).

- *Quick Tip:* Be direct, specific, and objective!

b. Measurable Annual Goals. A statement of measurable annual goals for the child, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general curriculum, and meet each of the child's other educational needs that result from the child's disability. Wis. Stat. 115.787(2)(b).

- *Quick Tip*: As a general rule, IEP teams should write clear, concise goals and objectives that parents, advocates and hearing officers can understand. When a non-educator looks at a goal and accompanying objectives, he or she should be able to understand exactly what the IEP team wants the student to accomplish.

- "While the Court did not specifically define 'in light of the child's circumstances,' the decision emphasized the individualized decision-making required in the IEP process and the need to ensure that every child should have the chance to meet challenging objectives. The IDEA's focus on the individual needs of each child with a disability is an essential consideration for IEP Teams. Individualized decision-making is particularly important when writing annual goals and other IEP content because 'the IEP must aim to enable the child to make progress." For example, the court stated that the IEP Team, which must include the child's parents as Team members, must give 'careful consideration to the child's present levels of achievement, disability, and potential for growth." *Questions and Answers on Endrew F.,* U.S. Department of Education (12/7/2017).

- "Determining an appropriate and challenging level of progress is an individualized determination that is unique to each child. When making this determination, each child's IEP Team must consider the child's present levels of performance and other factors such as the child's previous rate of progress and any information provided by the child's parents." *Id.*

c. Benchmarks or Short-Term Objectives, if Appropriate. For a child with a disability who takes alternate assessments aligned with alternate achievement standards, a description of benchmarks or short-term objectives. Wis. Stat. 115.787(bm).

d. Special Education and Related Services and Supplementary Aids and Services. A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, and a statement of the program modifications or supports for school personnel that will be provided for the child:

i. To advance appropriately towards attaining the annual goals;

ii. To be involved in and make progress in the general education curriculum and participate in extracurricular and other nonacademic activities; and

iii. To be educated and participate with other children with disabilities and children without disabilities.

e. An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in extracurricular and other activities.

f. A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on state and districtwide assessments, and if the IEP Team determines that the child shall take an alternative assessment on a particular state or districtwide assessment of student achievement, a statement of why:

i. The child cannot participate in the regular assessment; and

ii. The particular alternate assessment selected is appropriate for the child;

g. The projected date for the beginning of the services and the anticipated frequency, location, and duration of those services and modifications; and

h. Beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter:

i. Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills;

ii. The transition services needed to assist the child in reaching those goals; and

iii. Beginning not later than 1 year before the child reaches the age of majority under state law, a statement that the child has been informed of the rights, if any, that will transfer to the child on reaching the age of majority.

i. If the IEP Team determines that the use of seclusion or physical restraint may reasonably be anticipated for the child, appropriate positive interventions and supports and other strategies that address the behavior of concern and that comply with all of the following:

i. The interventions, supports, and other strategies are based upon a functional behavioral assessment of the behavior of concern;

ii. The interventions, supports, and other strategies incorporate the use of the term 'seclusion' or 'physical restraint;

iii. The interventions, supports, and other strategies that include positive behavioral supports.

2. **Development of an IEP**

a. In developing each child's IEP, the IEP Team shall consider the strengths of the child, the concerns of the child's parents for enhancing the education of their child, the results of the initial evaluation or most recent reevaluation of the child, and the academic, developmental, and functional needs of the child.

b. In the case of a child whose behavior impedes his/her learning or the learning of others, consider the use of positive behavioral interventions and supports and other strategies to address that behavior. Wis. Stat. 115.787(3).

D. Recent Decisions and Practice Tips

1. Develop IEP within Required Timelines for Students Found Eligible

a. Recent Decisions

> "After a child is determined eligible for special education services a meeting to develop an IEP . . . must occur within 30 days."
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> "Student was determined eligible for special education and related services on October 31, 2017, therefore, the Student's IEP team should have met to develop an IEP for Student by December 1, 2017. The IEP Team met on December 5, 2017. The District created a document (not an IEP form) which the meeting participants signed and which had notes from the meeting. The very minimal notes indicate that the team agreed an IEP could not be developed without information about current levels. Therefore, no IEP was developed at the December 5, 2017 meeting or has been developed to date. The District's explanation for the delay was that the Student was hospitalized in November of 2017, so academic assessments which were needed to develop IEP goals could not be completed by the December 5, 2017 IEP Team meeting and the Academy did not have a representative participate at the December 5, 2017 IEP meeting as planned or provide requested information regarding Student's current levels or achievement and performance.
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> Although it would have been helpful for the Academy to participate in the IEP meeting and provide information, this does not explain the unreasonable delay in meeting to develop an IEP. The academic assessments were completed by the end of December, but no subsequent IEP meeting was scheduled. The video recording of the December 5, 2017 IEP meeting indicated that Parents and District verbally agreed to hold off on development of the IEP and that District would provide tutoring services until additional assessments were completed. This agreement was not documented nor were the parameters or timelines clearly specified. This purported agreement does not meet the requirements of IDEA for development of an IEP." *Id.*

b. Practice Tips

i. Develop IEPs within 30 days of the determination that a student is eligible for special education. The IEP Team can reconvene to amend the IEP as necessary once it obtains the additional information it is seeking.

ii. Consider mediation for situations in which an extension of timelines in the IDEA or Chapter 115 may be appropriate.

2. **Align Goals with Present Levels**

"[T]he MSDE finds that the statement of the student's present levels of academic achievement and functional performance related to functional life skills does not identify the skills in which the student demonstrates weakness. As a result, the MSDE finds that there is no documentation that the annual IEP goal is aligned with the statement of the student's present levels of academic achievement and functional performance in order to ensure that the program addresses the student's identified functional life skill needs. Therefore, the MSDE finds a violation with respect to this aspect of the allegations."

Baltimore City Public Schools, 113 LRP 14659 (MD SEA 1/23/2013).

3. **Keep Methodology Out**

"The Parents claim that the Student's IEP was not appropriate in part because she was not receiving aqua therapy. There is no doubt that aqua therapy can be a related service that should be provided under the IDEA… The District considered aqua therapy as a related service but denied it because the Student was making good progress. The Student had increased her level of participation; she had increased her endurance ability to stand. The IDEA does not allow parents to challenge an IEP because it calls for a methodology that is not the best or most desirable program for their child. The alchemy of 'reasonable calculation' necessarily involves choices among educational policies and theories. In deciding between different methodologies, deference is paid to the District, not a third party."

Westport Bd. of Educ., 111 LRP 11279 (SEA CT 07/06/10).

a. **Practice Tips**

i. Avoid identifying particular methods of instruction or naming individuals who will provide the services. For example, instead of stating that Ms. Jones will provide one-on-one reading instruction three times a week for 30 minutes each using Lindamood Bell, the IEP could simply state "one-to-one reading instruction three times a week for 30 minutes each." Likewise, if a child requires a full time aide, "daily staff assistance" may be appropriate language. This helps ensure compliance if a staff member is ill for a few days or leaves the district.

ii. Although IEP Teams should generally avoid including methodology in the IEP, be sure the methodologies you select are solid. Although methodology is for the school district to determine, a court or hearing officer can change that if our methods are repeatedly ineffective and/or not supported by peer-reviewed research. (In very rare cases, an IEP team might determine a certain method is absolutely necessary for FAPE – but this is a relatively unusual circumstance.) As a result, staff should be certain that they are using methods that are well-researched and reasonably calculated to be effective for the individual child. If the child is not benefiting, determine why and make the appropriate changes to either the methods or the IEP.

iii. If a parent requests a method, don't just say no yet, and never say never. Ask why. Get more information. Consult the special education director. Determine whether it would be helpful to the child's program. Consider the request and have a well-articulated response. If, after careful research and consideration, you determine the parent's request for method is not appropriate, consult the special education director again, and send prior written notice as appropriate.

4. **Prepare for difficult IEP Team meetings, without predetermining.**

a. "As explained in *Doyle v. Arlington County School Board*, 806 F. Supp. 1253, 1262 (E.D. Va. 1992), if the school system has already fully made up its mind before the parents even get involved, it has denied them the opportunity for any meaningful input. The Court in *Doyle* went on to state that the holding of *Spielberg* required the school board to come to the table with an 'open mind,' but did not require them to come to the IEP table with a 'bland mind.' *Id*. Thus, while a school system must not finalize its placement decision before an IEP meeting, it can and should have given some though to that placement. *Id*.

Other circuits have similarly held that a school board may come to an IEP team meeting with some idea of what placement may be best for a student. As the United States Court of Appeals for the Sixth Circuit described in *Nack v. Orange City Sch. Dist.*, 454 F.3d 604 (6th Cir. 2006):

> [P]redetermination is not synonymous with preparation. Federal law prohibits a completed IEP from being presented at the IEP Team meeting or being otherwise forced on the parents, but states that

> school evaluators may prepare reports and come with pre-formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions."

M.C.E. v. Board of Educ. of Frederect County, 57 IDELR 44, (D. Md. 2011).

b. **Emails between Staff Members can be Relevant in Predetermination Questions.**

"K.M. offers into evidence emails between District teachers and administrators that suggest that the District had predetermined its CART services denial before some of the IEP meetings. She argues that the ALJ was deprived of the ability to consider these emails, because the District did not turn them over in response to requests for K.M.'s records. The District insists that these emails have never been part of K.M.'s student records file. The Court does not consider these emails for the purposes of the OAH appeal, as Plaintiff has failed to show that the emails should have been turned over before the OAH. Indeed, at oral argument, Plaintiff's counsel conceded that the ALJ had given him the opportunity to brief the issue of the emails, but that he chose not to take it.

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The procedural violations alleged by K. M. here are de minimus; there are no allegations that anyone, including Mother, was excluded from the IEP meetings and there was no deceit of withholding of information by the District, as true of cases in which the procedural violations were found to be egregious. To the contrary, Mother was actively involved throughout the process – even when she was vigorously opposing the District's proposals or refusing consent to implementation of services. Though the Court does not suggest that it was acceptable for the District to be biased against the idea of providing CART services, any preference it had against providing CART services did not manifest in a procedural violation of the IDEA sufficient to suggest a deprivation of K.M.'s right to a FAPE."

K.M. et al v. Tustin Unified Sch. Dist., 57 IDELR 8, (E.D., Cal 2011) (citations omitted).

VII. IEP Implementation

A. Failure to Monitor Student Progress Can Deny FAPE

1. Recent Decisions

"[T]he District failed to appropriately review and revise Student's IEP to address a lack of progress in reading for the 2017-18 school year. To identify a lack of progress, the school district must perform regular progress monitoring throughout the school year. In this case, the evidence demonstrates that Special Education Teacher monitored Student's progress on her IEP goal in reading on only one occasion in January of 2018. Student's performance on this informal assessment indicated that she was reading at a first-grade level, performance well below what was identified as her present level of performance for the beginning of the school year. Despite below-expected performance on this assessment, there is no evidence that Special Education Teacher conducted further progress monitoring prior to Student's annual IEP meeting on April 3, 2018.

Moreover, the failure to monitor and report progress denied Parent the opportunity to recognize concerns about Student's reading skills and request that the IEP Team reconvene prior to the annual review to address a lack of progress. . . In light of Endrew F., the ED has provided additional guidance concerning the importance of sharing progress monitoring with Parents."

Colorado Dept. of Educ., 118 LRP 433765 (SEA CO 6/22/18).

2. Practice Tips

a. Ensure that the appropriate staff members are monitoring student progress and keeping data.

b. "IEP Teams should use the periodic progress reporting required at 34 CFR § 300.320(a)(3)(ii) to inform parents of their child's progress. Parents and other IEP Team members should collaborate and partner to track progress appropriate to the child's circumstances." *Questions and Answers on U.S. Supreme Court Decision Endrew F. v. Douglas County School District Re-1,* 71 IDELR 68 (OSEP 2017).

c. Reconvene the IEP Team and review/revise the IEP as appropriate to address any lack of expected progress toward the annual goals and in the general curriculum, as required by Wis. Stat. § 115.787(4).

B. Address Student Refusal to Participate in Related Services.

"The administrative record reflects that T.M. missed occupational therapy sessions for a variety of reasons, and that many of the sessions that did take place occurred within the classroom. T.M.'s IEP called for him to receive weekly occupational therapy. The first three attempts to provide him occupational therapy outside the classroom in September 2011 were unsuccessful, because T.M. refused to leave the classroom. He cooperated for one September 2011 meeting, but did not complete a full session. For the remainder of the year, the therapist provided sessions both in and out of the classroom, though a handful of sessions were not provided because either T.M. or, in one instance, the therapist, were unavailable.

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From September through April, T.M. received 24 hours of occupational therapy and missed 10 hours. All but one of the missed hours were due to T.M.'s absence, unavailability, or refusal to cooperate. The therapist began providing therapy in the classroom in October, and T.M. missed only six more hours over the remainder of the year. The therapist reported T.M. was progressing on his goals. The HO found that the 'short gaps in providing OT were not material violations of the IEP.' I agree."

T.M. v. District of Columbia, 64 IDELR 197 (D.D.C. 2014).

- *Quick Tip:* Consider conducting an FBA and developing a BIP for students who refuse to participate in school-based therapy or other related services.

VIII. School Safety

A. The Federal Commission on School Safety (December 18, 2019)

1. Teachers are best positioned to identify and address disorderly conduct.

2. With respect to training and pther related aspects of school safety, state and local policies and approaches should reflect their own unique circumstances and needs. *Id.*

3. Other issues.

B. Joint "Dear Colleague Letter" (OCR, January 8, 2014)

1. The increasing use of disciplinary sanctions such as in-school and out-of-school suspensions, expulsions, or referrals to law enforcement authorities creates the potential for significant, negative educational and long-term outcomes, and can contribute to what has been termed the "school to prison pipeline".

2. Studies have suggested a correlation between exclusionary discipline policies and practices and an array of serious educational, economic and social problems, including school avoidance and diminished educational engagement; decreased academic achievement; increased behavior problems; increased likelihood of dropping out; substance abuse; and involvement with juvenile justice systems.

3. Disproportionality and Possible Discriminatory Conduct.

C. Recommendations from OCR Suggest that School Districts Provide:

1. Safe, inclusive, and positive school climates that provide students with supports such as evidence-based tiered supports and social and emotional learning.

2. Training and professional development for all school personnel.

3. Appropriate use of law enforcement.

4. Nondiscriminatory, fair, and age-appropriate discipline policies.

5. Communicating with and engaging school communities.

6. Emphasizing positive interventions over student removal.

7. Monitoring and self-evaluation.

8. Data collection and responsive action.

9. See, Appendix, Id., Joint "Dear Colleague Letter" (OCR, January 8, 2014)

D. Harmonizing the Contrasting Federal Perspectives

1. Review Code of Student Conduct.

2. Develop a consensus (which includes classroom teachers) as to what/how behavior impacts achievement and safety.

3. Develop a protocol as to onboarding parents when disciplinary or non-disciplinary behavior merits or requires a placement change.

4. Other.

E. Disciplining Students for Threats of School Violence

1. Student Expulsions (Wis. Stat. § 120.13(1)(c))

a. The school board may expel a pupil from school whenever it finds the pupil guilty of:

i. Repeated refusal to or neglect to obey school rules;

ii. Knowingly conveying any threat or false information concerning an attempt or alleged attempt being made to destroy any school property by means of explosives;

iii. Conduct by the pupils while at school or while under the supervision of a school authority that endangers the property, health, or safety of others;

iv. Conduct while not at school or while not under the supervision of a school authority that:

- Endangers the property, health, or safety of others at school or under the supervision of school authority; or

- Endangers the property, health, or safety of any employee or school board member of the school district in which the pupil is enrolled.

b. The school board shall expel a pupil from school for not less than one year whenever it finds that the pupil, while at school or while under the supervision of a school authority, possessed a firearm as defined in 18 USC 921(a)(3).

2. Expulsion Based on Threats of School Violence

a. Wis. Stat. 120.13(1)(c)1. expressly states, "[C]onduct that endangers a person or property includes making a threat to the health or safety of a person or making a threat to damage property."

b. Practice Pointers from Recent Expulsion Appeal Decisions:

i. *Decision No. 773* (January 2, 2019) and *Decision No. 775* (January 10, 2019)

- A "threat" and endangerment" may still be found even if there is a delay in reporting or if the threat is not directed at a specific individual. The key is whether there is

evidence of an impact on and/or nexus to school, students, and/or staff.

- Threats over the summer or while enrolled in a private school may be found to endanger students or others at the school.

ii. *Decision No. 778* – The DPI found that the expelled student did not have a due process right to cross-examine student witnesses at the expulsion hearing. While unreliable and unsubstantiated hearsay must not be the only evidence considered, DPI concluded that requiring student witnesses to testify or revealing the identities of student witnesses at expulsion hearings would have a chilling effect. Administrators may present student witness statements, as they are familiar with students and have assessed the credibility of the student witnesses during their investigation. The name of the student witness may be redacted from the statement.

F. Sharing Information with Law Enforcement

1. Pupil Records

a. What do you do when law enforcement asks for records or information regarding a student?

Consider the confidentiality requirements of FERPA and Wis. Stat. § 118.125. The state statute defines pupil records (education records) as follows:

"Pupil records" means all records maintained by a school relating to individual pupil. State and federal law prohibits the disclosure of confidential pupil records, with limited exceptions, absent written consent of the student or in the case of a minor student, the parent/guardian of the minor student.

Generally, a school district may disclose personally identifiable information from a pupil record under three circumstances: 1) written consent from a parent, guardian or adult pupil, 2) receipt of a court order, or 3) by authority of statute.

b. **Consider who is asking and why they are asking. SRO designated as a "school official" or other law enforcement personnel?**

Providing records to an SRO designated as a "school official"

Pupil records can be made available to law enforcement officers who are individually designated by the school board and assigned to the school district who have been determined by the school board to have legitimate educational interests, including safety interests, in the pupil records, and meet specific criteria under FERPA. *See* Wis. Stat. sec. 118.125(2)(d) and FERPA 34 CFR § 99.31(a)(1)(i)(B).

A school official has a legitimate educational interest if the official needs to review an educational record in order to fulfill his or her professional responsibility. SROs acting as school officials may only use personally identifiable information from education records for the purposes for which the disclosure was made, e.g., to promote school safety and the physical security of the students. SROs are prohibited from re-disclosing the record, unless specifically authorized by law, Wis. Stat. sec. 118.125(2)(d). This means that an SRO who is serving as a "school official" under FERPA may not disclose personally identifiable information from education records to others, including other employees of his or her local police department who are not acting as school officials, without consent unless the re-disclosure fits within one of the exceptions to FERPA's consent requirement.

c. **Providing Records to Other Law Enforcement Personnel.**

Directory data can be provided, without consent, if the parents or eligible student has not opted out of such a disclosure. If the school or school district has a directory information policy under FERPA that permits this disclosure, then the directory information of those students whose parents (or the eligible students) have not opted out of such a disclosure may be disclosed.

d. **Disclosure May be Made Pursuant to a Subpoena and Court Order.**

FERPA permits disclosure of education records without consent in compliance with a lawfully issued subpoena or judicial order. See § 99.31(a)(9)(i) and (ii). However, a school must generally make a reasonable effort to notify the parent or eligible student of the subpoena or judicial order before complying with it in order to allow

the parent or eligible student the opportunity to seek protective action, unless certain exceptions apply.

e. **Health and Safety Emergency Exception.**

A district may disclose student records to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of any individual. The U.S. Department of Education's FERPA regulations provide guidance: In [determining whether a health or safety emergency exists], an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals.

If district determines that there is an "articulable and significant threat" to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals.

A school or district must make this determination on a case-by-case basis, taking into account the totality of the circumstances pertaining to a threat to the health or safety of a student or others.

f. **What does "articulable and significant threat" mean?**

The phrase "articulable and significant threat" means that a school official is able to explain, based on all the information available at the time, what the threat is and why it is significant when he or she makes and records the disclosure

Special education information may be disclosed under this exception.

g. **Attendance Records.**

A copy of a student's attendance record shall be provided to a law enforcement agency if the law enforcement agency certifies in writing that the pupil is under investigation for truancy or for allegedly committing a criminal or delinquent act, and that law enforcement will not further disclose the records except as authorized by Wis. Stat. § 938.396.

G. Child Abuse and Neglect Reporting Requirements

1. Basic Standard

"Any of the following persons who has reasonable cause to suspect that a child seen by the person in the course of professional duties has been abused or neglected or who has reason to believe that a child seen by the person in in the course of professional duties has been threatened with abuse or neglect and that abuse or neglect of the child will occur shall, except as provided under subs. (2m) and (2r), report as provided in sub. (3):

***

a. A school teacher

b. A school administrator

c. A school counselor

d. A school employee not otherwise specified in this paragraph."

Wisconsin Statute § 48.981(2)(a)

2. To Whom Reports are Made

"A person required to report under sub. (2) shall immediately inform, by telephone or personally, the county department or, in a county having a population of 750,000 or more, the department or a licensed child welfare agency under contract with the department or the sheriff or city, village, or town police department of the facts and circumstances contributing to a suspicion of child abuse or neglect or of unborn child abuse or to a belief that abuse or neglect will occur. "

Wisconsin Statute § 48.981(3)(a)(1)

3. Confidentiality

" All reports made under this section, notices provided under sub. (3) (bm) and records maintained by an agency and other persons, officials and institutions shall be confidential. Reports and records may be disclosed only to the following persons:

***

The subject of a report, except that the person or agency maintaining the record or report may not disclose any information that would identify the reporter."

Wisconsin Statute § 48.981(7)(a)(1)

4. **Retaliation Prohibited**

"No person making a report under this subsection in good faith may be discharged from employment, disciplined or otherwise discriminated against in regard to employment, or threatened with any such treatment for so doing."

Wisconsin Statute § 48.981(2)(e)

5. **Required Training**

"Each school board shall require every employee of the school district governed by the school board to receive training provided by the department in identifying children who have been abused or neglected, in the laws and procedures under s. 48.981 governing the reporting of suspected or threatened child abuse and neglect, and in the laws under s. 175.32 governing the reporting of a threat of violence. A school district employee shall receive that training within the first 6 months after commencing employment with the school district and at least once every 5 years after that initial training."

Wisconsin Statute § 118.07(5)

IX. Address the Relationship Between Trauma and Safety

A. Definition:

"The ACE Study measured three categories of adverse childhood experiences: abuse, neglect, and household dysfunction. To assess the presence of ACEs, adults were asked via survey to indicate if they had experienced any of the following: physical abuse; emotional abuse, sexual abuse, emotional neglect; physical neglect; violence between adults in the home; household member substance abuse; parental separation or divorce; household member who was depressed, mentally ill, or suicidal; incarcerated household member."

Adverse Childhood Experiences in Wisconsin: 2011-2015 *Behavioral Risk Factor Survey Findings* (May 2018).

B. Trauma Can Be the Result of School-Based Violence

"T.K. experienced severe, ongoing emotional trauma as a result of the rape, resulting in a pattern of cutting herself, drug addiction, alcohol and marijuana use and other "emotional and behavioral changes." D. 26-2 ¶¶ 26-29, 32. BPS's records reflect that T.K. had "school attendance issues" and "increasing[ly] bad behavior."

D. 26-2 ¶¶ 31, 45-46. After the incident, T.K. was "regularly bull[i]ed on an ongoing basis," as girls allegedly slapped her and stole various items of hers. D. 26-2 ¶ 34. She "suffered ongoing harassment and intimidation from her classmates as the rape and drug inducement became well known to the whole student body," including "sexual propositions, name calling, and rejections … in school and via social media." D. 26-2 ¶¶ 43-44." *T.K., with and through her parents, G.K. and V.K., Plaintiffs, v. Town of Barnstable, Barnstable Public Schools, Patrick Clark and Meg Mayo-Brown, Defendants*., 72 IDELR 220 (D.C. Mass. 2018).

C. Exposure to Trauma Can Lead to Eligibility under Section 504

"Student Plaintiffs allege that Defendant violated Section 504 of the Rehabilitation Act by failing to establish systems that address their exposure to adversity and complex trauma so as to facilitate meaningful access to the benefits of public education. Count IV is thus predicated on an initial, underlying finding that these student Plaintiffs are disabled under Section 504 by virtue of their exposure to complex trauma and adversity, including, but not limited to: "experiences of physical and sexual violence, involvement in the child welfare and juvenile justice systems, alcohol and substance abuse in the family and community, extreme poverty, denial of access to education and historical trauma."

***

"Plaintiffs explained the ways in which "[e]xposure to trauma can lead to palpable, physiological harm to a young person's developing brain," and how these physiological impacts manifest in the classroom. (Doc. 60 at 40.) Moreover, the Second Amended Complaint is replete with allegations relating each student Plaintiffs' unique exposure to complex trauma and adverse childhood experiences to their ability to read, think, and concentrate -- i.e. how their brains' physical response to trauma substantially limits their ability to learn. (Doc.60 at 13-36.) Thus, the Court finds that Plaintiffs have adequately alleged that complex trauma and adversity can result in physiological effects constituting a physical impairment that substantially limits major life activities within the meaning of Section 504 of the Rehabilitation Act."

Stephen C. v. Bureau of Indian Educ., 118LRP 16978 (D. Ariz. 03/29/18).

D. School Officials Should be Trained to Address Trauma:

1. Review and in-service staff on to relevant policies and the need to engage the procedural requirements.

2. Child Find Training and Retraining.

    a. Go beyond screening

b. Guard against over identification

3. Monitor truancy and discipline and possible related trauma.

4. Monitor DPI resources.

5. IEP goals for students who have experienced trauma should give special attention to skills the student needs to learn in addition to decreasing challenging behaviors.

6. Consider ways in which the school environment may be modified to reduce the anxiety of students who have experienced trauma.

7. Consider including self-regulation strategies or interventions into the student's IEP.

8. Other.

X. Legal Developments Related to Individuals Who Are Transgender

A. Transgender Students

1. Seventh Circuit Cases

a. ***Doe v. Madison Metropolitan School District,*** **Case 20-CV-_____**

i. A complaint was filed on February 18, 2020, by the parents of students who identify as transgender. The complaint challenges the district's policy, which prohibits teachers and staff from revealing a student's gender identity, including the affirmed name and pronouns being used at school, to parents or guardians unless legally required to do so or unless the student has given the school permission to disclose this to the parents.

ii. The complaint alleges that the district's policy interferes with the parents' constitutional right to direct the upbringing and care of their children and free exercise of religion.

b. ***Whitaker v. Kenosha Unified School District et al.,*** **Case 2:16-cv-00943-PP**

i. A transgender boy high school student and his parents filed a lawsuit against the Kenosha Unified School District, alleging that the school district's practice of not treating the student consistent with his gender identity, including the

decision not to permit the student to access the boys' restrooms, violated Title IX. The student requested a preliminary and permanent injunction directing the district to permit the student to use the boys' restrooms at school and otherwise treat the student consistent with his gender identity. The school district filed a motion to dismiss, arguing that Title IX's protections did not apply to transgender students.

ii. On September 19, 2016, Judge Pepper denied the school district's motion to dismiss. On September 20, 2016, Judge Pepper granted a preliminary injunction which will temporarily require the school district to permit the student to use the boys' restrooms at school. The district reportedly intends to appeal both decisions.

iii. On May 30, 2017, a three-judge panel of the Seventh Circuit Court of Appeals unanimously affirmed the preliminary injunction.

iv. The Court's decision hinged heavily on the harm that this particular student would likely suffer if he was denied access to the boys' restroom. The Court noted that the student had been diagnosed with Gender Dysphoria and had begun hormone replacement therapy as part of his transition. The Court found that the school district's bathroom policy negatively impacted the student's mental health and caused him significant psychological distress, including depression and thoughts of suicide. In addition to the emotional harm identified by the Court, the Court found that the school district's bathroom policy exacerbated the student's medical condition, which rendered the student susceptible to fainting and/or seizures if dehydrated.

v. The Court found that the student demonstrated a likelihood of success on his Title IX claim, concluding that "the School District denied him access to the boys' restroom because he is transgender. A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX." The Court went on to conclude that providing a transgender student with an alternative single-user/gender neutral bathroom is not sufficient to relieve a school district from liability, due to the increased stigmatization.

vi. The Court also concluded that the student was likely to succeed on his Equal Protection Clause claim, finding that the School District treated transgender students, who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently. The school district had the burden of demonstrating that its justification for its bathroom policy was not only genuine, but also "exceedingly persuasive." The Court found the school district had failed to provide evidence that the district, its students, or the public would be harmed as a result of allowing the student to use the boys' restroom. While the Court recognized that the school district had a legitimate interest in protecting the privacy rights of other students in the restrooms, the Court concluded that a transgender student's presence in the restroom provided no more risk to other students' privacy rights than any other student present in the restroom. In addition, the Court highlighted the fact that the before the school district implemented its bathroom policy, the student had used the boys' restroom for nearly six months without incident or complaint from another student.

c. ***Students and Parents for Privacy, et al. v. United States Department of Education, et al.,*** **Case: 1:16-cv-04945**

i. A group of students and parents in Palatine, Illinois, filed a civil rights lawsuit against the Administration and the Township High School District, seeking to invalidate the Resolution Agreement reached between the district and OCR.

ii. The Plaintiffs claim that the privacy rights of other students in the locker room are not protected by the agreed upon measures, and that the Agreement violates Title IX, the Administrative Procedure Act, the students' fundamental right to privacy, the Illinois and Federal Religious Freedom Restoration Acts, and the First Amendment Free Exercise of Religion Clause.

iii. U.S. Magistrate Judge Gilbert's Report and Recommendation

"[T]he Court cannot say with confidence that Plaintiffs have a likelihood of success on the merits of their claim that DOE's interpretation of Title IX is not in accordance with law or entitled to deference. The Court also finds Plaintiffs have not shown they have a likelihood of success on the merits of their claim that District 211 or the Federal

Defendants are violating their right to privacy under the United States Constitution or that District 211 is violating Title UX because transgender students are permitted to use restrooms consistent with their gender identity… High school students do not have a constitutional right not to share restrooms or locker rooms with transgender students whose sex assigned at birth is different than theirs. In addition, sharing a restroom or locker room with a transgender student does not create a severe, pervasive, or objectively offensive hostile environment under Title IX given the privacy protections District 211 has put in place in those facilities and the alternative facilities available to students who do not want to share a restroom with a transgender student." (Emphasis added.)

iv. On December 29, 2017, United States District Judge Alonso adopted the Magistrate Judge's Report and Recommendation, and overruled the Plaintiffs objections to the same.

v. On April 12th, 2019, the Plaintiffs voluntarily dismissed the case. The District Court dismissed the case without prejudice.

d. ***J.A.W. v. Evansville Vanderburgh School Corporation Case* 3:18-cv-37-WTL-MPB (S.D. Ind. Jun. 7, 2019)**

i. The ACLU of Indiana filed a lawsuit against the Evansville Vanderburgh School Corporation on behalf of J.A.W., a transgender boy high school student who was denied the ability to the use the restrooms that corresponded with his gender identity. J.A.W. had been diagnosed with gender dysphoria, had long identified as male, was under a physician's care, and was taking hormone therapy. He was told by a school administrator that he was not allowed to use the male restrooms, and that he would be subject to discipline if he did.

ii. To avoid having to use the restrooms at school, the student restricted his fluid intake and avoided using the restroom at school, causing him pain and discomfort. On the few occasions that the student could not avoid using the bathroom while at school, he used the girls' restrooms to avoid discipline. The student testified that this drew attention to the fact that he was transgender, and that female students expressed discomfort with him using the girls' restroom because he looked like a boy.

iii. On August 3, 2018, the court granted a preliminary injunction allowing the student to use the boys' restrooms. The court heavily relied on the 7th Circuit's decision in *Whitaker* in making its decision.

iv. Regarding the likelihood of success on the Title IX claim, the court stated the following:

> "EVSC argues that *Whitaker* 'was not... a mandate requiring school corporations to allow unemancipated minors who profess to be transgender access to the restrooms of their choosing on the strength of nothing more than their own demands,' Dkt. No. 65 at 20, and asserts that *Whitaker* is distinguishable from this case in several respects. First, it points to the Seventh Circuit's observation in *Whitaker* that it was "`not a case where a student has merely announced that he is a different gender,'" *id.* (quoting *Whitaker,* 858 F.3d at 1050), and argues that this demonstrates that "some threshold showing is required to trigger the protections for transgender students discussed in *Whitaker,* and a mere `announcement' of one's transgender status is insufficient," *id.* at 20-21. Thus, it argues, *Whitaker* did not hold that "schools are prohibited from requiring a parental request prior to allowing transgender students to access restrooms in alignment with their gender identity" or that "schools are prohibited from requiring some evidence that access to such facilities is medically, psychologically, and developmentally necessary and appropriate for the individual student." Dkt. No. 65 at 21. That is true — *Whitaker* did not specifically hold either of those things. But that is irrelevant to the issue now before the Court, because EVSC has made it clear, through the testimony of Dr. Smith, that its decision to prohibit J.A.W. from using boys' restrooms was not based on either a requirement that there be a parental request or a requirement of any sort of evidence regarding what is necessary and appropriate for J.A.W. Rather, EVSC's position unequivocally is that unless and until J.A.W. obtains a birth certificate that states that his sex is male — something that appears to be legally impossible for him to do at this point in time — he will not be permitted to use the boys' restrooms. And in that fundamental sense, this case is indistinguishable from *Whitaker*. In other words, there likely is a line to be drawn with regard to when Title IX requires a school to permit a transgender student to use the restrooms that coincide with his gender identity, but in this case EVSC has drawn that line in a place that the Seventh Circuit has already

indicated is likely unacceptable. Therefore, the Court finds that J.A.W. has sufficiently established a reasonable likelihood of success on the merits of his claim under Title IX."

v. Regarding the likelihood of success on the Equal Protection Clause claim, the court stated:

"In *Whitaker*, the asserted justification for the restroom policy was the need to protect the privacy rights of all of the students in the district. The Seventh Circuit found that privacy argument to be "based on sheer conjecture and abstraction." *Id.* at 1052. The same is true of EVSC's stated justification for its practice in this case: "preventing disruption and protecting the safety of all of its students, both transgender and cisgender." Dkt. No. 41 at 19.

With regard to the prevention of "disruption," EVSC has presented no evidence to support this justification beyond Dr. Smith's testimony that he believes there would be "substantial disruption" if "children were allowed simply to choose bathrooms based upon their subjective gender identity" and that "the parent body would object." Dkt. No. 61 at 33-34. But as the Court has already noted, at this point, J.A.W. is not asking to simply choose a restroom based on his subjective gender identity. He has been diagnosed with gender dysphoria and has been taking male hormones — which have altered his appearance and his voice — for almost a year. Further, EVSC has not described what form this "disruption" would take beyond complaints from parents, which the court found insufficient in *Whitaker*. *See Whitaker*, 858 F.3d at 1052 (finding that the receipt of one complaint from a parent and the fact that some parents and other community residents had spoken out in opposition — including at a school board meeting — to the plaintiff using the boys' restrooms insufficient to support the school district's position). In fact, when asked whether there had been any complaints from parents or students "as it relates to bathroom usage in transgender," Dr. Smith related the following:

> Well, as recently as last month, in speaking to an administrator at — the day after the Monday after I was deposed, she referenced two situations that had occurred in the building where she is principal; had a parent, a mother, that called that was extremely upset because the daughter had been exposed to a transgender man that had

> gone into the restroom and she felt very — I think the words were scared, vulnerable and terrified.
>
> Dkt. No. 61 at 33. But that anecdote supports J.A.W.'s position. Under EVSC's policy, J.A.W. — a transgender male — is supposed to use the girls' restrooms. Thus EVSC's own policy has apparently caused the sort of "disruption" that EVSC is trying to avoid.
>
> In any event, the practice identified by EVSC — determining which restroom a student may use based upon the student's birth certificate — is inconsistent with the articulated reason for the policy. As Dr. Smith conceded at the hearing, whatever hypothetical disruption that might occur if J.A.W. were to use the boys' restrooms at school would not be caused by what J.A.W.'s birth certificate says; it is unlikely that those causing the disruption would be aware of the content of his birth certificate or that their opinion that J.A.W. should not be using the boys' restrooms would change simply because a different box was checked on that document."

2. **Recommendations**

a. Develop procedures or guidelines relating to transgender students which focus on process and do not guarantee a result for particular requests. Such procedures would ensure consistency among the schools. For example, the procedures would address issues such as which District representative students and parents should contact with concerns relating to the student's gender identity and expression at school, what information the District may ask for before making a decision, communication to and involvement of parents, student confidentiality, etc. The procedures would provide that the District would address student needs and concerns on a case-by-case basis, taking into account the privacy rights of all students.

b. In implementing the procedures, if there is a request for a transgender student to use restrooms or locker rooms consistent with their gender identity, consider having a closed session with the School Board so it can discuss that particular student situation.

c. Investigate complaints from transgender students of bullying and harassment and take appropriate action, regardless of whether "gender identity" is expressly mentioned in the bullying or harassment policy.

d. Although a student's transgender status alone would not be the basis for a referral, students with disabilities may not be denied FAPE or appropriate accommodations due to their transgender status. Child Find requirements apply.

e. 504 Plans or IEPs may, as appropriate, reflect conditions that may be related to a student's transgender status (e.g., anxiety or depression). Gender Plans should not be developed in isolation from any 504 Plan or IEP.

B. Transgender Employees: Cases to Watch

1. Three closely-related cases are currently pending before the U.S. Supreme Court. At issue is whether Title VII of the Civil Rights Act, which prohibits employment discrimination on the basis of sex, specifically prohibits discrimination on the basis of sexual orientation and transgender status. (*Bostock v. Clayton County* and *Harris Funeral Homes v. EEOC*).

2. Oral arguments were held on October 8, 2019.

"[Attorney] Cole [of the ACLU] described the case in simple terms. Stephens is being treated differently because of the sex she was assigned at birth. If she had been assigned a female sex at birth, he argued, she would not have been fired for wanting to come to work dressed as a woman. But instead she was assigned a male sex, Cole continued, and so she was fired because she failed to conform to the sex stereotypes of her employer. It can't be the case, Cole asserted, that Ann Hopkins – the plaintiff in the Supreme Court's original case on sex stereotyping – couldn't be fired or denied a promotion for being insufficiently feminine, but Stephens could be fired for being insufficiently masculine..."

https://www.scotusblog.com/2019/10/argument-analysis-justices-divided-on-federal-protections-for-lgbt-employees/

XI. Questions, Comments, Discussion.

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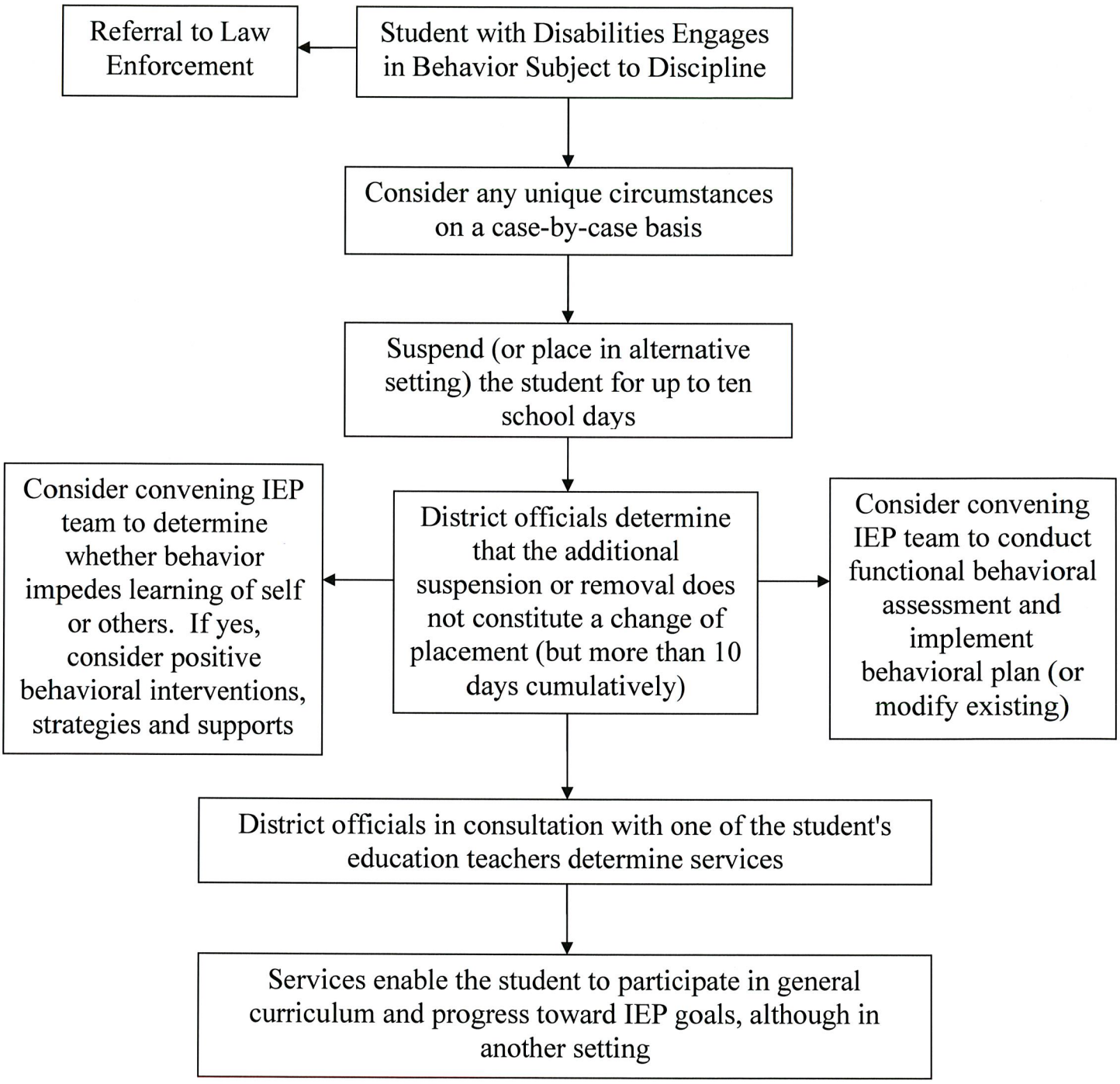

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Chart A

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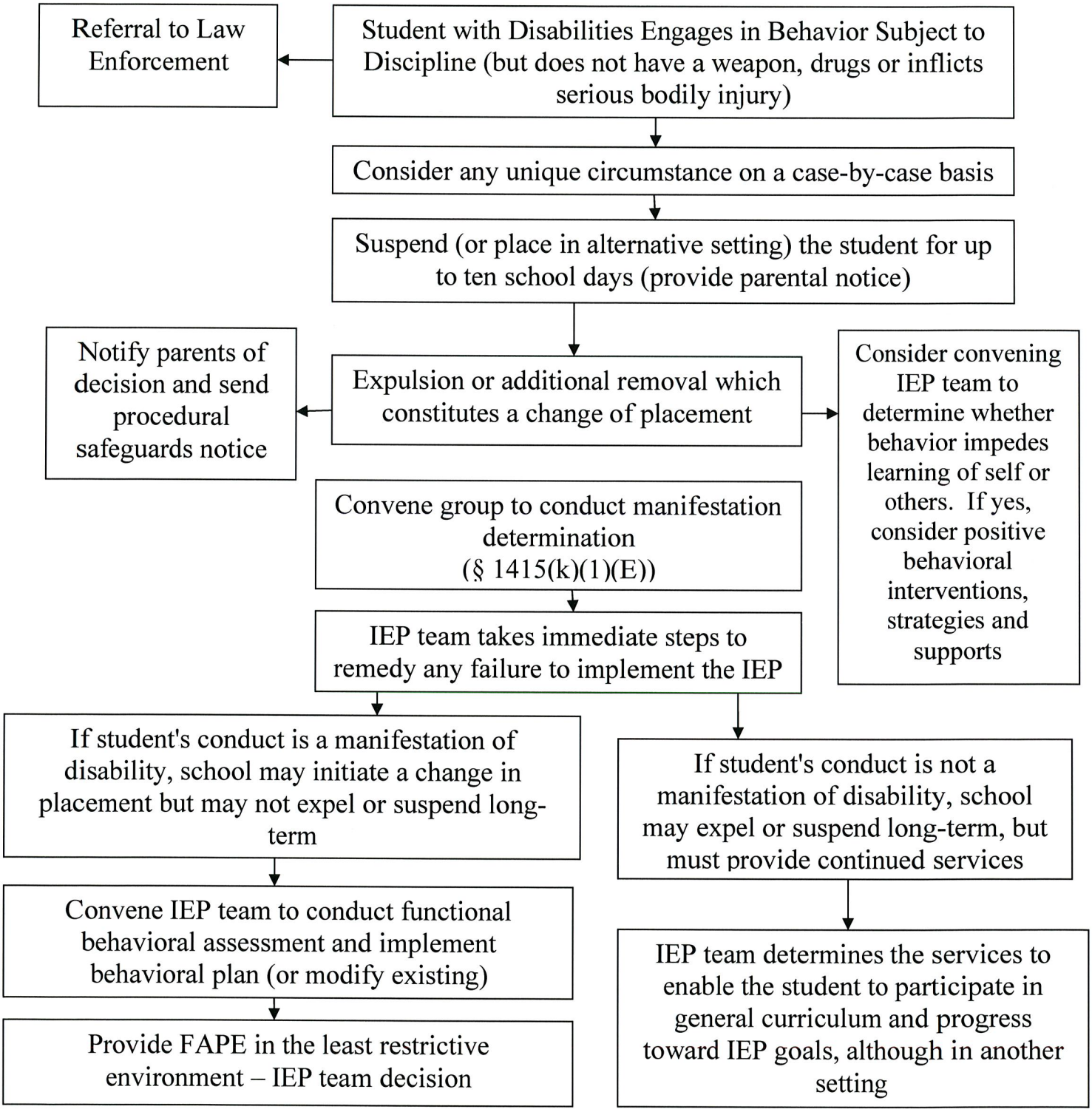

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Chart B

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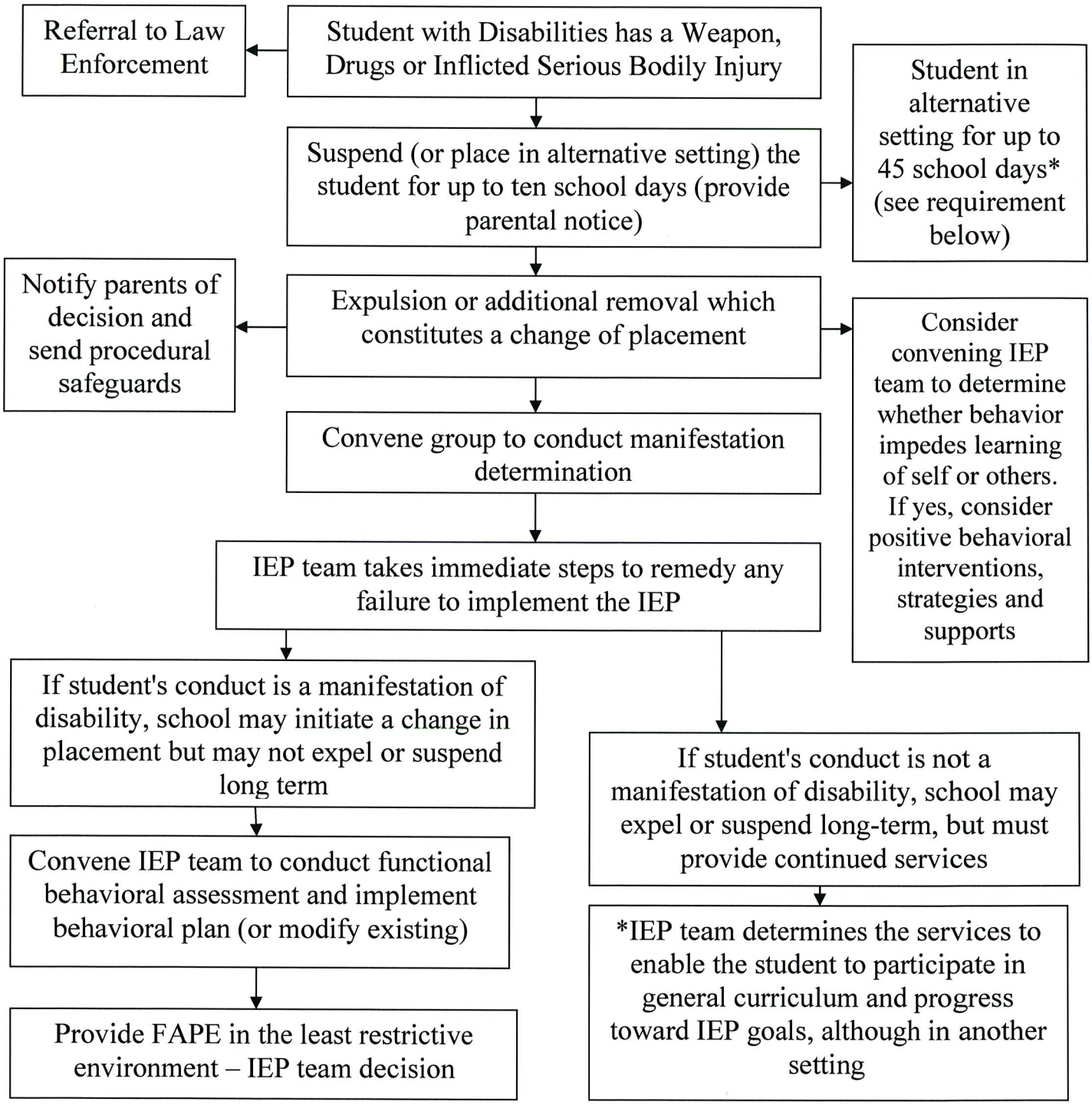

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Chart C

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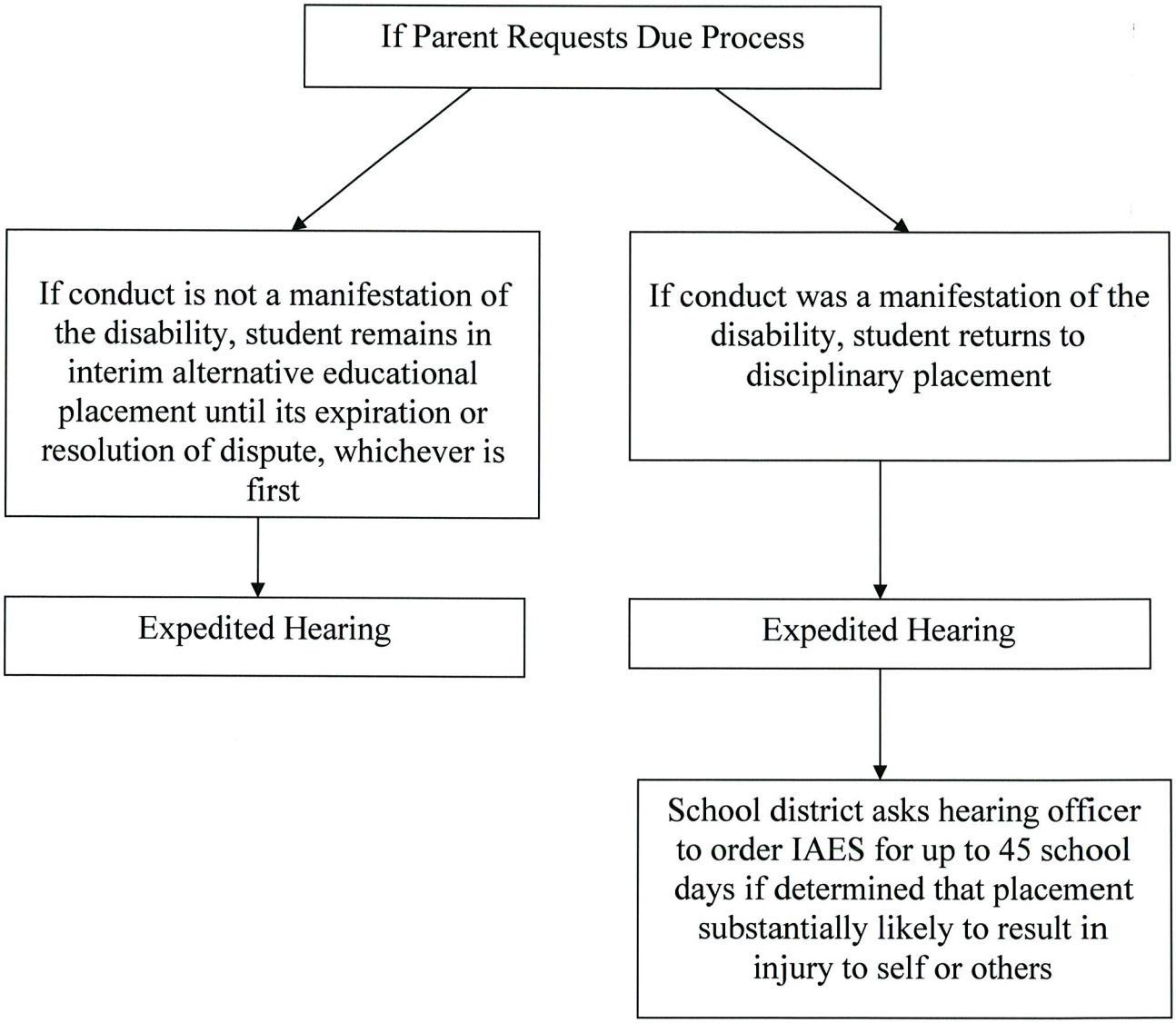

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Legal Update

Buelow Vetter
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Ensure that Regular Education Teachers Have Access to Student IEPs

October 18, 2019

Developing an IEP that is reasonably calculated to enable a student to make progress appropriate in light of the student's circumstances is only one part of providing a free appropriate public education (FAPE). The school district must also ensure that the IEP is implemented.

Oftentimes, the IEP will provide the student with certain accommodations and/or modifications in the classroom (e.g., preferential seating, reminders to stay on-task, written instructions, extra time to complete a test or assignment, movement breaks, etc.). It is imperative that regular education teachers and related service providers are aware of the accommodations and/or modifications that a student's IEP requires them to provide. It is ultimately the responsibility of the school district to ensure that the appropriate staff members have access to the IEP and are aware of the specific accommodations and/or modifications that must be provided to the student.

This is spelled out in the IDEA. The IDEA regulations require school districts to ensure that:

1. The child's IEP is accessible to each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation; and
2. Each teacher and provider described above is informed of: (a) his/her specific responsibilities related to implementing the child's IEP; and (b) the specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP.

In light of the above, we recommend the following:

1. A student's case manager should meet with a student's regular education teachers to review the portions of the IEP that the teacher is responsible for implementing. Many school districts find it helpful to use an "IEP at a Glance" document for this purpose.
2. Any behavior intervention plan (BIP) should also be provided to and reviewed with the teachers and related service providers working with the student.
3. The case manager should periodically check in with the student's teachers and related service providers to discuss the student's performance and progress. The IEP Team should reconvene to discuss any lack of expected progress and revise the IEP as appropriate.
4. Arrangements should be put in place in advance to ensure implementation by substitute teachers as appropriate.

5. Special arrangements which ensure student confidentiality should be used as necessary for situations involving related service providers who are outside the classroom environment (e.g., bus drivers, lunch or recess supervisors, etc.)
6. School staff, including regular education staff, should be trained in special education legal requirements and best practices.

If you have any questions about this Legal Update or would like assistance in auditing your IDEA and Section 504 policies or training school staff in special education legal requirements and best practices, please contact Alana Leffler at aleffler@buelowvetter.com or 262-364-0267, Gary Ruesch at gruesch@buelowvetter.com or 262-364-0263, or your Buelow Vetter attorney.

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Legal Update

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Department of Public Instruction Issues Important Decisions Upholding Expulsions Based on "Threats" Outside of School

January 25, 2019

Last week, the Department of Public Instruction (DPI), issued two groundbreaking decisions upholding expulsions based on threats of shootings. The DPI's decisions find that, under certain circumstances, threats occurring outside of school, including during the summer break or even while a student is enrolled in a private school, may still serve as a basis for expulsion from school. This Legal Update focuses on DPI's conclusions on threats and the major takeaways from the two decisions.

Decision (773) Jan. 2, 2019.

In *Dec. 773*, the student appealed the school board's decision to expel based on the student's posting of a video on social media using profanity and threatening to shoot someone, while holding a real gun. The video was posted over summer break and was removed from social media prior to the start of the academic year. Several weeks later, after school began, the district received an anonymous report from someone claiming to be a student who felt threatened by the video.

The DPI found that the school board could reasonably conclude the posted threat endangered the property, health or safety of others at school or under the supervision of a school authority. The DPI considered that the pupil posted the video on social media, fellow district students viewed and commented on the video, and the district received a report from an individual claiming to be a student who perceived the video as a threat to the safety of students. Despite the fact that the video was posted over the summer and was removed prior to the start of the school year, the DPI still upheld the expulsion.

Decision (775) Jan. 10, 2019.

In *Dec. 775*, the student appealed the school board's decision to expel based on the student's Snapchat post, in which he posed with an Airsoft gun with a text stating, "Florida 2.0 coming soon." The post was made five days after the Stoneman Douglas High School shooting in Parkland, Florida. At the time the student posted the message, he was not enrolled in the district, but was enrolled in a private school. The student withdrew from the private school before any expulsion proceedings were commenced by the private school. At the start of the next school year several months later, the student enrolled in the district and the administration commenced expulsion proceedings. The school board expelled the student, finding the student's conduct while outside of school endangered the health, safety or property of others at the district's schools.

The main issues in this case were whether the expulsion statutes give a district the authority to expel a student for conduct that occurred while enrolled in a private school, and whether evidence in the record could sustain a finding that the student endangered the health or safety of others at a school for the district, since the student's post occurred while he was a student at the private school. The DPI found that the statutes did not limit the authority of a district to expel a student even though the student was enrolled in a private school at the time the threat was posted. However, the DPI cautioned that "[s]chool boards do not have blanket authority to expel a student based on that student's conduct at any school, public or private, that occurred at any time, regardless of whether that conduct had any relation to the expelling school district." Instead, the school board must still find that the student engaged in conduct which endangered the property, health, or safety of others at the school board's school, or under the supervision of the school board's authority.

The DPI also upheld the school board's determination that the social media threat of a school shooting endangered the property, health or safety of others at school or under the supervision of a school authority. The DPI reasoned that the posting could reasonably be perceived as a threat to students at the district since the message was not limited to a specific school. Additionally, as prior school shootings demonstrate, an individual does not need to attend a school to be a threat to that school (ex. a former student that carried out the Sandy Hook shooting).

Conclusions

These decisions clarify a school board's authority to expel a student under usual circumstances, particularly when a student is not a student of the district or under the authority of the school when the conduct occurs. These two decisions also seem to expand the scope of the conduct which subjects public school students to the district's disciplinary authority. School administration and school boards facing conduct by students while school is not in session or even before a student is enrolled in a district, should know that the school board may still have the disciplinary authority to expel students when the conduct is reasonably found to be a threat of harm which endangered students at the school and if the best interest of the school demands expulsion.

In these cases, important considerations in upholding the decisions appear to be the perception of statements as being threats, district staff and student reactions to the threats and current events. Thus, school officials should take great care to present specific evidence at the hearing to demonstrate that the conduct endangers students in the school district. This evidence may take the form of testimony or documentation. In any event, the more attenuated the conduct is, i.e. based upon timing, enrollment status, location, etc., the greater attention this should be given so that the school board's decision to expel is grounded in the hearing record.

If you have any questions about this Legal Update, please contact Attorney Claire Hartley at 262-364-0260 or chartley@buelowvetter.com, Attorney Gary Ruesch at 262-364-0263 or gruesch@buelowvetter.com, Attorney Matt Derus at 262-364-0266, or mderus@buelowvetter.com, or your Buelow Vetter attorney.

In order to comply with Treasury Circular 230, we are required to inform you that any advice we provide in this Legal Update concerning federal tax issues is not intended or written to be used, and cannot be used, to avoid federal tax penalties or to promote, market, or recommend to another person any tax advice addressed herein.

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Federal Commission on School Safety Issues Final Report

December 21, 2018

On December 18, 2018, the Federal Commission on School Safety issued its much-anticipated final report. The Commission, led by Education Secretary Betsy DeVos, was created by President Trump following the school shooting in Parkland, Florida. It was tasked with "producing a report of policy recommendations in an effort to help prevent future tragedies." The report provides recommendations for school districts and other federal, state, and local policymakers on issues such as student mental health, cyberbullying, threat assessments, student discipline, and compliance with the Family Educational Rights and Privacy Act (FERPA). This Legal Update will focus on the Commission's recommendations regarding student discipline, specifically, the recommendation to rescind the Obama Administration's 2014 *Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline*.

2014 Obama Administration Guidance

The Obama Administration's Guidance on the Nondiscriminatory Administration of School Discipline ("the Guidance") provides an overview of data collected by the Office for Civil Rights (OCR), which shows that students of certain racial or ethnic groups tended to be disciplined more than their peers. The Guidance also discusses the increased use of "exclusionary discipline," such as out-of-school suspensions, expulsions, and referrals to law enforcement, which some argue contributes to the "school to prison pipeline."

The Guidance clarifies that statistical data alone would not be determinative in an OCR investigation, and it recognizes that disparities in student discipline rates may be caused by a range of factors. However, the Obama Administration believed that "racial discrimination in school discipline is a real problem."

The Guidance explains that a school's disciplinary practices may violate Titles IV and VI, which protect students from discrimination based on race, when a school intentionally disciplines students based on race through the selective enforcement of a facially neutral policy, for example. The Guidance goes on to explain that, absent direct evidence of intentional discrimination based on race, the U.S. Department of Education and the U.S. Department of Justice (the Departments) would examine circumstantial evidence to determine whether intentional discrimination occurred, normally using the following analysis:

1. Did the school treat a student or group of students of a particular race differently from a similarly situated student or group of students of another race in the disciplinary process? (The Departments would conclude that students are similarly situated when they are comparable in relevant respects, for example, with regard to the seriousness of the infraction and their disciplinary histories.) If yes, then…

2. Can the school articulate a legitimate, nondiscriminatory reason for the different treatment? If not, then the Departments could find that the school has intentionally discriminated based on race. If yes, then…

3. Is the reason articulated a pretext for discrimination? (Circumstances in which the Departments may find that the school's stated reason is a pretext include where witnesses contradict the school's stated reason for the disparity, where students of other races have received different discipline for similar misbehavior, or where the discipline issued does not conform to the school's discipline policy.) If yes, then the Departments would conclude that the school engaged in discrimination.

The Guidance also states that schools may violate Titles IV and VI when "they evenhandedly implement facially neutral policies and practices that, although not adopted with the intent to discriminate, nonetheless have an unjustified effect of discriminating against students on the basis of race. The resulting discriminatory effect is commonly referred to as 'disparate impact.' . . . Examples of policies that can raise disparate impact concerns include policies that impose mandatory suspension, expulsion, or citation upon any student who commits a specified offense. . ."

The Guidance concludes with recommendations for school districts, school administrators, teachers, and staff, including recommendations for: safe, inclusive, and positive school climates; training and professional development; the appropriate use of law enforcement; clear and consistent discipline policies; emphasizing positive interventions over disciplinary removals; and data collection and review. The Guidance prefaced its recommendations by stating, "Equipping school officials with an array of tools to support positive student behavior—thereby providing a range of options to prevent and address misconduct—will both promote safety and avoid the use of discipline policies that are discriminatory or inappropriate. The goals of equity and school safety are thus complementary, and together help ensure a safe school free of discrimination."

The Commission's Recommendation to Rescind the Guidance

Chapter 8 of the Final Report of the Federal Commission on School Safety discusses three main reasons why the Guidance, as written and as implemented, has been criticized:

1. The Guidance "creates a chilling effect on classroom teachers' and administrators' use of discipline by improperly imposing, through the threat of investigation and potential loss of federal funding, a forceful federal role in what is inherently a local issue;"

2. "Authorities, including the United States Supreme Court, have questioned the applicability of a disparate impact legal theory to Title VI of the Civil Rights Act of 1964, upon which the Guidance relies, thus calling into question its legal basis in the school discipline context;" and

3. The "threat of investigations by the Office for Civil Rights (OCR) . . . has likely had a strong, negative impact on school discipline and safety. . . When school leaders focus on aggregate school discipline numbers rather than the specific circumstances and conduct that underlie each matter, schools become less safe."

Accordingly, the Commission recommended the following:

1. "The U.S. Department of Justice (DOJ) and the U.S. Department of Education (ED) should rescind the Guidance and its associated sub-regulatory guidance documents. ED should develop information for schools and school districts that will identify resources and best practices to assist schools in improving school climate and learning outcomes as well as in protecting the rights of students with disabilities during the disciplinary process while maintaining overall student safety.

2. DOJ and ED should continue to vigorously enforce Title VI of the Civil Rights Act of 1964 and provide appropriate information to assist schools and the public in understanding how ED will investigate and resolve cases of intentional discrimination."

The Commission expressed a commitment "to ensuring that educational programs and policies are administered in a fair, equitable, and racially neutral manner that does not resolve in discrimination," and to "acting swiftly and decisively to investigate and remedy any discrimination" when there is evidence "beyond a mere statistical disparity" that a school's programs and/or policies may discriminate based on race.

Buelow Vetter Analysis and Recommendations

Because Education Secretary Betsy DeVos is a member of the Federal Commission on School Safety, the Department of Education most likely will adopt the Commission's recommendation to rescind the Obama Administration's Guidance. As a result, school districts may see a decrease in OCR investigations into allegations of discrimination based solely on statistical disparities, as well as a decrease in findings of Title IV or VI violations based on disparate impact.

We continue to recommend the following best practices with regard to student discipline:

1. Student discipline policies should be written and implemented in a neutral, equitable and consistent manner, without regard to race, sex, or other categories protected under Section 118.13 of the Wisconsin Statutes or federal law.

2. Student discipline policies and student codes of conduct should include:

a. Specific definitions and examples of prohibited conduct (e.g., threatening behavior, dangerous behavior, disruptive behavior); and

b. A description of what types of conduct may result in disciplinary removals (e.g., removal from class, out-of-school suspension, expulsion) and the procedures for determining the appropriate educational placement of a student who has been removed from the classroom or school.

3. School staff should receive training in the following areas:

    a. Effective classroom management strategies;
    b. Trauma-informed approaches to handling student behavior issues;
    c. The equitable application of student discipline policies and practices; and
    d. The importance of objectively documenting the specific behavior that led to discipline.

4. Schools should impose discipline, including out-of-school suspensions and expulsions, and refer matters to law enforcement as appropriate to ensure a safe school environment.

If you have any questions about this Legal Update, or require assistance in reviewing your school policies, please contact Attorney Alana Leffler at 262-364-0267 or aleffler@buelowvetter.com, or your Buelow Vetter attorney.

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

February 22, 2019

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.

This Legal Update is intended to provide information only on general compliance issues and should not be construed as legal advice. Please consult an attorney if you have any questions concerning the information discussed in this Legal Update.

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