



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

September 5, 2007

This letter is in response to your e-mail inquiry received on July 10, 2007, by the Information Resource Center. This response is based on information from your letter along with conversations that a member of the staff in the Office of Special Education and Rehabilitative Services (OSERS) had with you regarding your concerns. You requested the Department of Education's opinion on whether an expulsion hearing may occur before a hearing officer determines whether or not the local educational agency (LEA) did or did not have knowledge that the child was a child with a disability and whether the manifest determination review must be conducted before the expulsion hearing goes forward. In particular you stated that there is a pending expulsion hearing and a pending expedited due process hearing regarding whether or not the LEA had knowledge that your child was a child with a disability. Pursuant to a conversation you had with a member of OSERS's staff, it is our understanding that your child is in the process of being evaluated for special education and related services, but the evaluation process began after the incident that led to the proposed expulsion. You reference sections of Connecticut state law, however, the following is an interpretation of the IDEA and the implementing Part B federal regulations in the context of the facts you have provided.

Relevant IDEA provisions

Under IDEA, there are disciplinary provisions that protect both children with disabilities and children who are not yet determined eligible for special education and related services, but who may be suspected of having a disability. In the situation you described, your child had not been evaluated or determined eligible to receive special education services as a child with a disability when the LEA proposed the disciplinary action. Section 615(k)(1)(E)(ii) of IDEA and 34 CFR §300.530(e)(1) require that, within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the Individualized Education Program (IEP) Team (as determined by the parent and the LEA), review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents, to determine- (I) if the conduct in question was caused by or had a direct and substantial relationship to, the child's disability; or (II) if the conduct in question was the direct result of the LEA's failure to implement the IEP. The conduct must be determined to be a manifestation of the child's disability if the LEA, parent and relevant members of the IEP team determine

among other things, return the child to the placement from which the child was removed unless the child's behavior falls under one of the special circumstances listed in 34 CFR 300.530(g). These circumstances include possessing a weapon, possessing an illegal drug or inflicting serious bodily injury upon another person while at school, on school premises or at a school function under the jurisdiction of the State educational agency (SEA) or the LEA. If one of these incidents occurred, the child could be placed in an interim alternative educational setting for 45 days, whether or not the behavior was a manifestation of the child's disability.

Section 615(k)(5) of IDEA and 34 CFR §300.534 allow a child who has not been determined eligible for special education and related services and who has engaged in behavior that violated a code of student conduct, to assert any of the discipline protections provided in IDEA if the public agency had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred. A public agency must be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred: (1) the parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services; (2) the parent of the child requested an evaluation of the child pursuant to 34 CFR §§300.300 through 300.311; or (3) the teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency. 34 CFR §300.534(b).

If a public agency does not have knowledge that a child is a child with a disability prior to taking disciplinary measures against the child, the child may be subjected to the disciplinary measures applied to children without disabilities who engage in comparable behaviors. 34 CFR §300.534(d). Additionally, if a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under 34 CFR §300.530, the evaluation must be conducted in an expedited manner. 34 CFR 300.534(d)(2)(i). Until the evaluation is completed, the child should remain in the educational placement determined by school authorities, which can include suspension or expulsion without educational services. 34 CFR §300.534(d)(2)(ii).

Application of IDEA provisions to your inquiry

In the situation you describe, there appears to be a disagreement between you and the LEA as to whether, pursuant to 34 CFR §300.534(b), the LEA had a basis of knowledge that your child was a child with a disability. Therefore, you requested an expedited due process hearing pursuant to 34 CFR §300.532(c) to resolve this issue. The SEA or LEA is responsible for arranging the expedited due process hearing, which must occur within 20 school days of the date the complaint requesting the hearing is filed and the hearing officer must make a determination within ten school days after the hearing. 34 CFR §300.534(c)(2). In your situation, the LEA is requesting to proceed with the expulsion hearing before the expedited due process hearing occurs. You requested an evaluation of

your child after the conduct which formed the basis for the disciplinary action and that the LEA authorized an evaluation, which is currently pending.

You have inquired whether the LEA has to postpone the expulsion hearing until the LEA's basis of knowledge has been determined and whether the manifest determination review must be conducted before the expulsion hearing. There is nothing in the IDEA or the Part B regulations that requires an LEA to put a disciplinary hearing on hold until a hearing officer determines whether, pursuant to 34 CFR §300.534(b), an LEA did or did not have knowledge that a child is a child with a disability. That being said, however, there is also nothing in either the IDEA or the Part B regulations that would prevent an LEA and parent from agreeing to postpone the expulsion hearing until after the expedited due process hearing is held and the hearing officer issues a decision on the LEA's basis of knowledge. In your case, if the LEA proceeds with the expulsion hearing before the expedited due process hearing, the provisions of 34 CFR §300.534(d) would apply since your child has not yet been determined eligible for special education and related services, you did not request an evaluation until your child was subject to disciplinary measures, and the issue of whether the LEA had a basis of knowledge that your child was a child with a disability has not yet been decided. In that case, the LEA may treat your child like a child not determined eligible for special education and related services and subject your child to disciplinary measures applied to children without disabilities who engage in comparable behaviors. 34 CFR §300.534(d)(i). Your child's evaluation, the request for which was made during the time period in which your child was subjected to disciplinary measures, must be conducted in an expedited manner, however, and, until the evaluation is completed, your child must remain in the educational placement determined by school authorities, which can include suspension or expulsion without educational services. 34 CFR §300.534(d)(2)(i) and (ii).

If, as a result of the expedited due process hearing, the hearing officer decides that the LEA had a basis of knowledge that your child was a child with disability, the hearing officer has the authority to determine the educational placement of the child and may order that a manifestation determination review be conducted, pursuant to 34 CFR §300.530(e). See 34 CFR 300.532(b)(2).

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

We hope that you find the response to your question helpful. If you need further assistance, please feel free to contact my office.

Sincerely,

A handwritten signature in dark ink, appearing to read "Patricia J. Guard". The signature is fluid and cursive, with the first name "Patricia" being the most prominent part.

Patricia J. Guard
Acting Director
Office of Special Education
Programs