Risk assessments can be risky business

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Many readers may be familiar with a very common scenario in Maine schools, and it looks something like this: A student does or says something that appears very threatening. Perhaps it is a threat to harm another student or a teacher in a very serious manner, or a threat to damage school property. In any event, the student is suspended from school and school administrators want to have a “risk assessment” undertaken. The hope or expectation is that the student will remain out of school until the risk assessment is completed, and then he or she will not be allowed back if the assessment shows a significant risk of harm. The practice of asking for these risk assessments arose out of the school killings that seemed to begin with Columbine.

To some, risk assessments appear to sit in a vacuum, a sort of legal limbo, unconnected to the host of other laws that govern school actions. It sometimes seems that because risk assessments by definition involve measuring the likelihood of serious injury or harm, they fall outside the normal restrictions on what schools can do with student. But this is clearly and definitively not true! It is very important for school officials to recognize that student risk assessments are strictly governed by a number of very important laws — and these laws impose significant limitations on how risk assessments may be used.

The purpose of this article is not to advocate for or against risk assessments. Instead it is intended to help readers recognize the legal web within which the student risk assessment operates.

Student removals and risk assessments

The first thing that all school administrators should recognize on the subject of risk assessments is that when a child is ordered out of school pending completion of a risk assessment, this will virtually always amount to a student suspension from school. Granted, on occasion the parents of the child freely agree to have the child out of school during the assessment, and if the parents willingly agree to the child’s removal then the removal may not be considered a suspension. But if school officials are mandating that the child be out of school until the completion of the assessment, then the removal will likely be considered a suspension.

It is vitally important to remember this. School principals and superintendents in Maine have the authority to suspend a student from school for no more than 10 school days. That’s it. And if the school department wants to keep a child out longer, the legal avenue for doing so is through a vote of the school board – ordering either a long term suspension or an expulsion. What this means is that, as a general rule, school principals and superintendents do not have the legal authority to require that a child remain out of school for more than 10 school days while a risk assessment is occurring. If the risk assessment can be done in that short a time period, the removal problem is avoided. But if it cannot, the school will lack legal authority to keep the child out longer than 10 school days, absent a school board vote.

Again, if the parent and the superintendent agree to a longer removal with the provision of some educational services (tutoring), these issues are likely avoided. In that case, the extended removal is not a suspension, but really amounts to a relocation of student programming. This type of voluntary arrangement often is accompanied by school services off school grounds, and after the initial 10 days of removal, the
extended absence is not listed in school records as a suspension. The child is going to school off school
grounds. But these are voluntary decisions reached by the parents after discussion with the superintendent.
Absent such a voluntary agreement, the removal will almost certainly be viewed as a disciplinary removal
subject to the procedures just mentioned. That is, the principal or superintendent could order the student out
for no more than 10 school days. The school board would need to order any longer removals.

Of course, we are referencing regular education discipline rules here. If the student is in special
education, schools can suspend for the same 10-day period. But if longer removals are desired, these have to
work through the IEP team process. This means that, for special education students, the IEP team must meet
and order the longer removal. This will usually also involve a manifestation determination. And of course, the
family has a right to challenge those longer term removal decisions through due process. If they do, then the
"stay put" requirement of special education law comes into play. Under "stay put", the child will remain in his
or her previous placement (most likely, back in school) unless the school can prove to a hearing officer that the
child presents a substantial likelihood of injury – something in this scenario the school is still trying to evaluate!

All of these things can occur. School officials can suspend students in these situations for up to 10 school
days. School boards can meet and keep the child out longer. In the case of special education students, IEP
teams can meet and order removals, subject to the possibility of parental due process challenge. And every
once in a while parents do voluntarily agree to longer removals. But what school officials must understand is
that student removals for the purpose of risk assessments operate within these legal parameters, not outside
of them.

In sum, a student removal for a risk assessment has to be understood within the context of Maine’s
student suspension and expulsion laws, and within Maine’s special education laws for students with
disabilities. In most circumstances these laws will control how long the removal can last and the procedures
for bringing it about. School officials must act consistent with these laws.

Risk assessments are evaluations

In virtually all circumstances, a student risk assessment is a student evaluation. Perhaps occasionally
school officials will quickly and informally undertake their own assessment of whether a student presents a
risk, and will do so without any evaluation instruments that probe a student’s mental well being. These
informal activities usually occur quickly and on the spot. But when a school official calls for a risk assessment,
what is usually being sought is an assessment of the student’s mental well being through the use of
assessment instruments administered by a mental health professional.

A risk assessment in the situation just described will always be understood as an evaluation of the
student. Because it is an evaluation, a variety of laws impose additional limitations on the activity. Most
importantly, the school will virtually always need parental consent to administer the evaluation. Under the
"Hatch Amendment" – a federal law found within the No Child Left Behind Act – schools must have parental
consent before administering an assessment of a child’s mental or psychological problems, or of any illegal,
anti-social, or self-incriminating behavior. A risk assessment of the sort just described and ordered by the
school will virtually always fall within the reach of the Hatch Amendment and require parental consent.

If the child is in special education, a risk assessment will also be understood as an “evaluation” of the
child under those laws, especially because the reason for the assessment is to consider the child’s long term
programming or placement needs. Just like under the Hatch Amendment, this evaluation of the special
education student will require parental consent. If the family refuses consent, the school can take the family
to a due process hearing in an effort to override the refusal, but the school will have to convince a hearing
officer that this evaluation is necessary to program effectively for the child. And until the hearing officer issues
her ruling, the law’s stay put provision will keep the child in his or her regular placement – again, unless the
school convinces the hearing officer that the child presents a substantial likelihood of injury.
In other words, risk assessments can occur, but because they are “evaluations,” they will require parental consent and cannot otherwise be forced upon a family. Families often agree with having these assessments, but if they do not provide consent, the school will be unable to force the evaluation to occur.

**Having the family do the risk assessment**

School officials may wonder if all of the rules and restrictions described above can be avoided by simply requiring the family to undertake the risk assessment, and usually to pay for that risk assessment. Yet this perspective seems to reflect an uncertainty about just what the risk assessment is.

Certainly parents can arrange and undertake risk assessments of their children. In that situation, the parent pays. Because the parent is arranging it, the parent is obviously providing the consent for the assessment to occur. Along with the risk assessment, the parent might also agree or choose to keep the child out of school until the assessment is completed.

But notice how all of this depends on the parent voluntarily choosing to participate in the risk assessment process. We have said from the beginning, if the parent voluntarily consents to a risk assessment, and voluntarily chooses to keep the child out of school during the risk assessment process, the school department will be unlikely to encounter significant legal challenges with voluntary conduct of this sort. There are usually very few legal risks when parents and schools work cooperatively together.

But the primary point of this article is that when parents are not willing participants in the assessment process, all bets are off. If the school is mandating the assessment, it will be understood as an evaluation and parental consent will be required. If the school is mandating student removal until the assessment is completed, the removal will likely be subject to all the state laws and/or special education rules that govern and limit student removals. Finally, it is also quite clear that if the school is really mandating the risk assessment, the school will likely have to pay for that evaluation. Certainly this is true in special education and under Section 504. It is likely also true just as an element of regular education school law.

This brings us back to our starting point. The risk assessment does NOT operate in a legal limbo simply because student safety may be involved. Risk assessments are student evaluations and subject to the various rules that govern such evaluations. Removal from school during a risk assessment is a removal from school and therefore subject to the range of laws that control student removals. Risk assessments can be used, but they must be used consistent with all these requirements.

**An exception for expelled students?**

There may be one important exception to many of the principles just discussed. In the case of a student who has been properly expelled from school by the school board for an indefinite time period, the superintendent is required to prepare a reentry plan for the student that will help the student understand what the school board will require before the student is permitted to return to school. In many cases, depending on the offense leading to the expulsion, the school board will require an assessment showing that the child will not be a significant risk to others if he or she returns to school.

Here, the child is not required to get the assessment, and therefore the school is not required to pay for it. This type of assessment will also not be understood as falling within the special education laws or the Hatch Amendment. Again, the assessment is truly not in any way mandated. Instead, the student having been properly expelled, the school board is saying, “If you want to come back to school, please provide us with satisfactory evidence that you are not a safety hazard, and this is one type of evidence that will be helpful to us.” If the family does not want to do so, they don’t have to do so. The student will likely remain expelled for a longer time if they do not agree to obtain the risk assessment, but that will be the family’s choice. Special education does not alter this analysis because in order for the special education child to be expelled, the IEP team must have concluded that the misbehavior was not a manifestation of the student’s disability.
Conclusion

Risk assessments can be very important instruments for schools. But they fall within the reach of a number of state and federal laws, and these laws impose limits on the way in which risk assessments may be used. Perhaps the best advice that flows out of recognizing these limitations is that schools may want to avoid using the risk assessment except in those situations where the school really believes that the student presents a real and significant risk of serious harm to others. But even then, one wonders if an even more effective tool in response to what the student did is simply to suspend the child and then move ahead with an expulsion. For a host of reasons, this may often be the best approach when a student has done something sufficiently dangerous as to require a risk assessment. But whatever standard schools choose to apply when seeking a risk assessment, they must be sure to comply with the various laws discussed above that come into play in these delicate situations.

Endnotes

1. See 20-A M.R.S.A. § 1001(9).