

STUDENTS WITH EMOTIONAL DISTURBANCE: A Guide to Identification

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818 La Cassia Drive Boise, Idaho 83705 Phone 208.336.8858 / Fax 208.367.1560

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“Serious emotional disturbance is not an easy term to precisely define and there is more than one set of parameters that could be set for its application.”

--Office of Special Education Programs
Letter to Conway

PREFACE

Students identified as *emotionally disturbed* qualify for special education and related services under the Individuals with Disabilities Education Improvement Act of 2004 (IDEA) if it is determined they are in need of such educational services. The evaluation team has the difficult responsibility of determining whether a student has met the federal definition of emotionally disturbed (ED).

The problems involved in identifying students as ED are multiple. These problems stem from the ambiguity inherent in the federal definition of ED, which has led to diverse interpretations of the definition by hearing officers and courts. Even the Office for Special Education Programs (OSEP) has acknowledged the problematic nature of the term, stating: “[s]erious emotional disturbance is not an easy term to precisely define and there is more than one set of parameters that could be set for its application.”¹ Determining whether a student has met the definition of ED is further complicated by the fact that many students under review suffer from multiple mental health issues—all of which must be considered in the review process.

This manual, *Students with Emotional Disturbances: A Guide to Identification*, provides guidance to Idaho school districts with regard to identifying students who are ED, as defined by federal and state laws, and regulations. Given the federal definition of ED, which is open to considerable interpretation, and the variety and number of disorders that must be considered, often for a single student, ED classification may be a difficult task. This *Guide to Identification* offers assistance in several ways:

¹ *Letter to Conway*, EHLR 213:153, 153 (OSEP 1988).

1. Sections I, II, and III describe ED in the context of various factors, including the IDEA, Section 504, and state regulations;
2. Section IV identifies the components contained in the federal regulation on ED, describes how each of these components has been defined by hearing officers and courts, and gives examples of how students have met specific components of the federal regulation on ED;
3. Section V discusses schizophrenia—the only condition that automatically qualifies a student as ED; and
4. Sections VI, VII, and VIII provide information on particularly contentious topics within a discussion of ED, including “social maladjustment,” “conduct disorder,” and “mental disorders.”

In determining ED eligibility, the eligibility team should evaluate a particular student in terms of *each* of the components listed in Sections IV and V of this manual.

Many interpretations of laws and regulations pertaining to ED come from the decisions of hearing officers. It should be remembered that hearing officers’ decisions are from administrative proceedings and do not set or have precedence. However, the language in such decisions may be helpful in interpreting similar situations.

In addition to providing hearing officers’ interpretations, the *Guide to Identification* cites policy letters from the U.S. Department of Education and refers to case law from various courts around the nation. Of the 20 case studies described in this manual, only four have direct precedence in Idaho.

The *Guide to Identification* also includes definitions from the American Psychiatric Association’s *DSM-IV-TR: Diagnostic and*

Statistical Manual of Mental Disorders (4th ed. July 2000, text revision), and references to the Idaho Department of Education’s *Idaho Special Education Manual 2007*.

ABOUT THE AUTHORS

Elaine Eberharter-Maki received her law degree in 1984 from the University of Idaho. She is a partner with EBERHARTER-MAKI & TAPPEN, PA and practices in all areas of education law. Elaine has represented school districts throughout Idaho since 1995 and has particular interest in special education, student discipline, and employment issues. Elaine teaches graduate-level courses in education law and special education administration for the University of Idaho and the University of Phoenix, and has been a speaker at the *University of Washington's Pacific Northwest Institute on Special Education and the Law* annually since 1996. She is also frequently invited to speak to educators, administrators, and board members relative to various legal issues. Prior to private practice, Elaine served as the Deputy Attorney General for the Idaho State Department of Education from 1988 to 1995.

Diane M. Tappen received her law degree from the University of Idaho in 1984, and has practiced law in both the private and public sectors. As a partner in EBERHARTER-MAKI & TAPPEN, PA, Diane represents school districts in all aspects of litigation, providing research and consultation, and appearing at civil and administrative hearings. She also has extensive hearing officer experience for various state agencies. In addition, Diane earned a teaching certificate in secondary education from Portland State University in 1997.

Roseanne R. Hardin has been an associate attorney with the law firm of EBERHARTER-MAKI & TAPPEN, PA since June 2002. Roseanne has taught master's level courses in child protection and court procedures, and ethics classes to graduate students in the Masters in Social Work program at Northwest

Nazarene University. She worked as a licensed Social Worker from 1976 to 2004. Roseanne received her law degree from the University of Idaho in 1984. She has worked as an attorney in both private and public practice, including as a Deputy Attorney General with the Idaho Department of Health and Welfare. She has extensive experience in negotiation, facilitation, and mediation, as well as training of employees in technical and management processes. Roseanne also served as agency legislative liaison for six years, as well as drafting and presenting of legislation for various programs.

I. EMOTIONAL DISTURBANCE IN CONTEXT

Introduction

The complexity of Emotional Disturbance (ED)² as a disability makes it impossible to establish a one-size-fits-all checklist on how to identify students as ED. Decisions from hearing officers and court cases, however, call attention to persistent themes associated with identifying ED students.

1. Each student must be evaluated on a case-by-case basis to determine if the definition of ED has been met;
2. Even students who exhibit a range of mental health conditions do not automatically qualify as ED, nor does any such condition automatically disqualify a student from receiving special education and related services under the category of ED;
3. With the exception of students diagnosed with schizophrenia, all students must meet the five elements delineated in the federal regulation to qualify as ED;
4. In addition to determining whether the student's mental health condition is disabling under the IDEA, it must be

² Emotional Disturbance (ED) is the term utilized by the IDEA and regulations promulgated under IDEA, as well as a category of disability defined in the *Idaho Special Education Manual 2007* at p. xviii. Idaho Code § 33-2001(3) includes children with "serious emotional disturbance" as "children with disabilities." For purposes of this guide, "emotional disturbance" is the terminology that will be used. References to "serious emotional disturbance" in case law or decisions should be read to have the same meaning as "emotional disturbance," as no distinction is intended between the definition or meaning of the two terms for educational purposes.

determined whether the student requires special education and related services;

5. Students who do not qualify under the category of ED for special education and related services may qualify for such services under another disability category;
6. Students with mental health issues, who are not eligible under the IDEA as ED, may qualify for services under Section 504 of the Rehabilitation Act of 1973 (Section 504).

ED as a Disability

ED is one of 13 categories of disabilities under the IDEA.³ ED encompasses all mental health issues under an umbrella category including, but not limited to, mood disorders such as depression, bipolar disorder, thought disorders such as schizophrenia, and other disorders including, but not limited to, anxiety disorder, Obsessive-Compulsive Disorder, and Tourette syndrome. Note that Tourette syndrome is specifically listed as a chronic or acute health condition under "other health impairment."⁴ Specifically excluded as a disabling condition for the purposes of IDEA is "social maladjustment."⁵

Students qualifying for special education and related services under the IDEA are entitled

³ 34 C.F.R. § 300.8(a) (2006). The categories of disabilities are "mental retardation, a hearing impairment (including deafness), a speech language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as 'emotional disturbance'), an orthopedic impairment, autism, traumatic brain injury; an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities." Pursuant to IDAPA 08.02.03.109.01.g (April 5, 2000), Idaho has the additional category of speech-language pathology services.

⁴ 34 C.F.R. § 300.8(9) (2006).

⁵ 34 C.F.R. § 300.8(a)(4)(i) (2006).

to an education program that is tailored to meet his/her individual needs. Special education is defined as specially designed instruction at no cost to the parent that meets the unique needs of a student with disabilities.⁶ Related services include an array of items such as transportation, counseling services, parent counseling and training, psychological services, physical and occupational therapy, to name just a few.⁷ Special education services must be offered to students three years of age through the semester they turn 21 at the preschool, elementary, and secondary levels of education.⁸

Determining ED Criteria

The criteria for ED are set forth in the IDEA and its implementing regulations. Individual states have the authority to provide operational definitions and interpretations set forth in the federal ED regulations, but such interpretation must not conflict with the IDEA or federal regulations.⁹

The Idaho State Department of Education developed the *Idaho Special Education Manual 2007* as a guideline and regulatory document. The *Manual* includes, among other things, guidance on ED identification. School districts in Idaho are required either to adopt the *Manual* as policy or maintain a similar document approved by the Idaho State Department of Education.¹⁰

⁶ 34 C.F.R. § 300.39 (2006).

⁷ 34 C.F.R. § 300.34 (2006).

⁸ A school may be ordered to provide compensatory education to a student beyond the semester he/she turns 21 if the school has previously failed to provide a Free Appropriate Public Education to that student. *Johnson v. Bismarck Pub. Sch. Dist.*, 949 F.2d 1000 (8th Cir. 1991); *M.C. v. Central Regional Sch. Dist.*, 23 IDELR 1181 (3rd Cir. 1996).

⁹ 34 C.F.R. Part 300 (2006); *Schrag Letter*, EHLR 213:247 (OSEP 1989).

¹⁰ IDAPA 08.02.03.109.02.a or b (2000).

Individuals Involved in ED Identification

Referrals for ED identification may be initiated by the parent or school district personnel. The impetus for such referrals is frequently based either on a diagnosis that the student has received and/or behaviors exhibited by the student that are suspected of negatively impacting the student's educational performance.

Upon receiving the referral, an evaluation team must be formed. An evaluation team has the responsibility to make decisions regarding evaluation, assessment, and eligibility. The evaluation team must contain the same membership as an IEP team, although not necessarily the same individuals, as well as other qualified professionals as needed to ensure that appropriate and informed decisions are made.¹¹ The evaluation team may conduct its review without a meeting unless the parent requests that a meeting be held.¹² In dealing with students suspected of being ED, a school psychologist typically administers many of the evaluation procedures. A school psychologist and other school professionals are qualified for their positions if they are: 1) properly licensed or certified; and 2) have not had their certification or licensure requirements waived on an emergency, temporary, or provisional basis.¹³

The results of evaluations, assessments, observations, and tests, along with any existing evaluations that may be available, are considered by the evaluation team. The law does not grant one team member's opinion more weight than another's. Rather, the decision is a *team consensus* regarding the recommendation

¹¹ Idaho Dep't of Educ., *Idaho Special Education Manual 2007*, p. 20. The IEP team membership is set forth in 34 C.F.R. § 300.321.

¹² Idaho Dep't of Educ., *Idaho Special Education Manual 2007*, p. 30.

¹³ 34 C.F.R. § 300.156 (2006).

pertaining to special education eligibility.¹⁴ If the evaluation team determines that a student has a disability and *needs* special education, an Individualized Education Program (IEP) is developed for the student.¹⁵

Importance of Documentation

The more documentation a school has regarding the identification, evaluation, and provision of a Free Appropriate Public Education (FAPE) to disabled students, the better. Appropriate documentation may be needed at some time to convince a hearing officer or a court that a school's provision of FAPE was appropriate, or its refusal to provide special education and related services regarding a particular student was justified. The more detailed the documentation, the easier it will be for schools to defend their actions.

Precedence

Not all cases cited in this guide have precedence¹⁶ in Idaho. The three federal courts that have direct precedence in Idaho are the U.S. District Court in Idaho, the Ninth Circuit Court of Appeals, and the United States Supreme Court.¹⁷ Cases reported from other federal courts may be reviewed for guidance, but there is no obligation that their rulings be followed in Idaho.

¹⁴ Idaho Dep't of Educ., *Idaho Special Education Manual 2007*, p. 74. In the event there is a lack of consensus between the parent and school personnel, then school personnel on the IEP team seek consensus and make the decisions, subject to parental due process rights.

¹⁵ 34 C.F.R. § 300.306 (2006).

¹⁶ "Precedent" is defined as "[a] decided case that furnishes a basis for determining later cases involving similar facts or issues." BLACK'S LAW DICTIONARY 1195 (7th ed. 1999).

¹⁷ The U.S. Supreme Court uses certiorari to review most of the cases that it decides to hear. BLACK'S LAW DICTIONARY 220 (7th ed. 1999).

Administrative hearing officer decisions do not have precedence, but may be helpful in interpreting a particular situation.

U.S. Department of Education guidance letters from the Office of Special Education and Rehabilitative Services (OSERS) and the OSEP are interpretive rules.¹⁸ Failure to comply with guidance letters may result in potential financial sanctions on states and school districts.¹⁹

¹⁸ *Metropolitan Sch. Dist. v. Davila*, 969 F.2d 485, 490 (7th Cir. 1992) (An "interpretive rule" is exempt from the Administrative Procedures Act requirements of notice and comment procedures. It provides an interpretation as to what the administrative officer thinks the statute or rule means. "Interpretive rules," although they are entitled to deference, do not bind reviewing courts.).

¹⁹ *Virginia Dept. of Educ. v. Riley*, 23 F.3d 80 (4th Cir. 1994).

II. FEDERAL LAW REQUIREMENTS

Overview

It is important to recognize that the *clinical* definition of an emotional disturbance is different from the *special education* definition of ED. “Thus, a child may suffer from an emotional disturbance clinically, but not suffer from such educationally so as to be eligible for special education.”²⁰ The federal regulation does not state the difference between clinical emotional disturbance and that required for eligibility under the IDEA; consequently, the term “emotional disturbance” or “seriously emotionally disturbed” has invited considerable interpretation by hearing officers and courts.

Educators, hearing officers, and the courts rely heavily on the *DSM-IV-TR*²¹ when assessing information regarding a student’s eligibility for ED. With the exception of schizophrenia, there is no magic diagnosis that deems a student eligible for ED. Rather, regardless of the student’s diagnosis, the student will not be determined eligible unless the student meets the five characteristics of ED set forth in Section IV.

In 1985, a congressionally-mandated study investigated the possible impact of a change in the federal definition of ED. As a result of this study, OSEP determined that no changes should be made to the definition of ED.²² No change was made in the IDEA language during reauthorization in 2004 or in the resulting regulations.²³ There is no discussion of ED in the comments to the regulations, with the only change in the definition of “disability” being the

²⁰ *Fauquier County Pub. Sch.*, 20 IDELR 579, 583 (SEA Va. 1993).

²¹ Am. Psychiatric Ass’n, *DSM-IV-TR: Diagnostic and Statistical Manual of Mental Disorders* (4th ed. July 2000, text revision).

²² *Letter to Conway*, EHLR 213:153 (OSEP 1988).

²³ 34 C.F.R. Part 300.

specific inclusion of Tourette syndrome²⁴ as an Other Health Impairment (OHI). As the terminology in the federal regulation has not been further defined by OSEP, it is helpful to consider court decisions and hearing officer decisions for guidance.

Definition of “Emotional Disturbance”

The IDEA defines the term “children with disabilities” as children with “serious emotional disturbance . . . who, by reason thereof, need special education and related services.”²⁵ Under the IDEA, if a student does not need special education, then the student is not entitled to related services.²⁶ Broader in scope than the IDEA, Section 504²⁷ defines appropriate education as consisting of special or regular education and related services.²⁸ Students identified as ED who do not qualify for special education under the IDEA may qualify for special or regular education and related services under Section 504. It is important to recognize that Section 504 is a separate statutory scheme with different qualifying criteria than the IDEA. Thus, if a student meets the criteria for Section 504 that does not automatically make the student eligible under the IDEA.²⁹

The federal IDEA regulations provide that “the term ‘child with a disability’ means a child who has been evaluated and determined to have . . . a ‘serious emotional disturbance’ . . . and

²⁴ 34 C.F.R. § 300.8(a)(9). “Tourette syndrome” is defined as a disorder characterized by multiple motor tics and one or more vocal tics recurrent over at least a 12-month period. Am. Psychiatric Ass’n, *DSM-IV-TR: Diagnostic and Statistical Manual of Mental Disorders* (4th ed. July 2000, text revision), pp. 111-14.

²⁵ 20 U.S.C. § 1401(3)(A).

²⁶ *West Chester Area Sch. Dist.*, 18 IDELR 802, 803-04 (SEA Pa. 1992).

²⁷ 20 U.S.C. § 1405 (1975); 29 U.S.C. § 794 (1994); 34 C.F.R. Part 104 (1995).

²⁸ 34 C.F.R. Part 104 (1995); *West Chester Area Sch. Dist.*, 18 IDELR 802 (SEA Pa. 1992).

²⁹ *R.B. v. Napa Valley Unified School District*, 496 F.3d 932, 48 IDELR 60 (9th Cir. 2007).

who, by reason thereof, needs special education and related services.”³⁰ The requirements that a student 1) have a disability and 2) need special education in order to be eligible for special education services under the IDEA apply to all 13 disability categories—including the category of ED.³¹ This two-part test has been interpreted by one hearing officer as a legislative attempt to define the category of ED in less restrictive terms; the test precludes the idea that a student be in the “most serious states of emotional distress” before qualifying for services.³² Conversely, another hearing officer held that ED “requires a finding of an absolute inability” to learn on behalf of a student.³³

³⁰ 34 C.F.R. § 300.8(a)(1) (2006).

³¹ *Id.*

³² *Edward A.F. v. Clint Independent Sch. Dist.*, 1986-87 EHLR DEC. 508:204, 210-11 (SEA Tex. 1986):

[The school district] overly emphasized the fact that the federal criteria prefaced the phrase “emotionally disturbed” with the word “seriously.”

....

... in order for Edward [the student] to qualify for coding as emotionally disturbed, he must exhibit bizarre and dangerous behavior, be detached from reality, and not be able to control his conduct or behavior. ... it is ludicrous to proffer that the authors of the federal or state criteria intended such a restrictive eligibility threshold.

... The common criteria is simply that the condition, once established, be such that it “adversely affects educational performance.”

... [T]he same two-part test for eligibility is carried throughout the federal criteria in reference to all other listed handicapping conditions. First, the handicapping condition is generally defined or described. Second, eligibility is conditioned on a showing that the condition “adversely affects educational performance.” It would make no sense whatsoever to assume that the legislators intended to qualify all other handicapping conditions on a standard of adverse effect on educational performance while restricting admission as emotional disturbed to only those in the most serious states of emotional distress.

³³ *Henry County Bd. of Educ.*, 22 IDELR 761, 763 (SEA Ala. 1995).

Federal Regulation for ED

The 2006 implementing federal regulations provide the key terms for defining severe emotional disturbance, as follows:

(i) *Emotional disturbance* means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.³⁴

³⁴ 34 C.F.R. § 300.8(c)(4) (2006).

Although special education encompasses more than academic performance, federal law does not require a school district to treat a student's emotional disturbance, nor does it require a particular approach in providing educational services.³⁵ However, under related services, the school district may need to provide counseling "with parents and others on those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school."³⁶

Section 504

Students who have been diagnosed with a mental health condition, but are determined to not meet the IDEA eligibility criteria for ED, may be entitled to the protections of Section 504.³⁷ Under Section 504, no qualified individual with a disability shall, on the basis of the disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives benefits from federal financial assistance.³⁸ While the IDEA deals only with students with disabilities, Section 504 is far broader and covers *all* individuals dealing with public schools, including students, employees, parents, and patrons. However, regarding the discussion of ED, only students are at issue.

A student is entitled to the protections of Section 504 if the student has a physical or mental impairment that substantially limits one or more major life activities. A major life activity includes, but is not limited to, the

³⁵ *Fauquier County Pub. Sch.*, 20 IDELR 579 (SEA Va. 1993).

³⁶ 34 C.F.R. § 300.34(b)(14)(iii) (2006).

³⁷ *West Chester Area Sch. Dist.*, 18 IDELR 802 (SEA Pa. 1992) (A student who needed only related services was found not to be eligible under IDEA; however, under Section 504, the student was eligible for the related services that she needed to benefit from her regular education.).

³⁸ 34 C.F.R. § 104.4(a) (1995).

following: caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, *learning*, and working.³⁹ Because Section 504 uses a broad definition of the term "disability," a student need not be disabled in the area of learning to be considered disabled under Section 504.

If a student qualifies as disabled under Section 504, the school district must provide the student with FAPE. *Section 504's definition of FAPE is different from the IDEA's definition of FAPE.* Under Section 504, FAPE is defined as the provision of regular or special education and related aids and services that are designed to meet the individual education needs of students with disabilities as adequately as the needs of nondisabled students.⁴⁰

FAPE, under Section 504, includes residential placement for a student if placement in a public or private residential program is necessary because of the student's disability.⁴¹ Residential placement includes room and board plus non-medical care, and must be provided at no cost to the student or the student's parents or guardian.⁴²

Case Studies

In stating a claim for lack of provision of FAPE under Section 504, the courts in *Mark H. v. Lemahieu*⁴³ and *J.W. by and through J.E.W. and J.A.W. v. Fresno Unified School District*⁴⁴ held that the plaintiffs were not required to plead intentional discrimination or deliberate indifference with specificity. Rather, the plaintiffs will need to demonstrate that the school district was deliberately indifferent to the violation of specific requirements. Thus, FAPE claims under Section 504 must directly relate to discrimination resulting in the educational

³⁹ 34 C.F.R. § 104.3 (1995).

⁴⁰ 34 C.F.R. § 104.33 (1995).

⁴¹ 34 C.F.R. § 104.33(c)(3) (1995).

⁴² *Id.*

⁴³ 513 F.3d 922 (9th Cir. 2008).

⁴⁴ 108 LRP 22325 (D.C.E.D. Cal., Mar. 28, 2008).

programming for the disabled student not adequately meeting the student's educational needs.

III. STATE LAW REQUIREMENTS

Idaho law states that “[c]hildren with disabilities” include “children with . . . serious emotional disturbance.”⁴⁵ The 115 school districts and the 30 public charter schools in Idaho are responsible for providing special education and related services to children with disabilities beginning at age three and continuing through the semester of school in which the student turns 21.⁴⁶

The *Idaho Special Education Manual 2007* defines ED, essentially mirroring the language in 34 C.F.R. § 300.8(c)(4):

F. Emotional Disturbance

Definition: A student with emotional disturbance has a condition exhibiting one or more of the following characteristics over a long period of time, and to a marked degree, that adversely affects his or her educational performance:

1. an inability to learn that cannot be explained by intellectual, sensory, or health factors;
2. an inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
3. inappropriate types of behavior or feelings under normal circumstances;
4. a general pervasive mood of unhappiness or depression; or
5. a tendency to develop physical symptoms or fears associated with personal or school problems.

⁴⁵ IDAHO CODE § 33-2001 (1991).

⁴⁶ IDAHO CODE §§ 33-201 (1998) and 33-2002 (1998).

The term *does not* include students who are socially maladjusted unless it is determined they have an emotional disturbance. The term emotional disturbance *does* include students who are diagnosed with schizophrenia.⁴⁷

Further, the *Manual* sets forth the State’s criteria for determining whether a student is ED, as follows:

State Eligibility Criteria for Emotional Disturbance: An evaluation team will determine that a student is eligible for special education services as a student with emotional disturbance when all of the following criteria are met:

1. An evaluation that meets the procedures outlined in Section 5 of this chapter has been conducted.
2. The student has been documented as having an emotional condition consistent with the criteria in this chapter by one or more of the following: school psychologist, licensed psychologist, psychiatrist, physician, or certified social worker.
3. The student has been observed exhibiting one or more of the five behavioral or emotional characteristics listed in the definition of emotional disturbance.
4. The characteristic(s) has been observed:
 - a. for a long period of time (at least 6 months); and
 - b. by more than one knowledgeable observer; and
 - c. in more than one setting; and

⁴⁷ Idaho Dep’t of Educ., *Idaho Special Education Manual 2007*, p. 49 (emphasis original).

- d. at a level of frequency, duration, and/or intensity that is significantly different from other students' behavior in the same or similar circumstances.
5. The student's condition adversely affects educational performance in the area of academics, peer and teacher interaction, participation in class activities, and/or classroom conduct.
6. The student needs special education.⁴⁸

ED is defined, in part, as: "A condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance."

--Federal Regulations
34 C.F.R. § 300.8(b)(4)(i) (2006)

⁴⁸ Idaho Dep't of Educ., *Idaho Special Education Manual 2007*, p. 50, referencing Section 5 at pp. 37-41.

IV. THE FIVE ESSENTIAL ELEMENTS OF EMOTIONAL DISTURBANCE

Emotional disturbance is defined, in part, as: “[1] A condition [2] exhibiting one or more of the following characteristics [3] over a long period of time [4] and to a marked degree [5] that adversely affects a child’s educational performance.”⁴⁹

This definition contains five key elements that comprise the *sine qua non*⁵⁰ for ED classification. In order for a student to qualify for special education and related services under the category of ED, the student must meet all five of the following elements:

1. The student must have a condition;
2. The student must have one or more of the five ED characteristics;
3. The ED characteristics must have been present over a long period of time;
4. The ED characteristics must be to a marked degree; and
5. The student’s education performance must be adversely affected.

NOTE: Students diagnosed with schizophrenia are not required to additionally meet the five elements to be determined eligible under ED (see Section V).

1. What is “a condition”?

The word “condition” is not defined in the federal regulation. A dictionary definition of a condition is “something essential to the

⁴⁹ 34 C.F.R. § 300.8(b)(4)(i) (2006).

⁵⁰ *Sine qua non* is defined as “An indispensable condition or thing; something on which something else necessarily depends.” BLACK’S LAW DICTIONARY 1390 (7th ed. 1999).

appearance or occurrence of something else . . . a restricting or modifying factor.”⁵¹ Since “condition” is not defined in the federal regulation, one can assume that Congress intended that the usual and customary definition and interpretation be used.

Frequently, the term “condition” refers to various behaviors exhibited by a single student. A sampling of conditions that were found to be ED include: a student with oppositional disorder, hostile, aggressive, and withdrawn in relationships;⁵² a student with severe diabetes, seizure disorder, and classic narcissistic personality;⁵³ a student with conduct disorder, socialized, nonaggressive, and developmental arithmetic disorder.⁵⁴

2. What constitutes “one or more of the following characteristics”?

To qualify as ED, a student must have *one or more* of the five characteristics set forth in the federal regulation. The five characteristics are:

1. An inability to learn that cannot be explained by intellectual, sensory, or health factors;
2. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
3. Inappropriate types of behavior or feelings under normal circumstances;
4. A general pervasive mood of unhappiness or depression; or

⁵¹ MIRIAM WEBSTER’S COLLEGIATE DICTIONARY 240 (10th ed. 1997).

⁵² *In re Kristopher H.*, 1985-86 EHLR DEC. 507-183 (SEA Wash. 1985).

⁵³ *In re Jeffrey G.*, 1985-86 EHLR DEC. 507-438 (1986).

⁵⁴ *Edward A.F. v. Clint Independent Sch. Dist.*, 1986-87 EHLR DEC. 508:204 (SEA Tex. 1986).

5. A tendency to develop physical symptoms or fears associated with personal or school problems.⁵⁵

3. What does it mean for a student to have “an inability to learn that cannot be explained by intellectual, sensory, or health factors”?

To meet this characteristic, a student need not be totally incapable of learning but, rather, the student’s emotional condition must significantly interfere with his/her ability to benefit from instruction.⁵⁶ An “*unwillingness*” to learn should be distinguished from a “*inability*” to learn.⁵⁷

The *Idaho Special Education Manual 2007* defines the inability to learn as follows:

Inability to learn means that the condition must significantly interfere with the ability to benefit from instruction. It does not necessarily mean a total inability to learn. Reduced intellect or health impairment cannot be the primary cause of the behavioral/emotional problem. It must be established that there is an inability

to learn rather than an unwillingness to learn.⁵⁸

The data that should be collected to determine whether an inability to learn exists includes, but is not limited to, the following:

- # IQ testing or clear evidence of at least average cognitive ability
- # Vision and hearing screening
- # Medical history
- # Academic performance history and data on current academic assessment⁵⁹

4. What does it mean for a student to have “an inability to build or maintain satisfactory interpersonal relationships with peers and teachers”?

ED students have met this characteristic in a variety of ways. Examples include: a student whose only interaction with peers and teachers was aggressive or violent;⁶⁰ a student who had difficulty making and maintaining friendships;⁶¹

⁵⁸ Idaho Dep’t of Educ., *Idaho Special Education Manual 2007*, Appendix 4A, p. A4-3.

⁵⁹ *Id.* at p. A4-4.

⁶⁰ *Emery Unified Sch. Dist.*, 22 IDELR 1071, 1072 (SEA Cal. 1995); *see also Dallas Sch. Dist. v. Richard C.*, 24 IDELR 241, 244-45 (Pa. Commw. Ct. 1996) (A student was found to be unable to build or maintain satisfactory interpersonal relationships with peers and teachers, and also exhibited inappropriate behavior at school under normal circumstances. Some of the student’s behavior included:

standing in the corner of the room and pretending to urinate using sound effects and gestures or telling people to step over the puddle on the floor because he just wet his pants. . . . [s]pitting in students’ faces or on the floor . . . asking to use the phone to talk to his dead grandmother who is very sick. . . . [s]aying, “I can’t wait to become a skin head so I can kill people”

⁶¹ *Babb v. Knox County School System*, 965 F.2d 104, 107 (6th Cir. 1992) (“This inability to create normal

⁵⁵ 34 C.F.R. § 300.8(b)(4)(i) (2006).

⁵⁶ *E.g.*, *New York City Sch. Dist. Bd. of Educ.*, 18 IDELR 1326, 1328 (SEA N.Y. 1992) (A hearing officer held that an inability to learn “does not require that the child be totally incapable of learning,” but, rather, that “a child’s emotional condition has a significant effect upon the child’s educational performance.” The hearing officer held that a child was properly classified as emotionally disturbed “because of the child’s inability to remain on task and impulsive problem solving style, which inhibit his ability to learn, and his inability to build and maintain satisfactory interpersonal relationships with peers and teachers.”).

⁵⁷ *Mobile County Bd. of Educ.*, 23 IDELR 594, 599 (SEA Ala. 1995) (A student’s poor grades did not demonstrate an “inability to learn” but, rather, an unwillingness to do the work.).

a student who maintained only one-sided, abusive, and unhealthy relationships;⁶² a student who was withdrawn and unable to build or maintain satisfactory interpersonal relationships with peers and teachers.⁶³ On the other hand, a student's behavior that was documented to be "recklessly, knowingly or intentionally engage(ing) in fighting or tumultuous conduct, that is: loud, cursing and defiant" was found not to meet the ED criteria.⁶⁴

The *Idaho Special Education Manual 2007* defines an inability to build or maintain satisfactory interpersonal relationships as follows:

Patterns and problems of interpersonal relationships that result in the "inability to build or maintain" satisfactory relationships with peers, teachers, and others are pervasive and are characterized by conflict and chaos which create an inability to establish and maintain group membership. This also includes individuals who are profoundly withdrawn, have poor reality contact, or lack social skills but have the ability to learn them. This inability does not refer to students who have problems with a particular teacher

social bonds no doubt stems, in part, from tendencies that have resulted in physical abuse of siblings and classmates, torture of animals, and property theft and destruction." The student, at age four, was expelled from preschool for breaking a gerbil's leg and urinating on other children. He had also broken his stepbrother's arm at least once.).

⁶² *Lapides v. Coto*, 1987-88 EHLR DEC. 559:387, 390 (N.D. Cal. 1988).

⁶³ *Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105, 48 IDELR 1 (2nd Cir. 2007) (A student was eligible for special education due to depression and social anxiety meeting the elements of ED).

⁶⁴ *Merrillville Community Schools, Northwest Indiana Special Education Cooperative*, 37 IDELR 108 (SEA Ind. 2002) (Based upon the conflicting testimony of the evaluators, the hearing officer determined that a student did not meet the criteria for ED and, further, that there was "no evidence of probative value that the student has an absolute inability to control his disruptive behavior.").

or with one or more peers, nor does it include students who have appropriate, satisfactory relationships with peers in their subculture, yet violate community norms.⁶⁵

The data that should be collected to determine whether an inability to build or maintain satisfactory interpersonal relationships includes, but is not limited to, the following:

- # Observations, behavior scales
- # Personality Inventories
- # Teacher and parent reports⁶⁶

Case Studies

In *R.B. ex rel. F.B. v. Napa Valley Unified School District*,⁶⁷ the Ninth Circuit Court of Appeals reviewed the parents' allegations that "overwhelming" evidence had been presented at the administrative hearing that the student, R.B., had an inability to build or maintain relationships. The court reviewed the language with regard to this eligibility criteria and noted that relationships "with peers and teachers" must be reviewed—not simply relationships with peers. The evidence presented at the administrative hearing was that the student had such a good relationship with her third grade teacher that, when she was in the fifth grade, she occasionally visited the third grade classroom to tutor students in reading. Although the parents' expert opined that R.B. was unable to form satisfactory relationships with teachers, the hearing officer properly discounted the testimony because the expert had not observed R.B. in the school setting, nor had the expert spoken with school personnel. R.B. was not found eligible for IDEA educational services under this provision of the ED criteria.

In *Dallas Sch. Dist. v. Richard C.*,⁶⁸ the parents of a 15-year-old learning disabled

⁶⁵ Idaho Dep't of Educ., *Idaho Special Education Manual 2007*, Appendix 4A, p. A4-4.

⁶⁶ *Id.*

⁶⁷ 496 F.3d 932, 48 IDELR 60 (9th Cir. 2007).

⁶⁸ 24 IDELR 241 (Pa. Commw. Ct. 1996).

student objected to the school district's reclassification of their son as ED. A Comprehensive Evaluation Report conducted by the school district described the student's conduct as follows:

1. Leaving the school building when he is asked to change his seat;
2. Standing in the corner of the room and pretending to urinate using sound effects and gestures or telling people to step over the puddle on the floor because he just wet his pants;
3. Spitting in students' faces or on the floor;
4. Asking to use the phone to talk to his dead grandmother who is very sick;
5. Standing up and yelling cheers to the class complete with hand motions "you say pencil, I say paper, etc. . . .";
6. Putting a curse on a student by standing over her with his hands extended over her head calling Satan to curse her;
7. Continually singing out in class, Twinkle Little Star, Killing in the name of, I believe in reincarnation and I am coming back as a lion to eat you, rap singing;
8. Saying, "I can't wait to become a skin head so I can kill people";
9. Pretending to skateboard and do Kung-Fu fighting during class complete with sound effects;
10. Talking and cursing at his shirt.⁶⁹

⁶⁹ *Id.* at 244-45, n. 4.

Hearing Officer Decision

The hearing officer found that the student engaged in serious maladaptive behavior and that he satisfied the statutory criteria for ED. The hearing officer ordered certain changes to the student's IEP so that the IEP would allow the student to obtain meaningful educational benefits. The changes made provisions for such things as therapy by a psychologist, one-on-one instruction, small staff-to-pupil ratio, a behavioral modification plan, family counseling, and reevaluation.

Hearing Panel Decision

The student's parents filed exceptions with a hearing panel regarding the hearing officer's findings. The hearing panel agreed with the student's parents that he had been improperly classified as ED and found that the student did not meet the regulatory definition of ED. The hearing panel determined the student's disciplinary problems at school were evidence of "maladaptive behavior"⁷⁰ that did not warrant ED classification.

Court Decision

The school district appealed the hearing panel's findings to a Pennsylvania Commonwealth Court. The court held that the hearing panel had concluded that the student did not meet the first regulatory characteristic—an inability to learn that cannot be explained by intellectual, sensory, or health factors; however, the court also found that the hearing panel failed to consider the remaining four characteristics—any one of which could place a student within the ED classification. The court found that the evidence indicated disciplinary problems, but also indicated that the student was "unable to build or maintain satisfactory interpersonal relationships with peers and teachers, and that the student exhibit[ed] inappropriate behavior

⁷⁰ *Id.* at 244.

under normal circumstances in school.”⁷¹ The hearing officer’s decision was reinstated since it was determined that the school district had properly classified the student and had offered an appropriate program.

5. What does it mean for a student to have “inappropriate types of behavior or feelings under normal circumstances”?

Inappropriate types of feelings include “negative self statements as well as feelings which are reflected in and inferred from observable behavior,”⁷² including behavior stemming from a fantasy life in which the student “gets revenge” and that results in “the potential for aggressive acting out.”⁷³ School officials should document each instance when persistent and significantly inappropriate feelings exist—typically, feelings not justified by circumstances.

Although a student may exhibit inappropriate behavior, he/she may not qualify for services under this section if the student is able to conform his/her behavior when the desire to do so is adequate.⁷⁴

The *Idaho Special Education Manual 2007* defines “inappropriate types of behavior or feelings under normal circumstances” as follows:

Students exhibit behavior that is incongruent to the situation or is highly changeable. Behavior would include bizarre verbalization, overreaction, repeated recitation of words, fetishes, and obsessive and compulsive

behaviors. Other actions may include inappropriate sexual behaviors such as inappropriate touching of others, public masturbation, or unusual or provocative sexual verbalization. Inappropriate feelings include negative self-statements as well as feelings that are reflected in and inferred from observable behavior. Documentation must be obtained that persistent and significantly inappropriate feelings exist which are not justified by circumstances.⁷⁵

The data that should be collected to determine whether “inappropriate types of behavior or feelings under normal circumstances” exist, includes, but is not limited to:

- # Observations, behavior rating scales
- # Personality inventories
- # Parent and teacher reports⁷⁶

Case Studies

In *Lincoln County School District v. A.A.*,⁷⁷ the U.S. District Court for Oregon reviewed a case involving A.A., a 16-year-old, who had a history of anorexia nervosa, requiring hospitalization, of which the school district was aware. The student had been hospitalized for 31 days for emaciation that had compromised his cardiovascular system. Following inquiry by A.A.’s mother, the school district provided Section 504 services but did not evaluate the student or inform the parents of the IDEA provisions. Subsequently, A.A.’s academic performance diminished from a GPA of 3.40 in the fall of seventh grade to a GPA of 1.43 in the fall of his tenth grade year. The student became withdrawn and had physical altercations with his parents. The student’s condition worsened and a counselor overheard him tell other

⁷¹ *Id.*

⁷² *Henry County Bd. of Educ.*, 22 IDELR 761, 763 (SEA Ala. 1995).

⁷³ *In the Matter of Long Beach Unified Sch. Dist.*, 1984-85 EHLR DEC. 506:274, 276 (SEA Cal. 1984).

⁷⁴ *Henry County Bd. of Educ.*, 22 IDELR 761, 763 (SEA Ala. 1995).

⁷⁵ Idaho Dep’t of Educ., *Idaho Special Education Manual 2007*, Appendix 4A, p. A4-4.

⁷⁶ *Id.* at p. A4-5.

⁷⁷ 39 IDELR 185 (D. Or. 2003).

students he “thought it would be more humane to kill his parents with a gun, rather than a machete.” Teachers were aware that he was using marijuana. Upon inquiry about alternative placements and services, the school district informed the parents that nothing was available at that time and school district staff did not evaluate the student. Eventually, the parents moved their son into a substance abuse program and then to a residential facility.

The hearing officer determined that the school district failed in its duty to conduct an IDEA evaluation of A.A. Further, the hearing officer held that A.A. was eligible as ED, noting:

His uniquely exaggerated need to be in control, his resulting failure to do work he did not control, his rigid thinking, his extreme feelings about the school system, as well as his written and oral expression to his teachers and parents were all inappropriate types of behavior and feelings in normal circumstances.⁷⁸

The hearing officer also awarded tuition reimbursement to the parents for the unilateral placement of A.A. in a substance abuse program and residential facility.

The school district sought reversal of the administrative decision. The court rejected most of the school district’s arguments, and upheld a majority of the hearing officer’s findings and conclusions. The court noted, “had the district conducted an evaluation . . . , ‘it would more likely than not have ascertained A.A.’s status as a child with [an IDEA qualifying] disability.’”⁷⁹ Also, the court concluded the school district’s argument that the parents failed to provide it with information suggesting a disability was without merit, since the school district “failed to adopt and follow child find and evaluation procedures by which

the district would have obtained such information.”⁸⁰

In *R.B. ex rel. F.B. v. Napa Valley Unified School District*,⁸¹ the Ninth Circuit Court of Appeals also reviewed whether R.B. was ED under the prong relating to inappropriate behavior. R.B.’s behavior included the following:

As a fifth grader, R.B. was sent to the principal’s office for, *e.g.*, pinching and twisting classmates’ arms on the playground on multiple occasions, tearing up classroom materials, verbalizing her hope that her music teacher would die, poking a classmate with a pencil because he would not help her cheat, and using the f-word. Morrison testified that R.B. physically attacked counselors at Intermountain and damaged property at least daily. R.B. would also attack younger children and throw food. R.B. admitted that she deliberately included grammatical errors in her written work because she enjoyed making life difficult for Brandt. When R.B. became a danger to herself or to others, Brandt would send R.B. to “day coverage”: this happened weekly during R.B.’s first four months in the classroom.⁸²

Although R.B.’s behavior was inappropriate, the court reviewed whether the inappropriate behavior took place under “normal circumstances.” The evidence revealed that R.B. was not regularly taking her ADHD medication for most of the fifth grade. Additionally, R.B.’s first months at Intermountain, a residential facility, were not under “normal circumstances” because she was adapting to life at a new school away from her family. The court further found that, even if the

⁷⁸ *Id.* at p. 1965.

⁷⁹ *Id.*

⁸⁰ *Id.* at p. 1966.

⁸¹ 496 F.3d 932, 48 IDELR 60 (9th Cir. 2007).

⁸² *Id.*, 496 F.3d at 945.

circumstances were “normal,” the evidence established to a preponderance that R.B.’s inappropriate behaviors were not to a “marked degree,” nor were they over a long period of time. The evidence established that, while R.B. engaged in inappropriate behavior over several school years, the behavior was “to a marked degree” only during one trimester of one grade. Additionally, R.B.’s inappropriate behavior did not adversely affect her educational performance.

In *M.R. by R.R. v. Lincolnwood Bd. of Educ.*,⁸³ a student was diagnosed as having an emotional disorder. A due process hearing was held concerning a placement issue for the eighth grade student who:

[E]xhibits bizarre conduct such as barking and acting like a dog including licking his hands like paws; getting up and moving about the classroom at inappropriate times; biting his thumbs and pulling his hair; physically threatening conduct, acting argumentative and being unwilling to follow verbal instructions from teachers; accusing other children of hitting him and trying to hurt him when a student brushed against him in the hallway; laying on the floor in the hall on his side and going around in circles kicking at all of the students that are in the immediate area and then remaining still and unresponsive; deliberately falling on the floor; getting in fights with other students at recess and interrupting other students’ recess activities; refusing to use the bathroom for long periods of time and then only unless the bathroom was empty and watched from the outside by staff; being disruptive in an assembly to the extent of having to be removed and then telling his teacher that he was

⁸³ 843 F. Supp. 1236, 20 IDELR 1323 (N.D. Ill. 1994).

going to kill her; free association; walking around the room imitating a computer; making fun of other students’ names; excessive crying; increasing use of verbal threats against teachers and students coupled with getting close to others and raising his fist; tantrums; hitting a teacher and an aide; screaming and swearing over the office intercom system stating that “I’m going to kill all you [obscenity] . . .” making faces at other students; leaving his desk and flicking the lights on and off. . . .⁸⁴

The court upheld the school district’s recommended placement for the student at a therapeutic day school because of the student’s deteriorating and disruptive behavior.

In *Lapides v. Coto*,⁸⁵ a student displayed grossly inappropriate behavior and feelings under normal circumstances. The actions of the student convinced the court that the student was ED:

Chad had undeniably had more than his share of tragedy and pain, beginning at a very early age. However, this does not make hanging out of a third story window by a bedsheet, or cutting off the tip of his finger with a hatchet upon hearing of the death of a former friend’s father, normal responses under the circumstances. Chad has had a long history of bizarre, often life-endangering behavior. . . . This behavior has adversely affected Chad’s educational performance. Thus, plaintiffs have met the requirements for being seriously emotionally disturbed by qualifying under at least one of the five categories found in 34 C.F.R.

⁸⁴ *Id.* at 1238 (quoting from a Level II hearing officer’s decision).

⁸⁵ 1987-88 EHLR DEC. 559:387 (N.D. Cal. 1988).

300.5(b)(8)(i)A-E [the federal regulation on SED].⁸⁶

The court ordered the school district to reimburse the parents for their unilateral placement of their son in a residential facility.

6. What does it mean for a student to have “a general pervasive mood of unhappiness or depression”?

“Pervasive” is defined as something that has “become diffused through every part of.”⁸⁷ In a case where a student exhibited a mood of unhappiness or depression at home, but not at school, it was held not to be pervasive.⁸⁸

The *Idaho Special Education Manual 2007* defines “a general pervasive mood of unhappiness or depression” as follows:

Pervasive moods of unhappiness or depression may be manifested in different ways in different students and may include constant crying, withdrawal, boredom, and depression, as well as angry, aggressive, or agitated behavior. Also included are eating and sleeping problems, loss of interest in usual activities, as well as feelings of hopelessness. A desire to die or an intent to commit suicide signifies extremely troubled students. Feeling depressed about a death in the family or the divorce of parents is situation specific and, for the most part, a normal feeling that tends to be “resolvable” and not pervasive.⁸⁹

The data that should be collected to determine whether “a general pervasive mood of

unhappiness or depression” exists includes, but is not limited to:

- # Observations, behavior rating scales
- # Personality inventories
- # Parent and teacher reports⁹⁰

In children and adolescents, the mood may be irritable rather than sad. Symptoms may last for most of the day, nearly every day, for at least two consecutive weeks.⁹¹

Case Study

In *Los Gatos-Saratoga Joint Union School District*,⁹² it was determined that a 17-year-old student had some “issues” with clothing style, difficulty sleeping, and was affected by migraines. She exhibited a general pervasive mood of unhappiness or depression for a two-month period. Subsequently, the student developed physical illness including nausea, severe headaches, body aches, light sensitivity, and other vision problems, as well as self-injurious behavior including self-mutilation. The hearing officer determined that the student met the criteria for ED.

Although a student may exhibit depression or unhappiness to a marked degree and for a long period of time, the depression or unhappiness must also adversely affect the student’s educational performance. The hearing officer determined that the student’s performance was adversely impacted by the ED, including the lack of motivation, inability to concentrate, distraction, and difficulty in getting to school.

⁸⁶ *Id.* at 390.

⁸⁷ MIRIAM WEBSTER’S COLLEGIATE DICTIONARY 868 (10th ed. 1997).

⁸⁸ *Berkeley Unified Sch. Dist.*, 1985-86 EHLR DEC. 507:435 (SEA Cal. 1986).

⁸⁹ Idaho Dep’t of Educ., *Idaho Special Education Manual 2007*, Appendix 4A, p. A4-5.

⁹⁰ *Id.*

⁹¹ For a major depressive episode “[t]he symptoms must persist for most of the day, nearly every day, for at least 2 consecutive weeks.” Am. Psychiatric Ass’n, *DSM-IV-TR: Diagnostic and Statistical Manual of Mental Disorders* (4th ed. July 2000, text revision), p. 349.

⁹² 41 IDELR 227 (SEA Cal. 2004).

7. What does it mean for a student to have “a tendency to develop physical symptoms or fears associated with personal or school problems”?

Physical symptoms have included headaches, nausea, asthma, ulcers, and colitis,⁹³ tiredness and stomachaches;⁹⁴ as well as nausea, severe headaches, body aches, light sensitivity, and other vision problems.⁹⁵

In one case, a student’s emotional difficulties were found by a hearing officer to have resulted in stress-induced headaches and stomachaches at school. The student was found to be ED since his emotional difficulties significantly impacted his educational performance over a sustained period of time, even though he had not failed a significant number of academic courses. The student was also found to be unable to maintain interpersonal relationships with peers and teachers.⁹⁶

The *Idaho Special Education Manual 2007* defines “a tendency to develop physical symptoms or fears associated with personal or school problems” as follows:

Persistent physical symptoms are chronic, as opposed to acute reactions to some situation at home or school and must have a negative impact on learning. They may include such reactions as headache, nausea, asthma, ulcers, and colitis. Data needs to be obtained across settings and over time, and medical evidence needs to be obtained to document that the problem does not have a physical origin.

⁹³ Idaho Dep’t of Educ., *Idaho Special Education Manual 2007*, Appendix 4A, p. A4-5.

⁹⁴ *Cornwall Cent. Sch. Dist. Bd. of Educ.*, 17 IDELR 1023 (SEA N.Y. 1991).

⁹⁵ *Los Gatos-Saratoga Joint Union School District*, 41 IDELR 227 (SEA Cal. 2004).

⁹⁶ *Cornwall Cent. Sch. Dist. Bd. of Educ.*, 17 IDELR 1023 (SEA N.Y. 1991).

Although school phobia or refusal meets criteria for eligibility and certification as having an emotional disturbance, placement would probably not be recommended. Other less restrictive treatment interventions such as systematic desensitization are likely to resolve the problem.⁹⁷

The data that should be collected to determine whether “a tendency to develop physical symptoms or fears associated with personal or school problems” exists includes, but is not limited to:

- # Observations, behavior rating scales
- # Personality inventory
- # Parent and teacher reports⁹⁸

8. What is “a long period of time”?

Professional criteria and standards may set forth a minimum length of time before a particular disorder is recognized to exist. An example of such professional criteria is in the definition of schizophrenia, wherein an individual must have exhibited the characteristic symptoms for at least six months before a proper diagnosis can be made.⁹⁹ Similarly, the diagnostic criteria for Attention-Deficit/Hyperactivity Disorder (ADHD) require particular symptoms of inattention to have persisted for at least six months.¹⁰⁰

As a result, temporary periods of instability caused by such problems as death in the family, separation or divorce, or a new school do not usually qualify as “a long period of time.”¹⁰¹

⁹⁷ Idaho Dep’t of Educ., *Idaho Special Education Manual 2007*, Appendix 4A, p. A4-5.

⁹⁸ *Id.* at pp. A4-5 and A4-6.

⁹⁹ Am. Psychiatric Ass’n, *DSM-IV-TR: Diagnostic and Statistical Manual of Mental Disorders* (4th ed. July 2000, text revision), p. 298.

¹⁰⁰ *Id.* at 85.

¹⁰¹ *Pflugerville Indep. Sch. Dist.*, 21 IDELR 309, 311 (SEA Tex. 1994) (“[I]t does not follow that children

In evaluating any student for disability, the student's disability must be reviewed on its unique facts and circumstances. This includes determining what, for each child, "a long period of time" should be defined as. While Idaho has established six months as the minimum period, in a particular situation it may be appropriate to determine that a longer period of time is necessary to establish eligibility for ED.¹⁰²

The *Idaho Special Education Manual 2007* defines "a long period of time" as at least six months. Further, the *Manual* states:

When determining whether a student exhibits behavioral or emotional problems over a long period of time, consider the following factors:

- (1) Transitory situational problems that may be understandable, given the nature of the circumstances. For example, a death in the family, divorce, moving to a new school, financial crisis, or physical illness or injury may produce transitory behavior changes. In general, this is a temporary period of instability, bounded by times of greater stability.
- (2) Nontransitory circumstances, where behavior changes do not

of separation and divorce are emotionally disturbed for the transitory period of adjustments.".)

¹⁰² *Letter to Woodson*, EHLR 213:225, 226 (OSEP 1989) [In determining whether a student's characteristics of his/her disability have persisted over a period of time and to a degree sufficient to have adversely affected educational performance, "these determinations are based largely on the unique facts and circumstances of a particular case. Thus, State and local educators must make the necessary determinations as to temporal threshold and degree on a case by case basis to ensure that children are not improperly classified as 'handicapped' for EHA-B [IDEA] purposes." (Citation omitted.)]; *Northside Indep. Sch. Dist.*, 1 ECLPR 370 (SEA Tex. 1993) (A five-year-old student was emotionally disturbed, as well as being classified as other health impaired and developmentally disabled, but he was not "so classified due to is young age and his evolving changes.").

return to the adaptive state that existed prior to a precipitating event. Evidence of a baseline of appropriate behavior prior to a significant (negative) change in behavior is needed. Historical information is important in order to do this.¹⁰³

The data that should be collected to determine whether "a long period of time" exists includes, but is not limited to the following:

- # Written school documentation
- # Historical information¹⁰⁴

9. What is "a marked degree"?

The term "a marked degree" does not have a legal definition. Idaho addresses this issue by specifying that the characteristic(s) at issue must not only be observed for at least six months, but such observation must be by more than one knowledgeable observer, in more than one setting, and at a level of frequency, duration, and/or intensity that is significantly different from other students' behavior in the same or similar circumstances.¹⁰⁵ In establishing such criteria, Idaho is requiring consideration of both the pervasiveness and intensity of the characteristic.

Similarly, some professionals in the special education field define "a marked degree" as having two separate components: pervasiveness and intensity. "Pervasiveness refers to the continuity of the negative behaviors; intensity refers to the demonstration of negative behaviors in an overt, acute and observable manner."¹⁰⁶ Other states interpreting the phrase

¹⁰³ Idaho Dep't of Educ., *Idaho Special Education Manual 2007*, Appendix 4A, p. A4-6.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at p. A4-7.

¹⁰⁶ *Conejo Valley Unified Sch. Dist.*, 1985-86 EHLR DEC. 507:213, 215 (SEA Cal. 1985).

“a marked degree” refer to the “frequency, duration and/or intensity of the behavior in comparison to the student’s peers and/or school and community norms. Terms such as acute, continuous, and/or pervasive are sometimes employed for clarification purposes.”¹⁰⁷

The *Idaho Special Education Manual 2007* defines “a marked degree” as follows:

A “marked degree” generally is concerned with pervasiveness and intensity of the characteristics. Data regarding duration, frequency, and intensity must be included in the observation reports. Results from standardized and/or norm-referenced personality inventories and other instruments are used to substantiate “to a marked degree,” but are not the sole source of information.¹⁰⁸

The data collected to determine whether “a marked degree” exists must be taken by more than one knowledgeable observer in more than one setting. The following questions must be answered:

- (1) Is the behavior in question considered a significant problem by more than one observer and in more than one setting?
- (2) What is the frequency, intensity, and duration of the behavior? Is the frequency, intensity, and duration significantly different from that of a similar student in the same or similar circumstances?
- (3) In what setting does the behavior occur?
- (4) Are there noticeable or predictable patterns to the behavior?

¹⁰⁷ Schrag Letter, EHLR 213:247, 249 (OSEP 1989).

¹⁰⁸ Idaho Dep’t of Educ., *Idaho Special Education Manual 2007*, Appendix 4A, p. A4-7.

- (5) How does the behavior affect others?
- (6) Is the behavior identified as a concern by norm-referenced behavior measures?¹⁰⁹

Given Idaho’s criteria that “more than one knowledgeable observer; in more than one setting” observe the characteristics, it is important that the observations not be biased. To avoid bias, the observers should not have direct involvement with the student. The observers should be concerned with 1) watching the behavior of a particular student and assessing whether a problem exists; and 2) determining if the frequency, intensity and/or duration of the student’s behavior is significantly different from other students’ behavior in the same or similar circumstances.

10. How is “adversely affects a child’s educational performance” defined?

In order to establish eligibility as ED, an adverse affect on educational performance must be shown, even though a student may have exhibited ED characteristics for “a long period of time” and to “a marked degree.”

The *Idaho Special Education Manual 2007* defines “adversely affects a child’s educational performance” as follows:

There must be evidence of a demonstrable relationship between the student’s behavior and decreased educational performance. Keep in mind that educational performance is not limited to academic performance, but may also include interactions with peers or teachers, participation in class activities, and classroom conduct.¹¹⁰

¹⁰⁹ *Id.*

¹¹⁰ *Id.* .

In determining whether a student's "educational performance" is being "adversely affected," there should be evidence that the student's behavior and decreased educational performance are related.¹¹¹ The following questions should be applied to each student being evaluated for the disability of ED and documentation should occur of observations, class work, and testing results:

- (1) Is educational performance substantially within the range expected of a student based on his or her chronological age?
- (2) If the student is performing below academic expectations, is the probable cause emotional problems?
- (3) Are the emotional problems affecting educational performance of the student to a greater degree than similar problems affect the performance of peers?
- (4) Does the student achieve passing grades?
- (5) Does the student maintain regular academic growth?
- (6) Does the student demonstrate severe deficiencies in social skills

¹¹¹ *Berkeley Unified Sch. Dist.*, 1985-86 EHLR DEC. 507:435 (SEA Cal. 1986) (A student was found not to be ED since, despite poor academic performance, she was able to learn.); *contra, In re Kristopher H.*, 1985-86 EHLR DEC. 507:183, 187 (SEA Wash. 1985) (Even though a student was performing at or near grade level, a hearing officer noted: "[A] child who is hostile, aggressive, withdrawn in personal relationships with both teacher and peers, is isolated in the classroom and whom a psychiatrist has diagnosed as being close to being institutionalized, that child is certainly not being educated."); *Seattle School Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) (A student was "unable to derive any meaningful educational benefit from her past education," although she was exceptionally bright and tested appropriately on standardized tests. The student's educational progress was deteriorating, and she was unable to make productive use of what she learned.).

or social competencies that obstruct learning?

- (7) Is the student frequently absent? If so, how have grades been affected?¹¹²

The answers to these questions should be reviewed by the evaluation team to determine whether a student's "educational performance" is "adversely affected" by the student's emotional problems, which may be manifested through the student's behavior. As is the case for any student with a disability, the determination of whether a student's emotional problems "adversely affects educational performance" is "based largely on the unique facts and circumstances of the particular case."¹¹³

It should also be kept in mind that "educational performance" is not limited to academic performance, but may also include peer interaction, participation in class activities, and classroom conduct, as well as standardized testing, homework/quizzes, and following directions.¹¹⁴

¹¹² Idaho Dep't of Educ., *Idaho Special Education Manual 2007*, Appendix A4, pp. A4-7 and A4-8.

¹¹³ *Schrag Letter*, EHLR 213:247, 249 (OSEP 1989).

¹¹⁴ *Oakland Unified Sch. Dist.*, 1985-86 EHLR DEC. 507:191 (SEA Cal. 1985); *West Chester Area Sch. Dist.*, 18 IDELR 802 (SEA Pa. 1992); *accord, In re Kristopher H.*, 1985-86 EHLR DEC. 507:183, 187 (SEA Wash. 1985) [A hearing officer quoted the definition of education found in *Funk and Wagnall's New Standard Dictionary*, which stated education "includes not only the narrow conception of instruction, to which it was formerly limited but embraces all forms of human experience." (Emphasis original.)]; *see also Seattle School Dist. No. 1 v. B.S.*, 82 F.3d 1493 (9th Cir. 1996) (Unique educational needs include a disabled child's academic, social, health, emotional, communicative, physical, and vocational needs.).

V. SCHIZOPHRENIA

Students properly diagnosed with schizophrenia *automatically qualify* as ED and are entitled to services under the IDEA if they are in need of special education and/or related services; they are not required to meet the five key elements or any of the five characteristics described in the federal regulation on ED, as *all other* ED students must (*see* Section IV).¹¹⁵ However, the evaluation team must still determine that a student diagnosed with schizophrenia has had the condition over a long period of time and to a marked degree, and that the condition adversely affects the student's educational performance.¹¹⁶

Schizophrenia is a psychotic disorder that lasts for at least six months and includes at least one month of active-phase symptoms. Typical onset is in late adolescence or early adulthood. Positive symptoms, defined as those actions or attributes that are added to the student by the mental illness of schizophrenia, include delusions, hallucinations, disorganized speech, and grossly disorganized or catatonic behavior.¹¹⁷ Negative symptoms, defined as changes in behavior that take away attributes that were typical of the student due to the mental illness of schizophrenia, include restrictions in the range and intensity of emotional expression, in the fluency and productivity of thought and speech, and in the initiation of goal-directed behavior.¹¹⁸

¹¹⁵ Idaho Dep't of Educ., *Idaho Special Education Manual 2007*, Appendix A4, p. A4-6.

¹¹⁶ *Board of Education of Montgomery County v. S.G.*, 45 IDELR 93 (D.C. Md. 2006), quoting *Springer v. Fairfax County School Board*, 134 F.3d 659 (4th Cir. 1998).

¹¹⁷ Am. Psychiatric Ass'n, *DSM-IV-TR: Diagnostic and Statistical Manual of Mental Disorders* (4th ed. July 2000, text revision), p. 299.

¹¹⁸ *Id.*

Page 29 lists the "Diagnostic criteria for Schizophrenia" as defined in the *DSM-IV-TR*. The reader should note that the criteria for schizophrenia established in the *DSM-IV-TR* resemble the criteria for ED established in the federal regulation. However, the key issue for eligibility is the diagnosis, not an analysis as to whether the student meets the ED criteria. Although the federal regulation does not require the use of the *DSM-IV-TR* in arriving at a diagnosis, the *DSM-IV-TR* is, perhaps, the most frequently-used guide for diagnosing mental disorders.

Neither the *DSM-IV-TR* nor the federal definition of ED addresses the training and education of persons who may make the diagnosis of schizophrenia. Typically, the diagnosis would be made or confirmed by a psychiatrist but may be made by other professionals, particularly in light of the small number of child psychiatrists in Idaho. Psychiatrists are typically very important in the treatment of persons with schizophrenia, as psychotropic medications are required as are careful monitoring of those medications and health factors. A school district may question a diagnosis of schizophrenia by any professional who appears not to have the qualifications to assess the student's medical condition. In such instances, the district should seek to have the student referred to a psychiatrist for a second opinion. In this instance, the school district is responsible to pay for the costs associated with the second opinion.

Manic episodes of bipolar disorders may appear similar to or be confused with schizophrenia.¹¹⁹

Case Study

In *Board of Education of Montgomery County v. S.G.*,¹²⁰ prior to the fifth grade, S.G. was highly-motivated, well-organized, and did

¹¹⁹ *Id.* at pp. 297-311 and 410-16.

¹²⁰ 45 IDELR 93 (D.C. Md. 2006), *affirmed*, 230 Fed. Appx. 330 (4th Cir. 2007).

well in school. Thereafter, over a two-year period, her behavior began to deteriorate. She stole, heard voices, had suicidal thoughts, became physically self-abusive, hallucinated, and even became incontinent. Through a portion of that period, her superior academic skills allowed her to make educational progress but she finally had to be committed to an inpatient psychiatric hospital. Her diagnosis at discharge was Bipolar Affective Disorder, Type I, Manic, with psychotic features. After hospitalization, all of her academic grades dropped precipitously.

She returned to school but was given a “flash pass” that allowed her to immediately leave class as she deemed necessary, without having to tell her teacher why she needed to go to the health room. Her condition continued to impact her participation in regular classes. Her diagnosis later changed to psychosis with schizophrenic tendencies. While her psychosis was well-documented through multiple hospitalizations, her teachers appeared to be unaware of her condition despite her deteriorating performance. Although the student’s guardian requested that she receive special education services, the student was determined not eligible and her placement continued to be in a regular education program with a “flash pass.”

At the due process hearing:

The ALJ [administrative law judge] concluded that S.G. met the definition of emotionally disturbed because she was diagnosed with schizophrenia, had inappropriate ideation and feeling over a prolonged period of time and to a marked degree, and suffered an educational impact as a result.¹²¹

The ALJ ordered the school system to identify S.G. as eligible for special education services under the IDEA and to create an IEP placing her in a therapeutic school.

¹²¹ *Id.*, 45 IDELR 93 at p. 397.

On appeal to the U.S. District Court for Maryland, the school district contended there was no adverse educational impact to the student; her grades were average and, therefore, there was no eligibility for funding the private school placement. The court deferred to the ALJ’s finding:

I find [the school district’s] reliance on the student’s grades to be inappropriate under the circumstances. The evidence is clear that those grades are skewed because the child was graded only on what she actually did. Had the child been given grades which reflected her missed work, she clearly would have had substantially lower grades. It is not surprising that the child, who is bright, did well on standardized tests; however those results are only one factor to be considered. Furthermore, the school’s formal assessments relied, at least in part, on those skewed grades. As Parent indicated, the child’s true grades would have told a different story.¹²²

In conclusion, the U.S. District Court held:

The inclusion of children with schizophrenia contemplates that a child with psychotic symptoms may need special education services other than changes to the content of the learning materials or adaptations to the specific delivery method. Special education services must be broadly defined to include instruction in a therapeutic setting for a schizophrenic child who needs greater support services in his or her learning environment, but who is otherwise intellectually capable of mastering a general education curriculum through the delivery method used in a regular classroom.¹²³

¹²² *Id.* at p. 399.

¹²³ *Id.* at p. 400.

Diagnostic criteria for Schizophrenia

- A. *Characteristic symptoms:* Two (or more) of the following, each present for a significant portion of time during a 1-month period (or less if successfully treated):
- (2) delusions
 - (3) hallucinations
 - (4) disorganized speech (e.g., frequent derailment or incoherence)
 - (5) grossly disorganized or catatonic behavior
 - (6) negative symptoms, i.e., affective flattening, alogia, or avolition
- Note:** Only one Criterion A symptom is required if delusions are bizarre or hallucinations consist of a voice keeping up a running commentary on the person's behavior or thoughts, or two or more voices conversing with each other.
- B. *Social/occupational dysfunction:* For a significant portion of the time since the onset of the disturbance, one or more major areas of functioning such as work, interpersonal relations, or self-care are markedly below the level achieved prior to the onset (or when the onset is in childhood or adolescence, failure to achieve expected level of interpersonal, academic, or occupational achievement).
- C. *Duration:* Continuous signs of the disturbance persist for at least 6 months. This 6-month period must include at least 1 month of symptoms (or less if successfully treated) that meet Criterion A (i.e., active-phase symptoms) and may include periods of prodromal or residual symptoms. During these prodromal or residual periods, the signs of the disturbance may be manifested by only negative symptoms or two or more symptoms listed in Criterion A present in an attenuated form (e.g., odd beliefs, unusual perceptual experiences).
- D. *Schizoaffective and Mood Disorder exclusion:* Schizoaffective and Mood Disorder With Psychotic Features have been ruled out because either (1) No Major Depressive, Manic, or Mixed Episodes have occurred concurrently with the active-phase symptoms; or (2) if mood episodes have occurred during active-phase symptoms, their total duration has been brief relative to the duration of the active and residual periods.
- E. *Substance/general medical condition exclusion:* The disturbance is not due to the direct physiological effects of a substance (e.g., a drug of abuse, a medication) or a general medical condition.
- F. *Relationship to a Pervasive Developmental Disorder:* If there is a history of Autistic Disorder or another Pervasive Developmental Disorder, the additional diagnosis of Schizophrenia is made only if prominent delusions or hallucinations are also present for at least a month (or less if successfully treated).¹²⁴

¹²⁴ Am. Psychiatric Ass'n, *DSM-IV-TR: Diagnostic and Statistical Manual of Mental Disorders* (4th ed. July 2000, text revision), p. 312.

“Adolescence is,
almost by definition, a
time of social
maladjustment for
many people.”

--Fourth Circuit Court of Appeals
Springer v. Fairfax County School Board

VI. SOCIAL MALADJUSTMENT

The IDEA regulations explicitly exclude students who are “socially maladjusted” from eligibility under the ED category, unless the evaluation team determines that they have an emotional disturbance.¹²⁵ As one court stated, “[t]his exclusion makes perfect sense Adolescence is, almost by definition, a time of social maladjustment for many people.”¹²⁶

The term “socially maladjusted” is not defined in federal law, nor does the *DSM-IV-TR* recognize it as a mental disorder. The U.S. Department of Education recognized the multiple requests that were made during the comment period to the 2006 IDEA regulations to add a definition of socially maladjusted. “Numerous commenters requested defining or eliminating the term “socially maladjusted” in the definition of *emotional disturbance* stating that there is no accepted definition of the term, and no valid or reliable instruments or methods to identify children who are, or are not, ‘socially maladjusted.’”¹²⁷ Nevertheless, the U.S. Department of Education declined, under the rationale that “there is no consensus” on a definition.¹²⁸ Courts have struggled with the term “socially maladjusted.” One court has defined a socially-maladjusted child as one “who has a persistent pattern of violating societal norms with truancy, substance abuse, a perpetual struggle with authority, is easily frustrated, impulsive, and manipulative.”¹²⁹

The category of ED does not include students who are socially maladjusted unless the

¹²⁵ 34 C.F.R. § 300.8(a)(4)(ii).

¹²⁶ *Springer by Springer v. Fairfax County School Board*, 134 F.3d 659, 664, 27 IDELR 367 (4th Cir. 1998).

¹²⁷ 71 Fed. Reg. 46549 (Aug. 14, 2006).

¹²⁸ *Id.* at 46550.

¹²⁹ *Doe v. Bd. of Educ. of the State of Connecticut*, 753 F. Supp. 65, 17 EHLR 37 (D. Conn. 1990).

student *also* has a condition that meets the definition of ED. The regulation specifically states that the term ED “does not apply to children who are socially maladjusted, *unless* it is determined that they have an emotional disturbance.”¹³⁰ In such circumstances, a student identified as socially maladjusted must meet all the criteria defined in the federal regulation before being classified as ED¹³¹ (*see* Section IV).

Students found to be socially maladjusted, but not ED, have included: students who refuse to obey school, home, and societal rules;¹³² students who externalize blame and are oppositional and argumentative;¹³³ students who

¹³⁰ 34 C.F.R. § 300.8(a)(4)(ii) (emphasis added).

¹³¹ *A.E. v. Independent Sch. Dist. No. 25, of Adair Co., Oklahoma*, 936 F.2d 472, 476, 17 IDELR 950, 952 (10th Cir. 1991) (“That a child is socially maladjusted is not by itself conclusive evidence that he or she is seriously emotionally disturbed.”).

¹³² *Doe v. Sequoia Union High Sch. Dist.*, 1987-88 EHLR DEC. 559:133, 135 (N.D. Cal. 1987) (A U.S. District Court in California accepted an expert witness’s definition of “socially maladjusted” as being “a persistent pattern of violating societal norms with lots of truancy, substance and sex abuse, i.e., a perpetual struggle with authority, easily frustrated, impulsive, and manipulative.”); *Corpus Christi Independent Sch. Dist.*, 18 IDELR 1281, 1282 (SEA Tex. 1992) (A hearing officer defined “socially maladjusted” as one who:

refuses to obey school, home and societal rules.

He willfully stays out at night and is beyond control of his parents’ discipline. He is an inveterate substance abuser. He manifests anger and hostility toward his parents. He refuses to rise in the mornings for school and he refuses in the main to attend school. He volitionally chooses to disobey his parents, to abuse controlled substances, and to not attend school.).

¹³³ *Doe v. Bd. of Educ. of the State of Connecticut*, 753 F. Supp. 65, 17 EHLR 37, 39 (D. Conn. 1990) (The court, quoting from a social worker’s report and from a clinical psychologist, described a student thus:

Externalizes blame for difficulties. Insight and judgment believed significantly impaired at this time. . . . [H]e exhibits many characteristics of depression, but this is best understood as an underlying condition. In many ways, [his] episodes of rage is [sic]

chronically misbehave¹³⁴ and are in trouble with the law;¹³⁵ students who dislike school, abuse drugs, are beyond control of parents, are hostile toward authority figures, and whose emotional state fluctuates as a direct consequence of his/her environment.¹³⁶

It is important to recognize that a student found to be socially maladjusted, but not ED, may qualify for a FAPE pursuant to the

optionless, "last ditch" effort to ward off a total experience of dysphoria. . . . [the student had] "significant difficulties in dealing with his emotions, and employs considerable psychological energy to remain distant from an affective interaction. . . ." [His] "mood is angry and sad. He relates in an irritable, agitated manner. He tends to be oppositional and argumentative. No evidence of psychosis is noted.").

¹³⁴ *Henry County Bd. of Educ.*, 22 IDELR 761, 763 (SEA Ala. 1995):

The differences between "socially maladjusted" and ED has to do with the Child's ability to choose how he will behave and perform. To find the Child "emotionally conflicted" or "seriously emotionally disturbed" requires a finding of an absolute inability with regard to the definitional terms heretofore used and must be considered a very serious condition which does not apply to every "bad" child. In fact, the Child has apparently gotten along reasonably well with teachers and peers most of [sic] time and has simply been guilty of chronic misbehavior.

¹³⁵ *Fairfax County Pub. Sch.*, 22 IDELR 998, 999 (SEA Va. 1995) (A student had a "conduct disorder" and a "dysthymic disorder" and had experienced academic, behavioral, and legal problems for some time.).

¹³⁶ *Conejo Valley Unified Sch. Dist.*, 1985-86 EHLR DEC. 507:213, 214 (SEA Cal. 1985):

The socially maladjusted student is characterized by inability to tolerate structure, marked dislike of school, behavior beyond control of parents, drug abuse, poor tolerance for frustration, excessive need for immediate gratification, disregard or hostility toward authority figures, lack of social judgment, inconsistent performance, positive behavior response when strong structure is instituted and lack of pervasiveness of disorder (i.e. emotional state fluctuates as a direct consequence of environment.).

provisions of Section 504.¹³⁷ See *Merrillville* in Section IV, above.

Case Studies

In *Dale M. v. Board of Education of Bradley-Bourbonnais High School District No. 30*,¹³⁸ the Seventh Circuit Court of Appeals reversed the federal district court's ruling regarding a reimbursement award to the mother for her unilateral placement of her child in a residential school. The student became a resident of the district in 1993 when he was 14 years old. He had serious disciplinary problems, including disrupting classes and truancy. The following year he was placed in a "therapeutic day school" for disruptive and truant students but, during the first four months of school, he only attended 20 days. During this time period, he had been drinking alcohol and consuming marijuana, cocaine, and other illegal drugs. The student was hospitalized for depression and, at the same time, he was charged with residential burglary and car theft. After getting out of the hospital, the student refused to return to school and he received homebound instruction. He was again charged with residential burglary and sent to jail. A psychologist found that the student did not have a learning disability, but had "conduct disorder," along with depression and substance abuse.

When the student was released from jail, the school proposed that he return to the therapeutic day school. However, his mother placed him in a residential school in Maine and demanded that the school district pay for the costs of the private school placement. The private school did not offer psychiatric or medical treatment for substance abuse or

¹³⁷ *Irvine (CA) Unified Sch. Dist.*, EHLR 353:192 (OCR 1989) (The Office for Civil Rights found that a school district erred when it neglected to consider whether "social maladjustment" might be a handicapping condition under Section 504.); see *Merrillville Community Schools, Northwest Indiana Special Education Cooperative*, 37 IDELR 108 (SEA Ind. 2002).

¹³⁸ 237 F.3d 813, 33 IDELR 266 (7th Cir. 2001).

depression; it was a boarding school for difficult children. The Seventh Circuit addressed the student's behaviors as follows:

Another way to put this is that Dale's problems are not primarily educational. He has the intelligence to perform well as a student and no cognitive defect or disorder such as dyslexia that prevents him from applying his intelligence to the acquisition of an education, without special assistance. His problem is a lack of proper socialization, as a result of which, despite his tender age, he has compiled a significant criminal record. His substance abuse interferes with his schooling; that is true; but it interferes with much else besides, such as ability to conform to the law and avoid jail. Supposing that the most effective educational program for Dale would be to take correspondence courses while confined in a prison, we do not think his mother would be arguing that the school district would have to pay the prison authorities for the expense of incarcerating him. But that is close to what she is arguing—that since confinement, among its other benefits to Dale, will make it easier for him to obtain an education, the school district is responsible for the cost of confinement. That, we conclude, goes too far.¹³⁹

Although the Seventh Circuit never stated that the student was socially maladjusted, the discussion set forth by the court seems to indicate that he was, and the court further indicated that 24-hour supervision in a locked unit is not a related service.

In *Mr. and Mrs. N.C., on behalf of their son M.C. v. Bedford Central School District*,¹⁴⁰ a

¹³⁹ *Id.*, 33 IDELR 266 at p. 1015.

¹⁴⁰ 473 F. Supp. 2d 532, 47 IDELR 95 (S.D.N.Y. 2007).

federal district court in New York addressed the issue of distinguishing social maladjustment from emotional disturbance. The court reviewed whether a student whose male cousin began a course of sexual misconduct with the student, including watching pornographic videos and encouraging the student to engage in sexual intercourse with a female while the cousin watched and eventually escalating to sodomy was emotionally disturbed. The student was diagnosed with ADHD and received accommodations for his learning disabilities under Section 504.

The court determined that the evidence did not establish that the student had an emotional disturbance that entitled him to special education. It was determined that the student did not have an inability to learn, as the student had a B average on his report cards. Additionally, he did not develop physical symptoms or fears associated with personal or school problems. It was noted that the student had occasional bouts of unhappiness or depression, but the evidence did not establish that the bouts were pervasive or severe enough to qualify as an emotional disturbance. The evidence presented also showed that the student engaged in inappropriate behaviors that included fighting, an assault on another student, and possession of marijuana and drug paraphernalia. The student had three disciplinary incidents resulting in suspension in less than a three-month period.

The court expressly found that the student's increasing "drug use and aggressive behavior, without more, are not enough to qualify him for classification as emotionally disturbed—his conduct during tenth grade can be viewed as the type of bad behavior that characterizes social maladjustment, which by itself, is not covered under the IDEA."¹⁴¹ The professionals working with the student did not view him as depressed. Rather, the student's drug use was seen as the

¹⁴¹ *Id.*, 47 IDELR 95 at p. 408.

root cause of the student's problems and he was not treated for depression.

As the court found that the student did not suffer from four of the five factors over a long period of time and to a marked degree as required by the criteria, and that, relating to the fifth factor, demonstrated inappropriate behavior under normal circumstances, the behavior was better described as social maladjustment, the student was determined not to be eligible for special education due to an emotional disturbance. Additionally, there was no evidence presented that his educational performance was adversely affected.

In *Fresno Unified School District*,¹⁴² a 10-year-old student in fourth grade was denied special education based on the school district's determination that he was socially maladjusted and his inappropriate behavior was learned and supported by the home environment. The student was diagnosed with ADHD and oppositional defiant disorder (ODD). The student had never been determined eligible for special education, but he did have a 504 plan to address his behavioral difficulties. Additionally, the school district provided a classroom aide to monitor the student's behavior.

The undisputed evidence established that the student had a long history of violent and inappropriate behavior. The district suspended him numerous times for profanity, defiance, and physically injuring other students. From the second semester of first grade to the end of second grade, the student was in an alternative setting where he continued to exhibit inappropriate behavior. The student was assessed for special education services on three different occasions, but each time he did not qualify.

His mother and mental health provider stated he expressed an unnatural fascination with death, dead people, and dead animals.

¹⁴² 39 IDELR 28 (SEA Cal. 2003).

According to his mother, as early as kindergarten, her son had limited interaction with other children due to his contentious behavior. Additionally, he had fantasies of his pitbulls killing people, and morgue photos of famous dead people tacked to his bedroom walls. Therapists indicated the student had outbursts and was a danger to himself and others. Two therapists recommended placement of the student in a mental health facility.

The school district argued that the student's behavior was learned from home, where the behaviors were "shared and rewarded."¹⁴³ The school district, through its staff and outside expert witness, testified that the student did not meet the ED criterion related to inappropriate behavior because the student did not "exhibit bizarre, hallucinatory, delusional, or paranoid behavior, having crying or laughing jags, or experience severe mood swings." The hearing officer found otherwise—federal law does not require that a student's behavior must either be bizarre or withdrawn to meet the ED criteria. Further, the student's disproportionate sensitivity outbursts stemming from low self-esteem, overreaction to normal activities, and "out-of-control" behaviors indicated that the student met the qualifiers for ED. Additionally, the student's serious interest in death and his desire that someone kill him constituted aberrant behaviors and feelings.

The hearing officer also found that the student's ED characteristics adversely affected his education. Because of the student's multiple suspensions due to his ED characteristics, he had been excluded from school and missed valuable instruction in subject areas. While the student was of average intelligence, his grades

¹⁴³ The hearing officer held that the school district failed to provide little, if any, evidence regarding the student's home life. No staff member had visited his home. On one occasion, the student's mother used inappropriate language at school when she was upset. The student's mother testified that none of the student's siblings, including his twin brother, experienced the same behavioral problems.

were very poor and he was failing, or in danger of failing, multiple subjects. Additionally, the student's social skills were deficient.

The district claimed that the student could be controlled with a 504 plan that addressed his ADHD and behavioral issues. The hearing officer disagreed with the school district and found that, over the years, the student's 504 plans did little to address the student's needs. The hearing officer addressed the school district's assertion that the student was socially maladjusted, as follows:

Regarding the District's assertion that STUDENT is precluded from special education eligibility for special education as ED because he has an ODD or is socially maladjusted, the federal definition of ED does not exclude a student who is socially maladjusted as eligible for special education if the student is determined also to have an emotional disturbance. (Citation omitted.) Thus, STUDENT is not excluded from meeting ED criteria.¹⁴⁴

The hearing officer concluded that the student had been denied FAPE by the school district because he met the eligibility criteria of ED, in that he "exhibited unusual feelings or behaviors under normal circumstances to a marked degree and for a long period of time. Additionally, STUDENT's education has been adversely affected and he requires special education."¹⁴⁵

In *Springer by Springer v. Fairfax County School Board*,¹⁴⁶ during the eleventh grade, Edward began demonstrating significant behavior problems, including truancy, drug and alcohol abuse, stealing, and other criminal activities. While he had always been successful

in school, his grades dropped. His behavior problems consisted of the following:

He was arrested in August 1993 for possessing burglary tools and tampering with an automobile, offenses for which he was sentenced to one year probation, fifty hours of community service, and a suspended fine of \$2,500. Edward would frequently sneak out of his parents' house and stay out all night with friends. He stole from his parents and others. He regularly used marijuana and alcohol. Edward often broke school rules and had a high rate of absenteeism. He was disciplined for driving recklessly on school property, cutting classes, forgery, leaving school grounds without permission, and fighting. Towards the end of the eleventh grade, Edward and his friends stole a fellow student's car. Edward kept the car for a week of joy-riding. In connection with this episode he was sentenced to probation until his eighteenth birthday.¹⁴⁷

As a result of Edward's behavior, his parents enrolled him in a private residential school and sought district reimbursement. Edward's psychiatrist determined that he suffered from a conduct disorder and dysthymic disorder (a moderate depressive disorder). The hearing officer found that the diagnosis qualified Edward for special education and ordered the school district to reimburse the cost of the private school placement. On appeal, a state review officer overturned the hearing officer's decision, determining that Edward merely had a "conduct disorder," and did not qualify as ED.

In *Mars Area School District v. Laurie L.*,¹⁴⁸ Brandon, a student in the ninth grade, was

¹⁴⁴ 39 IDELR 28, at p. 1263.

¹⁴⁵ *Id.* at p. 1264.

¹⁴⁶ 134 F.3d 659, 27 IDELR 367 (4th Cir. 1998).

¹⁴⁷ *Id.*, 134 F.3d at 661, 27 IDELR at 368.

¹⁴⁸ 827 A.2d 1249, 39 IDELR 96 (Pa. Commw. Ct. 2003).

15 years old and had a long history of disruptive behavior from fifth through ninth grades, including difficulty sustaining attention, completing assignments, accepting adult directives, and gaining attention from peers in appropriate ways. In sixth grade, he was originally diagnosed as ED due to ADHD and ODD; he was also treated for depression. Brandon continued to be disruptive and demonstrated mood swings; in the sixth grade, he was suspended for ten days for making terrorist threats.

In the eighth grade, Brandon's grades declined. After he was involved in an incident with drugs, a manifestation determination was held, and Brandon was placed at an alternative school. Brandon was also reevaluated. The evaluation report found "that Brandon's cognitive-intellectual ability was average, and that his behavioral difficulties were 'more associated with socially maladjusted and conduct related behaviors rather than behaviors associated with a serious emotional disturbance.'"¹⁴⁹ After a second drug-related incident, the IEP team met and held a second manifestation determination and also considered the evaluation report. The IEP team determined that Brandon had been inappropriately identified as having a disability because he had no educational or academic needs that were not being met. Rather, it was determined that his behavior met the description of being socially maladjusted.

The court found that:

Nowhere in the School District's evaluation was there any evidence that Brandon was unable to learn, was unable to build or maintain personal relationships, was generally unhappy or had physical symptoms associated with personal or school problems. While there was evidence that Brandon's behaviors were, at times,

¹⁴⁹ *Id.*, 827 A.2d at 1252, 39 IDELR at pp. 1602-03.

inappropriate, the hearing officer did not associate them with a serious emotional disturbance, stating:

Brandon, as well as his teachers . . . , support personnel, and behavioral specialist . . . indicates that Brandon is well aware of the school rules, disciplinary procedures, and possible consequences for inappropriate behaviors but often makes a conscious choice to disobey adult directives. They, as well as Brandon, felt that his behaviors are more self-promoting. His behaviors have a purpose, with a desired goal, and that at times when provoked, his behaviors are intentional. They feel that he has an adequate perception of reality, an adequate perception of self, and an awareness of the appropriate social and school norms/rules/procedures, as well as, the expectations, which he at times chooses to disregard. For these reasons, Brandon's behaviors are more associated with socially maladjusted and conduct related behaviors rather than behaviors associated with a serious emotional disturbance.¹⁵⁰

Because the evidence overwhelmingly supported the school district's conclusion, the hearing officer's findings were upheld by the court.

In *Doe v. Sequoia Union High Sch. Dist.*,¹⁵¹ a student placed at a private special education

¹⁵⁰ *Id.*, 827 A.2d at 1256, 39 IDELR at pp. 1604.

¹⁵¹ 1987-88 EHLR DEC. 559:133, 134 (N.D. Cal. 1987).

program by her parents for a variety of reasons—numerous trancies, stayed in her room all the time, difficulties getting along with others, deteriorating grades—was found by a U.S. District Court to be “socially maladjusted” rather than ED.

At the administrative hearing, testimony was heard regarding the student’s use of drugs and alcohol, as well as her involvement in a punk subculture. Although the student was dysfunctional because of her use of drugs, she did not exhibit signs of true clinical depression.

Several teachers who testified at the hearing stated that the student would have passed the various classes, or received a higher grade, if she had done her homework and turned in assigned work.

The court, in reversing the hearing officer’s finding that the student was ED, found that the student “was totally capable of taking advantage of a regular education program were she, in fact, sober and not on drugs and attending school on a regular basis.”¹⁵² The court further held that “whatever condition the [student] was suffering from that it clearly was not the cause of her doing poorly in school, but the cause of this was primarily truancy, abuse of drugs, and boredom with some classes.”¹⁵³

¹⁵² *Id.* at 135.

¹⁵³ *Id.*

“Chad has undeniably had more than his share of tragedy and pain, beginning at a very early age. However, this does not make hanging out of a third story window by a bedsheet, or cutting off the tip of his finger with a hatchet upon hearing of the death of a former friend’s father, normal responses under the circumstances.”

--U.S. District Court in California
Lapides v. Coto

VII. DSM-IV-TR MENTAL DISORDERS

Published by the American Psychiatric Association, the *DSM-IV-TR: Diagnostic and Statistical Manual of Mental Disorders* (4th ed. July 2000, text revision), is a comprehensive classification of recognized mental disorders. Health professionals routinely use the *DSM-IV-TR* as a guide for making diagnoses of mental health illnesses.

Some students evaluated for a disability under the category of ED have been diagnosed with mental disorders, generally by a mental health professional. The IDEA neither requires nor precludes the application of *DSM-IV-TR* criteria in making eligibility determinations.¹⁵⁴ OSEP recognizes that the *DSM-IV-TR* “classification system may assist State and local educators in evaluating and diagnosing handicapping conditions in children, including the handicapping condition, ‘seriously emotionally disturbed.’”¹⁵⁵

The issue of whether a student diagnosed with a mental disorder can qualify under the IDEA for special education and related services has been an issue reviewed by hearing officers and courts. A student with a mental disorder/psychiatric disorder is not automatically eligible for special education and related services under the category of ED. Regardless of a *DSM-IV-TR* diagnosis, each student must be evaluated on a case-by-case basis to determine if the ED definition has been met.¹⁵⁶

¹⁵⁴ *Letter to Woodson*, EHLR 213:224, 226 (OSEP 1989).

¹⁵⁵ *Id.*

¹⁵⁶ *Letter to Lane*, 16 EHLR 959 (OSEP 1990) (“Regardless of which handicapping condition is applicable to a particular child, a psychiatric disorder, alone, is not sufficient to make a child eligible for EHA-B services.”); *Letter to McNulty*, 213 IDELR 108, originally

The issue that commonly arises for educators who are working with a student with a *DSM-IV-TR* diagnosis is that the diagnosis may not adequately describe the student’s behaviors so as to determine whether the student is ED. Further, the diagnosis, alone, may not shed light on the interventions that the student needs to receive FAPE. The student may not “present” with the textbook case. Rather, students with most mental health diagnoses are somewhere on a continuum so that, if educators rely solely on the diagnosis and do not evaluate the student’s unique behavior, an eligibility determination likely cannot be made. Further, some students with mental health diagnoses may have multiple diagnoses that must be considered. As a result, it is imperative, regardless of the student’s diagnosis, that school district personnel evaluate each student on a case-by-case basis to determine whether the student meets the criteria of ED.

Biologically-Based Brain Diseases

Students with biologically-based brain diseases (BBBD), including schizo-affective disorder, bipolar (manic-depressive) and unipolar disorders, pervasive developmental disorder, Tourette syndrome, obsessive-compulsive disorder, anxiety and panic disorders, ADD, and ADHD disorder, may fall within the disability category of ED.¹⁵⁷ BBBD has changed over time, especially in the last few years, and refers to those diagnoses that are related to physical or chemical responses within the brain and nerve synapses.¹⁵⁸ All serious and persistent mental illnesses are typically included

cited as EHLR 213:109 (OSEP 1987) (Mentally ill students do not qualify for IDEA services by virtue of their mental illness.).

¹⁵⁷ *Letter to Peschel*, 17 EHLR 178 (OSEP 1990).

¹⁵⁸ U.S. Dep’t of Health & Human Services Nat’l Institutes of Health, *Fiscal Year 2006 President’s Budget Request for NIMH*, p. 2 (available on the Internet at: http://www.nimh.nih.gov/about/budget/fy06_senate_statement.pdf).

in BBBD, including schizophrenia. Schizophrenia is expressly included within the definition of ED for the IDEA rules.¹⁵⁹

OSEP believes that an additional category for students identified with BBBD should not be added to the federal regulation since “as a philosophy . . . [OSEP] should not be moving in the direction of additional categories. . . . [Rather, it] should be focusing on the identification and service-delivery issues of all students with disabilities.”¹⁶⁰

Examples of students with one or more disorders listed as BBBD and who also meet the regulatory definition of ED include: a student with an oppositional disorder who was hostile, aggressive, withdrawn in relationships, and close to being institutionalized;¹⁶¹ and a student with severe diabetes and a seizure disorder who had a classic narcissistic personality and strived to build a relationship only to devalue and destroy it over and over again.¹⁶²

Addiction to Drugs and/or Alcohol

Drug and/or alcohol addiction is not considered a disability under the IDEA. However, there may be instances in which a student who is addicted to drugs or alcohol qualifies under the definition of ED, upon assessment of all of the student’s behaviors.¹⁶³

While drug or alcohol addiction is not addressed in the IDEA regulations, decisions from hearing officers and case law reveal that

drug use may be part of the litany of factors and disorders that must be reviewed in determining whether a student is ED.¹⁶⁴

In one situation, a court found that the student’s behavior sprang from social maladjustment, not from an educational disability based on the student’s history of drug involvement, which included daily marijuana use and, also, use of inhalants.¹⁶⁵ In another case, a student in the eleventh grade was not ED and was properly expelled. The student’s behavioral problems were attributable to his family life and his involvement in drugs.¹⁶⁶ In an unpublished decision, a court held that a student’s behavior was a result of his history of drug use, including inhalants and marijuana, and “social maladjustment,” not an ED.¹⁶⁷

Conversely, an Idaho hearing officer described a student’s use of drugs as “deplorable and a tragedy,” but found that the student’s underlying psychological and emotional problems *led her* to use drugs; the hearing officer found that the student was ED.¹⁶⁸

¹⁶⁴ *In re Child with Disability*, 1985-86 EHLR DEC. 507-388 (SEA III. 1986) (A 17-year-old student with a history of behavioral problems—including truancy, drug and alcohol abuse, and criminal wrongdoing—and who was diagnosed as being depressed and having underlying emotional disturbances was found to be ED.).

¹⁶⁵ *Board of Education of Frederick County v. J.D.*, 232 F.3d 886, 33 IDELR 182 (4th Cir. 2000).

¹⁶⁶ *Plugerville Indep. Sch. Dist.*, 21 IDELR 308 (SEA Tex. 1994).

¹⁶⁷ *Board of Education of Frederick County v. JD, III*, 232 F.3d 886, 33 IDELR 182 (4th Cir. 2000).

¹⁶⁸ *Sarah W. v. Independent Sch. Dist. of Boise City*, at 39:

Sarah’s drug use is deplorable and a tragedy. But I am not able to conclude from the evidence that all of Sarah’s problems can be laid at the feet of drugs. The Menninger Clinic concluded that Sarah’s underlying psychological and emotional problems led her to drug use, that she took drugs to make her feel happy and as a way to make friends. This appears to me to be a reasonable conclusion and a reasonable answer to the issue of whether

¹⁵⁹ 34 C.F.R. § 300.8(a)(4)(ii).

¹⁶⁰ *Letter to Peschel*, 17 EHLR 178, 180 (OSEP 1990).

¹⁶¹ *In re Kristopher H.*, 1985-86 EHLR DEC. 507:183 (1985).

¹⁶² *In re Jeffrey G.*, 1985-86 EHLR DEC. 507:438 (1986).

¹⁶³ *Sarah W. v. Independent Sch. Dist. of Boise City*, at 39 (unpublished decision, SEA Idaho Feb. 14, 1995) (before the Idaho State Dep’t of Education, Findings of Fact, Conclusions of Law and Decision); *In re Child with Disability*, 1985-86 EHLR DEC. 507:388 (SEA III. 1986).

Case Study

In *In re Kristina Louise C.*,¹⁶⁹ the parent of a student who was belligerent, depressed, and generally uncontrollable at home sought reimbursement for costs associated with the assessment and special education of her daughter. The mother had unilaterally placed her daughter in a private boarding school after she was suspended from school for disciplinary problems. The mother's written description of her daughter's behavior stated:

Her negative attitude toward school has held her back. She is disruptive to all classmates as well as teachers . . . She has been suspended from all schools in the Bellevue School District for the remainder of the 1984-85 school year. She was arrested by the Bellevue Police Department for theft . . . Kristi is extremely temperamental (sic) and shows her likes and dislikes for specific teachers . . . She is liked by students and faculty for her friendliness . . . She will not speak to me (Her Mother), unless she has to (does not volunteer) and displays erratic behavior toward adults as a whole . . . Kristi has only one sister . . . She confides in her sporadically, but displays jealousy and anger toward her most of the time . . . (Kristi) chooses not to participate in the family setting in any way. She locks herself in her room and is constantly on the phone with her friends. She is not eating well, not taking good care of herself. . . . Kristi feels extremely threatened by the family setting, as if she is not good enough, nor getting what she wants. She is confused about herself. Her negative attitude toward life and herself are creating a need for

her problem was drugs alone, or whether psychological problems were the root of the matter.

¹⁶⁹ EHLR 507:265 (SEA Wash. 1985).

acceptance from her peers, and not the family setting . . . Kristi has three close friends, all of whom are constantly "in trouble" with the law or their parents . . . She has a multitude of friends whom she does not reveal. The activities they pursue are various, most of which are illegal or immoral.¹⁷⁰

At the due process hearing, the assistant principal, Ms. Savory, testified that she had a good relationship with Kristi and that she had not observed the extreme behaviors identified by the mother. The assistant principal also testified that she had notified the mother that Kristi was likely involved in drugs, based upon her observations of a shift in Kristi's appearance and attitude.

Ms. Savory initially characterized Kristi as "alert, perky, and dressed nicely but was not attending school in full" but later noted that her appearance changed "to being more lethargic, less tidy, and wearing heavy eye make-up . . . a change in friendship associations (which) caused (Ms. Savory) to alert the mother that she was most likely drug involved on a daily basis." Ms. Savory believes Kristi demonstrated a willingness and an ability to reason and make choices. She believes Kristi was deliberately engaging in poor school performance to manipulate her mother into placing her at another school.¹⁷¹

The Washington state statute dealing with ED provided that a student's evaluation must distinguish between common disciplinary problem behaviors and serious behavioral disabilities.

Common disciplinary problems (e.g., truancy, smoking, breaking school conduct rules) may exist in conjunction

¹⁷⁰ *Id.* at 266.

¹⁷¹ *Id.* at 267.

with serious behavioral disabilities, but cannot be used as the sole criterion for representing special education and related services.¹⁷²

The hearing panel held that there was insufficient evidence to establish that the student exhibited any one of the five ED characteristics defined in the federal regulation over a long period of time and to a marked degree which adversely affected her educational performance. Therefore, Kristi was found to be ineligible for special education under the category of ED.

Conduct Disorder

Conduct disorder is recognized as a mental disorder in the *DSM-IV-TR*. The American Psychiatric Association describes the essential feature of conduct disorder as “a repetitive and persistent pattern of behavior in which the basic rights of others or major age-appropriate societal norms or rules are violated.”¹⁷³

Conduct disorder is manifested by the presence of three (or more) of the criteria listed on page 43 within the past 12 months, with at least one criterion present within the past six months. The diagnostic criteria also require that the disturbance in behavior cause clinically significant impairment in social, academic, or occupational functioning.¹⁷⁴

OSEP makes it clear that a student with a psychiatric disorder or mental illness is not automatically entitled to special education and related services.¹⁷⁵ A student diagnosed with a

conduct disorder may be eligible for special education and related services only if the student also meets the definition of ED.¹⁷⁶ In other words, unlike schizophrenia, a diagnosis of conduct disorder is not sufficient to make a student eligible as ED; the student must meet the ED criteria set forth in the IDEA.

A student with a conduct disorder, socialized, non-aggressive, and a developmental arithmetic disorder was found to be ED,¹⁷⁷ as was a student who had been diagnosed with a conduct disorder and a severe borderline personality disorder.¹⁷⁸ A student suffering from conduct disorder, severe solitary aggressive type, and paranoid and schizoid traits was also found to be ED.¹⁷⁹

condition is applicable to a particular child, a psychiatric disorder, alone, is not sufficient to make a child eligible for EHA-B services.”); *Letter to McNulty*, EHLR 213:108, 108 (OSEP 1987) (“It is entirely possible for a child to have serious mental illness resulting in dangerous behavior and/or institutionalization and at the same time have that child making normal progress in an educational program without special education services.”).

¹⁷⁶ *Morgan Hill Unified Sch. Dist.*, 19 IDELR 557, 565 (SEA Cal. 1992) (“Pursuant to the federal definition of SED, the diagnosis of a conduct disorder and SED are not mutually exclusive and students with conduct disorders may also satisfy educational criteria for SED if it is determined that they are also seriously emotionally disturbed.”).

¹⁷⁷ *Edward A.F. v. Clint Independent Sch. Dist.*, 1986-87 EHLR DEC. 508:204 (1986) (A hearing officer found that a student had become increasingly unable to interact with peers and teachers and that his aggressive behavior towards other children had sharply increased. His behavior had been practically unmanageable in the school setting.).

¹⁷⁸ *In the Matter of the Education of S.S. and Lake Oswego Sch. Dist.*, Case No. DP 91-117, at 17 (unpublished decision, SEA Or. Aug. 3, 1993) (A hearing officer found that a student suffered from a deep underlying clinical depression and, thus, had an underlying mood of unhappiness or depression. The student also had an inability to learn which could not be explained by intellectual, sensory, or health factors, and she lacked satisfactory interpersonal relationships.).

¹⁷⁹ *Babb v. Knox County School System*, 965 F.2d 104 (6th Cir. 1992).

¹⁷² *Id.* at 270.

¹⁷³ Am. Psychiatric Ass’n, *DSM-IV-TR: Diagnostic and Statistical Manual of Mental Disorders* (4th ed. July 2000, text revision), p. 93.

¹⁷⁴ *Id.* at p. 94.

¹⁷⁵ *Letter to Woodson*, EHLR 213:224, 225 (OSEP 1989) (“Commitment of a child to a psychiatric hospital for a psychiatric disturbance does not automatically entitle the child to a program of special education and related services.”); *Letter to Lane*, 16 EHLR 959, 960 (OSEP 1990) (“Regardless of which handicapping

(Continued on page 45)

Diagnostic criteria for Conduct Disorder

- A. A repetitive and persistent pattern of behavior in which the basic rights of others or major age-appropriate societal norms or rules are violated, as manifested by the presence of three (or more) of the following criteria in the past 12 months, with at least one criterion present in the past 6 months:

Aggression to people and animals

- (7) often bullies, threatens, or intimidates others
- (8) often initiates physical fights
- (9) has used a weapon that can cause serious physical harm to others (e.g., a bat, brick, broken bottle, knife, gun)
- (10) has been physically cruel to people
- (11) has been physically cruel to animals
- (12) has stolen while confronting a victim (e.g., mugging, purse snatching, extortion, armed robbery)
- (13) has forced someone into sexual activity

Destruction of property

- (14) has deliberately engaged in fire setting with the intention of causing serious damage
- (15) has deliberately destroyed others' property (other than by fire setting)

Deceitfulness or theft

- (16) has broken into someone else's house, building, or car
- (17) often lies to obtain goods or favors or to avoid obligations (i.e., "cons" others)
- (18) has stolen items of nontrivial value without confronting victim (e.g., shoplifting, but without breaking and entering; forgery)

Serious violations of rules

- (19) often stays out at night despite parental prohibitions, beginning before age 13 years
- (20) has run away from home overnight at least twice while living in parental or parental surrogate home (or once without returning for a lengthy period)
- (21) is often truant from school, beginning before age 13 years

- B. The disturbance in behavior causes clinically significant impairment in social, academic, or occupational functioning.

- C. If the individual is age 18 years or older, criteria are not met for Antisocial Personality Disorder. . . .¹⁸⁰

¹⁸⁰ Am. Psychiatric Ass'n, *DSM-IV-TR: Diagnostic and Statistical Manual of Mental Disorders* (4th ed. July 2000, text revision), pp. 98-99.

The problems of a student diagnosed with a conduct disorder and a related emotional disturbance were found not to be “of such a magnitude as to meet the federal definition of seriously emotionally disturbed.”¹⁸¹ ED classification was also denied to a student who had been diagnosed at various times with a conduct disorder, ODD with depression, attention deficit disorder, developmental reading disorder, and an adjustment disorder with mixed disturbance of emotions and conduct.¹⁸² A student whose behavior included lying, fighting, running away, and threatening others was found by a hearing officer to have behavior consistent with the diagnosis of a conduct disorder and was not ED.¹⁸³

Despite whatever label, *i.e.*, conduct disorder or social maladjustment, is applied to a student, the eligibility team must look to the *actual emotional and behavioral problems* of the student in determining ED classification.

With few exceptions, students diagnosed with conduct disorder also suffer from a variety of other disorders. No “typical” finding for or

¹⁸¹ *A.E. v. Independent Sch. Dist. No. 25*, 17 EHLR 950, 952 (10th Cir. 1991).

¹⁸² *Morgan Hill Unified Sch. Dist.*, 19 IDELR 557 (SEA Cal. 1992); *see also Fairfax County Pub. Sch.*, 22 IDELR 998 (SEA Va. 1995) (A student who had a clinical diagnosis as suffering from a conduct disorder and dysthymic disorder was found not to be ED. The primary purpose of a doctor’s letter making such a clinical diagnosis was to convince a judge to commit the student to a camp in lieu of incarceration and did not support a finding of disability.); *In re: Burton Sch. Dist. and Tulane County Office of Education*, EHLR DEC. 504:133, 134 (SEA Cal. 1982) (quoting from a prior due process hearing decision) (A hearing officer found that a student with a severe conduct disorder and a depressive disorder was ED, and that the student’s inappropriate behavior was “the tip of the iceberg and not the iceberg itself.”).

¹⁸³ *Morgan Hill Unified Sch. Dist.*, 19 IDELR 557 (SEA Cal. 1992); *Springer by Springer v. Fairfax County School Board*, 134 F.3d 659, 27 IDELR 367 (4th Cir. 1998); *Mars Area School District v. Laurie L.*, 827 A.2d 1249, 39 IDELR 96 (Pa. Commw. Ct. 2003); *Merrillville Community Schools, Northwest Indiana Special Education Cooperative*, 37 IDELR 108 (SEA Ind. 2002).

against ED can be extrapolated from these cases of multiple disorders. This fact emphasizes the need for school districts to evaluate each student on a case-by-case basis and to consider *all* of the elements and characteristics that may influence ED classification (*see* Section IV).

Case Studies

In *A.E. Evans v. Independent Sch. Dist. No. 25*,¹⁸⁴ a student with a learning disability in math also experienced problems with peer interaction, impulse control, and excessive anxiety while in school. The student was suspended from school for theft, fighting, tardiness, smoking, disruptions of class, and use of improper language. The behavior problems were found to be unrelated to the student’s disability. Upon hearing that she was suspended, the student made a suicidal gesture by cutting herself on the arm with a broken bottle.

The student was admitted to a psychiatric unit and was diagnosed as having a conduct disorder related to emotional problems and a borderline personality disorder.

The issue reviewed by the Tenth Circuit Court of Appeals was “whether seriously emotionally disturbed children who are diagnosed as having a conduct disorder are properly excluded from the coverage of Public Law 94-142 [IDEA] by the language in 34 C.F.R. § 300.5(b)(8) [federal regulation].”¹⁸⁵

The court found that the evidence presented supported the finding that, while the student suffered from a conduct disorder, she was not ED within the federal definition.

In *Capistrano Unified School District v. Wartenberg*,¹⁸⁶ the Ninth Circuit Court of Appeals also wrestled with the definition of conduct disorder. In *Wartenberg*, Jeremy, 16, had always done very poorly in school. Various

¹⁸⁴ 936 F.2d 472, 17 IDELR 950 (10th Cir. 1991).

¹⁸⁵ *Id.*, 936 F.2d at 474, 17 IDELR at 951.

¹⁸⁶ 59 F.2d 884, 22 IDELR 804 (9th Cir. 1995).

psychologists and counselors diagnosed him as having both ADD and a conduct disorder. He began receiving special education in the second grade based on “visual motor integration” and “visual closure deficits.”

In the seventh grade, Jeremy was hospitalized for several months because of his aggressive, violent behavioral problems, including violent and dangerous attacks on his mother and cruelty toward his baby brother, setting fires, shoplifting, and lying. Jeremy had been taking Ritalin since age 4, but it had not helped. The hospital psychiatrist noted, “Jeremy’s intelligence seemed to be average, but his ‘thought content revealed flight of ideas’ and his ‘insight and judgment were poor.’”¹⁸⁷ At the hospital, Jeremy was given an electroencephalogram and the results were abnormal. Reports concluded that he needed a very structured day treatment or residential placement.

After hospitalization, Jeremy returned to public school and continued to do poorly. Despite the numerous recommendations that Jeremy be given a very structured environment, the school initially placed him in regular classes where, by the next fall, he was failing all of his eighth grade classes. Several subsequent changes were made to his IEP, but the changes did not improve his performance. In one instance, the new program decreased the individualized attention he was scheduled to receive.

Jeremy’s parents moved him from the public high school and placed him at the Mardan Center of Educational Therapy. The parents asked the school district for reimbursement of tuition and fees spent on the placement, and attorney fees.

The school psychologist attributed Jeremy’s poor performance to a conduct disorder. However, other testimony seemed to indicate that the failure was due to his ADD, not willful

bad conduct, and that these two causes—ADD and conduct disorder—could not be separated out. The hearing officer found for the parents and held that “Jeremy’s social and emotional problems could not be separated out from the symptoms associated with his specific learning disability.”¹⁸⁸ The federal district court affirmed the hearing officer’s decision.

The Ninth Circuit Court of Appeals reviewed the case, not under the disability category of ED but, rather, under the category of children with “specific learning disabilities,” which specifically excluded children with learning problems due to an emotional disturbance.

In reviewing the definition of “children with specific learning disabilities” and the facts pertaining to Jeremy, the court held that:

If Jeremy’s failure at school resulted from misconduct, not a disorder, then he would not be entitled to have the school pay for his Mardan Center tuition and transportation. Likewise, if his failure was caused by a disorder, but the school’s proposed individualized education program was appropriate, or Mardan Center was not appropriate, he would not be so entitled. . . . So, a child with a specific learning disability caused by any number of factors will qualify for assistance, while a child with a specific learning disability which is “primarily the result of [non-serious] emotional disturbance” will not.¹⁸⁹

Witnesses at the due process hearing had testified that Jeremy’s bad behavior—impulsiveness, rebellion against authority, and poor performance—was caused by his ADD. Since Jeremy’s learning disability was the primary cause of his poor performance, he was entitled to special education and related

¹⁸⁷ *Id.* at 805.

¹⁸⁸ *Id.* at 807 (quoting a hearing officer’s decision).

¹⁸⁹ *Id.* at 809.

services. The Ninth Circuit held that “only if Jeremy’s learning problems were ‘primarily’ caused by non-covered causes would he lose coverage.”¹⁹⁰

Depression

Depression is not an uncommon diagnosis for students at virtually every grade level. Some students who are depressed are treated with medication and/or counseling, while many receive no mental health intervention. The key issue with depression is determining whether the impact of the disorder on the student’s life is sufficient to meet the criteria of ED. As a result, a diagnosis of depression, in and of itself, does not entitle a student to eligibility under the IDEA.¹⁹¹

A student diagnosed with atypical depression and mixed personality disorder with schizotypal features was found to be ED.¹⁹² Conversely, a student who was diagnosed with and hospitalized for major depression was found to have emotional difficulties, but not to the *degree* required by the definition of ED.¹⁹³

The same conclusion was reached by hearing officers in two other cases. A student who was hospitalized for a variety of disorders—dysthymia, secondary, early onset; ODD, severe; and possibly also had

¹⁹⁰ *Id.* at 810.

¹⁹¹ *Letter to Lane*, 16 EHLR 959 (OSEP 1990); *Letter to McNulty*, EHLR 213:109 (OSEP 1987).

¹⁹² *Berkeley Unified Sch. Dist.*, 1987-88 EHLR DEC. 509:197 (SEA Cal. 1987); *see also Doe v. Alabama State Department of Education*, 17 EHLR 41 (11th Cir. 1990) (A student classified as ED suffered from a major affective disorder, also known as manic depressive illness, and had substantial academic difficulty because of episodes of depression and unmanageable hyperactivity; this affected the student’s ability to concentrate and caused him considerable stress when he was confronted by the normal educational environment.).

¹⁹³ *Doe v. Bd. of Educ. of the State of Connecticut*, 17 EHLR 37 (D. Conn. 1990).

ADHD¹⁹⁴—did not meet the definition of ED. ED classification was also denied to a student who had been diagnosed as having post traumatic stress disorder, ODD, and dysthymia.¹⁹⁵

Attention Deficit Disorder (ADD)/ Attention Deficit Hyperactivity Disorder (ADHD)

Attention Deficit Disorder (ADD) and/or Attention Deficit Hyperactivity Disorder (ADHD) are another classification of mental health disorders with which students are often diagnosed. However, the diagnosis, in and of itself, does not reveal whether the student is ED. Students with ADD or ADHD may be found eligible for special education services under the disability category of “other health impaired.” Students who are ADD or ADHD may or may not exhibit symptoms that meet the criteria for ED. Typically, students who are ADD or ADHD, and who qualify as ED, have other mental health diagnoses, or a co-occurring disorder, resulting in the student being dually diagnosed, and both diagnoses are impacting the student’s education.

A student with ADD who was immature and impulsive, who had an aggressive and assertive approach to social interaction, who was unsuccessful in the regular academic setting, and who was unable to maintain satisfactory interpersonal relationships with

¹⁹⁴ *Fauquier County Pub. Sch.*, 20 IDELR 579 (SEA Va. 1993) (A student was hospitalized following a temper outburst at home, during which he jumped from a second story window and ran, barefoot and without sufficient clothing, into the woods. Another hospitalization occurred because of severe rage outbursts. Prior to admission, the student had to be physically restrained at home. He had also threatened to kill his 16-year-old sister, who was pregnant.).

¹⁹⁵ *Old Orchard Beach Sch. Dept.*, 21 IDELR 1084 (SEA Me. 1994) (A student made poor choices and was aware of the consequences of her choices.).

peers and teachers was found to be ED.¹⁹⁶ A student whose severe emotional and behavioral problems went far beyond that of a typical ADHD student was also found to be ED.¹⁹⁷ Conversely, a student diagnosed with ADD and ODD did not suffer from an “inability to learn,” but, rather, according to a hearing officer, an “unwillingness to do the work.”¹⁹⁸

Case Study

In *Laughlin III v. Central Bucks Sch. Dist.*,¹⁹⁹ the parents of a student with ADHD objected to the school district also classifying their child as ED. The court held that the student’s severe emotional and behavioral problems went far beyond that of a typical ADHD student. A psychoeducational evaluation conducted during the student’s third grade year provided that:

Personality assessment measures are reflective of an undersocialized youngster who shows evidence of pervasive anger as well as anxiety. He has a rich and often uncensored fantasy life that is filled with elements of hostility, danger and damage. Harry is a very troubled, insecure young man with poor self-esteem, whose controlling and negativistic behavior is seen in part as compensatory to his feelings of inadequacy and powerlessness. Harry has clearly, at this point, adopted an oppositional stance to authority, and focuses most of his energies into

controlling and manipulative interactional patterns.²⁰⁰

The student was also admitted to in-patient psychiatric hospitalization during the spring of his fourth grade because he

had threatened to run away or to kill himself, had become more physically violent, and had threatened violence against his mother. He reported that he sometimes heard voices saying “kill me” when someone picked on him and made him angry. In addition, he had “apparently established himself as an admired deviant powerful figure amongst his peers,” some of whom got “into trouble” by “follow[ing] his example.”²⁰¹

The court upheld the school’s classification of the student as ED and its placement of the student in a combination ED and learning disabled program.

¹⁹⁶ *Onteora Central Sch. Dist.*, 1987-88 EHLR DEC. 509:129 (SEA N.Y. 1987); *see also Laughlin III v. Central Bucks Sch. Dist.*, 20 IDELR 894 (E.D. Pa. 1994) (A student’s proposed placement in a combination ED and LD (learning disabled) program was appropriate since the student’s severe emotional and behavioral problems went far beyond that of a typical attention deficient hyperactivity disorder child.).

¹⁹⁷ *Laughlin III v. Central Bucks Sch. Dist.*, 20 IDELR 894 (E.D. Pa. 1994).

¹⁹⁸ *Mobile County Bd. of Educ.*, 23 IDELR 594, 599 (SEA Ala. 1995).

¹⁹⁹ 20 IDELR 894 (E.D. Pa. 1994).

²⁰⁰ *Id.* at 896 (quoting from a psychoeducational evaluation compiled by a licensed clinical and certified school psychologist).

²⁰¹ *Id.* at 897.

It may assist the educator to break down each part of the regulation discussed in this guide and apply the various definitions to a particular situation.

CONCLUSION

As this *Guide to Identification* makes apparent, determining whether a student qualifies for special education and related services under the ED disability category is not an easy task.

It may assist the educator to break down each part of the regulation discussed in this guide and apply the various definitions to a particular situation. School personnel should not forget that each student must be evaluated on a case-by-case basis. A student may not be determined to be eligible or ineligible for special education and related services because he/she has or does not have a specific disorder or condition.

Because ED as a disability category is such a complex area, the need for documentation is vital. Documentation describing a student's behavior, as well as the actions taken by the school district, will be necessary in those instances where a district's identification, determination, or actions are questioned.