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7CHECKLIST FOR IDENTIFYING STUDENTS ELIGIBLE UNDER THE IDEA HAVING AN EMOTIONALLY
DISTURBANCE (ED): AN UPDATE [FNA1]**PERRY A. ZIRKEL, PH.D., J.D., LL.M. [FNAA1]**

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This checklist is an update of its first formulation two decades ago. [FN1] The purpose is to canvass the court decisions concerning eligibility under the “emotional disturbance” (ED) classification of the Individuals with Disabilities Education Act (IDEA) in relation to the various criteria in the definition of ED. [FN2] This systematic examination identifies the nature and extent of the adjudicated interpretations of this controversial definition. [FN3] More specifically, *8 the checklist tracks the criteria in the unchanged definition of ED in the IDEA [FN4] in a flowchart-type sequence, showing the applicable court rulings [FN5] for each of the criteria in terms of whether the court ruled YES or NO. [FN6] The font size of the “X” entry approximates the weight of case law cited in the footnote for each one. [FN7]

The practical uses of the checklist include (1) having a systematic decisional framework for determining ED eligibility, (2) readily accessing the precedents interpreting each of the respective criteria, and (3) observing the trends in the case law to date. The three major findings are as follows:

1. criterion #1c (inappropriate behavior) is the most litigated initial doorway to ED eligibility, with the case law moderately favoring a YES
2. the major stumbling blocks to ED eligibility are the adverse effect (criterion #3) and social maladjustment (criterion #4)
3. the need for special education (criterion #5)

The first finding is not surprising, given the high stakes of behavior in the K–12 school setting. The frequency and outcomes of the social maladjustment criterion are also not unexpected in light of the circular language and at best ambivalent response to students who persistently exhibit unacceptable conduct. [FN8] Finally, the adverse effect criterion poses a relatively high hurdle for eligibility serves, in effect, as the other side of the coin for the paucity of litigation concerning the need for special education.

***9 CHECKLIST FOR DETERMINING ED ELIGIBILITY UNDER THE IDEA**

Criteria	Yes	No
1. Has the student exhibited <u>one or more</u> of the following characteristics: ^{FN [FN9]}		
a. an inability to learn that cannot be explained by intellectual, sensory, or health factors? - OR -		^{FN [FN10]} X
b. an inability to build or maintain satisfactory interpersonal relationships with peers and teachers? - OR -	^{FN [FN11]} X	^{FN [FN12]} X
c. inappropriate types of behavior or feelings under normal circumstances? -OR-	^{FN [FN13]} X	^{FN [FN14]} X
d. a general pervasive mood of unhappiness or depression? - OR -	^{FN [FN15]} X	^{FN [FN16]} X
e. a tendency to develop physical symptoms or fears associated with personal or school problems?	^{FN [FN17]} X	^{FN [FN18]} X
2. If YES, has the student exhibited said characteristic(s) at <u>both</u> of these levels: ^{FN [FN19]}		
a. for a long period of time? - AND -		
b. to a marked degree?	^{FN [FN20]} X	^{FN [FN21]} X
3. If YES, has the condition adversely affected the	^{FN [FN23]} X	^{FN [FN24]} X

student's educational performance?^{FN [FN22]}

4. If YES, is the student solely socially maladjusted
(i.e., not also meeting the criteria in ##1-3)?^{FN [FN25]}

X^{FN [FN26]}

X^{FN [FN27]}

5. If NO, as the result of a condition meeting the
criteria in ##1-3), does the student require special
education?^{FN [FN28]}

X^{FN [FN29]}

X^{FN [FN30]}

Alternatively, as the matter of the sequence of items in the checklist, this exclusionary criterion could be first, except that determining its sole role would seem to require tracking the overlapping criteria here listed before it. Alternatively, the child could be both socially maladjusted and ED but the adverse effect could be attributable to either one alone, thus fitting in criteria ## 4 and/or 5. This alternative interpretation arguably is more sensible. *See, e.g., W.G. v. New York City Dep't of Educ.*, 801 F.Supp.2d 142, 169 [274 Ed.Law Rep. [438]] (S.D.N.Y 2011) (“This somewhat circular sounding qualifier would be meaningless if simple demonstration of the criteria and adverse academic performance were sufficient in all cases to warrant the emotional disturbance disability classification”).

FN9. 34 C.F.R. § 300.8(c)(4)(i)(A)-(E).

FN10. *P.C. v. Oceanside Union Free Sch. Dist.*, 818 F.Supp.2d 516 [277 Ed.Law Rep. [888]] (E.D.N.Y. 2011); *Brendan K. v. Easton Area Sch. Dist.*, 47 IDELR ¶ 249 (E.D. Pa. 2007); *Katharine S. v. Umbach*, 36 IDELR ¶ 63 (M.D. Ala. 2002); *Barnard Sch. Dist. v. R.M.*, EHLR 555:263 (D. Vt. 1983).

FN11. *Hansen v. Republic R-III Sch. Dist.*, 632 F.3d 1024 [265 Ed.Law Rep. [9]] (8th Cir. 2011); *Venus Indep. Sch. Dist. v. Daniel S.*, 36 IDELR ¶ 185 (N.D. Tex. 2002); *Lapides v. Goto*, EHLR 559:387 (N.D. Cal. 1988); *cf. Pohorecki v. Anthony Wayne Local Sch. Dist.*, 637 F.Supp.2d 547 [248 Ed.Law Rep. [690]] (N.D. Ohio 2009) (confirming district's classification as reasonable rather than autism).

FN12. *R.B. v. Napa Valley Sch. Dist.*, 496 F.3d 932 [223 Ed.Law Rep. [559]] (9th Cir. 2007); *Springer v. Fairfax Cnty. Sch. Dist.*, 134 F.3d 659 [123 Ed.Law Rep. [478]] (4th Cir. 1998); *P.C. v. Oceanside Union Free Sch. Dist.*, 818 F.Supp.2d 516 [277 Ed. Law Rep. [888]] (E.D.N.Y. 2011); *W.G. v. New York City Dep't of Educ.*, 801 F.Supp.2d 142 [274 Ed.Law Rep. [438]] (S.D.N.Y 2011); *Torrance Unified Sch. Dist. v. E.M.*, 51 IDELR ¶ 11 (E.D. Cal. 2008); *Brendan K. v. Easton Area Sch. Dist.*, 47 IDELR ¶ 249 (E.D. Pa. 2007); *Katherine S. v. Umbach*, 36 IDELR ¶ 63 (M.D. Ala. 2002).

FN13. *Muller v. Comm. on Special Educ.*, 145 F.3d 95 [127 Ed.Law Rep. [36]] (2d Cir. 1998); *Eschenasy v. New York City Dep't of Educ.*, 604 F.Supp.2d 639 [243 Ed.Law Rep. [722]] (S.D.N.Y. 2009); *N.G. v. Dist. of Columbia*, 556

F.Supp.2d 11 [234 Ed.Law Rep. [660]] (D.D.C. 2008); *Torrance Unified Sch. Dist. v. E.M.*, 51 IDELR ¶ 11 (E.D. Cal. 2008); *Brendan K. v. Easton Area Sch. Dist.*, 47 IDELR ¶ 249 (E.D. Pa. 2007); *Venus Indep. Sch. Dist. v. Daniel S.*, 36 IDELR ¶ 185 (N.D. Tex. 2002); *Johnson v. Metro Davidson Cnty. Sch. Sys.*, 108 F.Supp.2d 906 (M.D. Tenn. 2000); *Lapides v. Coto*, EHLR 559:387 (N.D. Cal. 1988); cf. *J.S. v. Scarsdale Union Free Sch. Dist.*, 826 F.Supp.2d 635 [279 Ed.Law Rep. [229]] (S.D.N.Y. 2011) (“might qualify”); *Pohorecki v. Anthony Wayne Local Sch. Dist.*, 637 F.Supp.2d 547 [248 Ed.Law Rep. [690]] (N.D. Ohio 2009) (confirming district’s classification as reasonable rather than autism).

FN14. *Mr. and Mrs. N.C. v. Bedford Cent. Sch. Dist.*, 300 Fed.Appx. 11 [241 Ed.Law Rep. [60]] (2d Cir. 2008); *R.B. v. Napa Valley Sch. Dist.*, 496 F.3d 932 [223 Ed.Law Rep. [559]] (9th Cir. 2007); *Katherine S. v. Umbach*, 36 IDELR ¶ 63 (M.D. Ala. 2002); cf. *P.C. v. Oceanside Union Free Sch. Dist.*, 818 F.Supp.2d 516 [277 Ed.Law Rep. [888]] (E.D.N.Y. 2011) (at least not at the requisite level); *W.G. v. New York City Dep’t of Educ.*, 801 F.Supp.2d 142 [274 Ed.Law Rep. [438]] (S.D.N.Y. 2011) (attributable to social maladjustment).

FN15. *Muller v. Comm. on Special Educ.*, 145 F.3d 95 [127 Ed.Law Rep. [36]] (2d Cir. 1998); *Eschenasy v. New York City Dep’t of Educ.*, 604 F.Supp.2d 639 [243 Ed.Law Rep. [722]] (S.D.N.Y. 2009); *N.G. v. Dist. of Columbia*, 556 F.Supp.2d 11 [234 Ed.Law Rep. [660]] (D.D.C. 2008); *R.C. v. York Sch. Dep’t*, 51 IDELR ¶ 68 (D. Me. 2008), *magistrate’s recommendation adopted*, 51 IDELR ¶ 217 (D. Me. 2008); *N.G. v. Dist. of Columbia*, 556 F.Supp.2d 11 [234 Ed.Law Rep. [660]] (D.D.C. 2008); *Brendan K. v. Easton Area Sch. Dist.*, 47 IDELR ¶ 249 (E.D. Pa. 2007); *Lapides v. Coto*, EHLR 559:387 (N.D. Cal. 1987); cf. *Pohorecki v. Anthony Wayne Local Sch. Dist.*, 637 F.Supp.2d 547 [248 Ed.Law Rep. [690]] (N.D. Ohio 2009) (confirming district’s classification as reasonable rather than autism and only partial to extent of “depressive tendencies”).

FN16. *Mr. and Mrs. N.C. v. Bedford Cent. Sch. Dist.*, 300 Fed.Appx. 11 [241 Ed.Law Rep. [60]] (2d Cir. 2008); *Springer v. Fairfax Cnty. Sch. Dist.*, 134 F.3d 659 [123 Ed.Law Rep. [478]] (4th Cir. 1998); *W.G. v. New York City Dep’t of Educ.*, 801 F.Supp.2d 142 [274 Ed.Law Rep. [438]] (S.D.N.Y. 2011); *Torrance Unified Sch. Dist. v. E.M.*, 51 IDELR ¶ 11 (E.D. Cal. 2008); *Katherine S. v. Umbach*, 36 IDELR ¶ 63 (M.D. Ala. 2002); *Doe v. Sequoia Union High Sch. Dist.*, EHLR 559:133 (N.D. Cal. 1987).

FN17. *Venus Indep. Sch. Dist. v. Daniel S.*, 36 IDELR ¶ 185 (N.D. Tex. 2002).

FN18. *P.C. v. Oceanside Union Free Sch. Dist.*, 818 F.Supp.2d 516 [277 Ed.Law Rep. [888]] (E.D.N.Y. 2011); *Brendan K. v. Easton Area Sch. Dist.*, 47 IDELR 1249 (E.D. Pa. 2007); *Katherine S. v. Umbach*, 36 IDELR ¶ 63 (M.D. Ala. 2002).

FN19. 34 C.F.R. § 300.8(c)(4)(i).

FN20. *Muller v. Comm. on Special Educ.*, 145 F.3d 95 [127 Ed.Law Rep. [36]] (2d Cir. 1998); *Lauren G. v. W. Chester Area Sch. Dist.*, 2012 WL 5400215 (E.D. Pa. 2012); *Reg’l Sch. Dist. No. 9 v. Mr. and Mrs. M.*, 53 IDELR ¶ 8 (D. Conn. 2009); *R.C. v. York Sch. Dep’t*, 51 IDELR ¶ 68 (D. Me. 2008), *magistrate’s recommendation adopted*, 51 IDELR ¶ 217 (D. Me. 2008); *Johnson v. Metro Davidson Cnty. Sch. Sys.*, 108 F.Supp.2d 906 (M.D. Tenn. 2000).

FN21. *R.B. v. Napa Valley Sch. Dist.*, 496 F.3d 932 [223 Ed.Law Rep. [559]] (9th Cir. 2007) (for criterion 1d); *J.S. v. Scarsdale Union Free Sch. Dist.*, 826 F.Supp.2d 635 [279 Ed.Law Rep. [229]] (S.D.N.Y. 2011); *P.C. v. Oceanside Union Free Sch. Dist.*, 818 F.Supp.2d 516 [277 Ed.Law Rep. [888]] (E.D.N. Y. 2011); *Torrance Unified Sch. Dist. v. E.M.*, 51 IDELR ¶ 11 (E.D. Cal. 2008); *St. Joseph-Ogden Cmty. High Sch. Dist. No. 305 v. Janet W.*, 49 IDELR ¶ 125 (CD. Ill. 2008) (for criterion 1c); *Brendan K. v. Easton Area Sch. Dist.*, 47 IDELR ¶ 249 (E.D. Pa. 2007) (for criteria 1c and 1d); cf. *Hoffman v. E. Troy Sch. Dist.*, 38 F.Supp.2d 750 [133 Ed.Law Rep. [897]] (E.D. Wis. 1999) (child find in relation to severity standard in state law).

FN22. 34 C.F.R. § 300.8(c)(4)(i). This criterion connects with criterion #5, which effectively provides the extent of this adverse effect.

FN23. *Eschenasy v. New York City Dep’t of Educ.*, 604 F.Supp.2d 639 [243 Ed.Law Rep. [722]] (S.D.N.Y. 2009); *N.G. v. Dist. of Columbia*, 556 F.Supp.2d 11 [234 Ed.Law Rep. [660]] (D.D.C. 2008); *Venus Indep. Sch. Dist. v. Daniel S.*, 36 IDELR ¶ 185 (N.D. Tex. 2002); *Johnson v. Metro Davidson Cnty. Sch. Sys.*, 108 F.Supp.2d 906 (M.D. Tenn. 2000);

Lapides v. Coto, EHLR 559:387 (N.D. Cal. 1987); *cf. Bd. of Educ. v. S.G.*, 230 Fed.Appx. 330 [222 Ed.Law Rep. [119]] (4th Cir. 2007) (concluding that the absences were relevant factor based on school environment impacted the student's schizophrenia).

FN24. *Mr. and Mrs. N.C. v. Bedford Cent. Sch. Dist.*, 300 Fed.Appx. 11 [241 Ed.Law Rep. [60]] (2d Cir. 2008); *C.J. v. Indian River Cnty. Sch. Dist.*, 41 IDELR ¶ 120 (11th Cir. 2004); *J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60 [147 Ed.Law Rep. [39]] (2d Cir. 2000); *R. C. v. York Sch. Dep't*, 51 IDELR ¶ 68 (D. Me. 2008), *magistrate's recommendation adopted*, 51 IDELR ¶ 217 (D. Me. 2008); *Doe v. Bd. of Educ.*, 753 F. Supp. 65 [65 Ed.Law Rep. [109]] (D. Conn. 1990); *cf. Nguyen v. Dist. of Columbia*, 681 F.Supp.2d 49 [255 Ed.Law Rep. [233]] (D.D.C. 2010) (concluding that other factors were the causal links).

FN25. The specific language of this circular exclusion, which is akin to a Venn diagram of two overlapping ovals, is as follows: “The term [ED] does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance [as defined via the stated criteria]. 34 C.F.R. § 300.8(c)(4)(h). Schizophrenia, as compared with pure social maladjustment, is not a disqualifying condition *Id.* Conversely, autism does not apply if a child's educational performance is adversely affected primarily because the child has an ED. *Id.* § 300.8(c)(1)(ii).

FN26. *Springer v. Fairfax Cnty. Sch. Dist.*, 134 F.3d 659 [123 Ed.Law Rep. [478]] (4th Cir. 1998); *A.E. v. Indep. Sch. Dist. No. 25*, 936 F.2d 472 [68 Ed.Law Rep. [278]] (10th Cir. 1991); *W.G. v. New York City Dep't of Educ.*, 801 F.Supp.2d 142 [274 Ed.Law Rep. [438]] (S.D.N.Y. 2011); *Doe v. Sequoia Union High Sch. Dist.*, EHLR 559:133 (N.D. Cal. 1987) (adverse effect attributable to social maladjustment); *cf. Mr. and Mrs. N.C. v. Bedford Cent. Sch. Dist.*, 300 Fed.Appx. 11 [241 Ed.Law Rep. [60]] (2d Cir. 2008) (concluding that the inappropriate behavior was more consistent with social maladjustment than ED); *Brendan K. v. Easton Area Sch. Dist.*, 47 IDELR ¶ 249 (E.D. Pa. 2007) (following *Springer* but then alternatively proceeding to non-solely analysis); *Mars Area Sch. Dist. v. Laurie L.*, 827 A.2d 1249 [178 Ed.Law Rep. [868]] (Pa. Commw. Ct. 2003) (concluding that die student was socially maladjusted, not ED).

FN27. *Hansen v. Republic R-III Sch. Dist.*, 632 F.3d 1024 [265 Ed.Law Rep. [9]] (8th Cir. 2011) (adverse effect attributable to ED).

FN28. More specifically, the wording of the regulations is: “by reason thereof needs special education and related services.” 34 C.F.R. § 300.8(a). As aforementioned (*supra* note 22), this criterion interrelates with criterion #3.

FN29. *Venus Indep. Sch. Dist. v. Daniel S.*, 36 IDELR ¶ 185 (N.D. Tex. 2002); *cf. Johnson v. Metro Davidson Cnty. Sch. Sys.*, 108 F.Supp.2d 906 (M.D. Tenn. 2000) (implicit based on adverse effect without separate ruling on this criterion).

FN30. *C.J. v. Indian River Cnty. Sch. Dist.*, 41 IDELR ¶ 120 (11th Cir. 2004); *cf. Springer v. Fairfax Cnty. Sch. Dist.*, 134 F.3d 659 [123 Ed.Law Rep. [478]] (4th Cir. 1998) (lack of causal connection); *Munir v. Pottsville Area Sch. Dist.*, 59 IDELR ¶ 35 (M.D. Pa. 2012) (child find); *J.S. v. Scarsdale Union Free Sch. Dist.*, 826 F.Supp.2d 635 [279 Ed.Law Rep. [229]] (S.D.N.Y. 2011) (cryptic analysis).

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[FN1]. Perry A. Zirkel, *A Legal Checklist for Determining “SED” Eligibility*, 7 THE SPECIAL EDUCATOR 257 (May 1992).

[FN2]. Under the previous regulations, the designation for this classification was “serious emotional disturbance.” The most recent IDEA regulations, which the U.S. Department of Education issued on August 14, 2006, make that the difference is semantic rather than substantive, clarifying that this same designation is “referred to in this part as

‘emotional disturbance.’ ” 34 C.F.R. § 300.8(a)(1).

[FN3]. For an earlier wave of controversy, see, e.g., David B. Center, *Social Maladjustment: Definition, Identification, and Programming*, 22 FOCUS EXCEPTIONAL CHILD. 1 (Sept. 1989); Steven R. Forness & Jane Kritzer, *A New Proposed Definition and Terminology to Replace “Serious Emotional Disturbance” in Individuals with Disabilities Education Act*, 21 SCH. PSYCH. REV. 12 (1992); Jane Slenkovich, *Can the Language Social Maladjustment Language in the SED Definition Be Ignored*, 21 SCH. PSYCH. REV. 21 and 43 (1992); Russell Skiba & Kenneth Grizzle, *Opening the Floodgates: The Social Maladjustment Exclusion and State SED Prevalence Rates*, 32 SCH. PSYCH. REV. 267 (1994). In response to the most recent wave of criticism of the definition of ED, including the “social maladjustment” provision, the Department responded as follows in the commentary accompanying the final version of the 2006 regulations:

Historically, it has been very difficult for the field to come to consensus on the definition of [ED], which has remained unchanged since 1977. On February 10, 1993, the Department published a “Notice of Inquiry” in the Federal Register (58 FR 7938) soliciting comments on the existing definition of serious emotional disturbance. The comments received in response to the notice of inquiry expressed a wide range of opinions and no consensus on the definition was reached. Given the lack of consensus and the fact that Congress did not make any changes that required changing the definition, the Department recommended that the definition of [ED] remain unchanged. We reviewed the Act and the comments received in response to the NPRM and have come to the same conclusion. Therefore, we decline to make any changes to the definition of [ED].

71 Fed. Reg. 46,550 (Aug. 14, 2006). For the latest professional view, see the November 2004 special–theme issue of PSYCHOLOGY IN THE SCHOOLS.

[FN4]. 34 C.F.R. § 300.8(c)(4). Some state laws provide a variation of this set of definitional criteria. New Jersey, for example, includes social maladjustment as a separate qualifying classification rather than as a partial exclusion. N.J. ADMIN. CODE § 6A:14–3.5(c)(11) (2011). As another example, Iowa follows the federal definition of emotional disturbance but with no exclusion for social maladjustment. IOWA ADMIN. CODE 281–41.50(2).

[FN5]. Although extending to court decisions that are not officially published, the scope of coverage does not extend to hearing or review officer decisions. Similarly, it does not include OSEP policy letters. See, e.g., *Letter to Woodson*, EHLR 213:224 (OSEP 1989).

[FN6]. Court decisions are cited in more than one footnote to the extent that they ruled definitively on more than one of the criteria. Conversely, court decisions that determined eligibility under this IDEA classification without a separable ruling on one or more of the criteria are not included herein. See, e.g., *New Paltz Cent. Sch. Dist. v. St. Pierre*, 307 F.Supp.2d 394 [186 Ed.Law Rep. [753]] (N.D.N.Y. 2003) (eligible); *Richardson v. Dist. of Columbia*, 541 F.Supp.2d 346 [231 Ed.Law Rep. [715]] (D.D.C. 2008); *Maricus v. Lanett City Bd. of Educ.*, 141 F.Supp.2d 1064 [154 Ed.Law Rep. [525]] (M.D. Ala. 2001) (not eligible). The overlap with adjoining issues, such as child find and FAPE, also contributed to a less than bright boundary for the scope of the case law. See, e.g., *Reg'l Sch. Dist. No. 9 v. Mr. and Mrs. M.*, 53 IDELR ¶ 8 (D. Conn. 2009).

[FN7]. The entries, represented by three successive sizes of an “X,” are only a tentative approximation on a national basis, with particularly higher weighting for federal appellate decisions. The intervening variables include not only the interpretation of the court’s opinion but also—and most significantly for a particular setting—the jurisdictional fit of the cited case law.

[FN8]. For an early example of the resistance to ED eligibility for children with social maladjustment, see JANE

SLENKOVICH, PL 94-142 AS APPLIED TO DSM III DIAGNOSES 17 (1983) (arguing, from the perspective of a school district lawyer, that this exclusion was broad-based, requiring an additional clinical diagnosis beyond social maladjustment).

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