7CHECKLIST FOR IDENTIFYING STUDENTS ELIGIBLE UNDER THE IDEA HAVING AN EMOTIONALLY DISTURBANCE (ED): AN UPDATE [FNA1]

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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

<table>
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<th>Criteria</th>
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<td>1. Has the student exhibited <strong>one or more</strong> of the following characteristics:</td>
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<td>a. an inability to learn that cannot be explained by intellectual, sensory, or health factors? - OR -</td>
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<tr>
<td>b. an inability to build or maintain satisfactory interpersonal relationships with peers and teachers? - OR -</td>
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<tr>
<td>c. inappropriate types of behavior or feelings under normal circumstances? - OR -</td>
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<tr>
<td>d. a general pervasive mood of unhappiness or depression? - OR -</td>
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<tr>
<td>e. a tendency to develop physical symptoms or fears associated with personal or school problems?</td>
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<tr>
<td>2. If YES, has the student exhibited said characteristic(s) at both of these levels:</td>
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<td>a. for a long period of time? - AND -</td>
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<tr>
<td>b. to a marked degree?</td>
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<tr>
<td>3. If YES, has the condition adversely affected the</td>
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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]xFN [FN26]xFN [FN27]

5. If NO, as the result of a condition meeting the criteria in #1-3), does the student require special education?FN [FN28]xFN [FN29]xFN [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).


FN19. 34 C.F.R.§ 300.8(c)(4)(i).


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.


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).


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.


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[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].


[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); Marcus 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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