Checklist for Identifying Students As Eligible under the IDEA Classification of Emotional Disturbance (ED): An Update*

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This checklist is the most recent update of this checklist’s original version two decades ago.¹ The purpose is to provide a comprehensive, up-to-date, and systematic synthesis of the court decisions² concerning eligibility under “emotional disturbance” (ED) classification of the Individuals with Disabilities Education Act (IDEA) in relation to the various criteria in the definition of ED.³ This systematic examination identifies the nature and extent of the adjudicated interpretations of this controversial definition.⁴ More specifically, the checklist tracks the criteria in the unchanged definition of ED in the IDEA⁵ via a flowchart-type sequence, showing the applicable court rulings⁶ for each of the criteria in terms of whether the court ruled YES or NO.⁷ The font size of the “X” entry approximates the weight of case law cited in the footnote for each one.⁸

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 answer

2) the major stumbling blocks to ED eligibility are the subsequent essential elements of adverse effect (criterion #3) and social maladjustment (criterion #4)

* This article appeared in West’s Education Law Reporter, 2013, v. 286, pp. 7-11. The updates are highlighted in yellow.
3) **the courts often do not address** 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. 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.
# Checklist for Determining ED Eligibility under the IDEA

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Has the student exhibited one or more of the following characteristics(^{11}):</td>
<td></td>
<td></td>
</tr>
<tr>
<td>a. an inability to learn that cannot be explained by intellectual, sensory, or health factors? - OR -</td>
<td>X(^{12})</td>
<td></td>
</tr>
<tr>
<td>b. an inability to build or maintain satisfactory interpersonal relationships with peers and teachers? - OR -</td>
<td>X(^{13})</td>
<td>X(^{14})</td>
</tr>
<tr>
<td>c. inappropriate types of behavior or feelings under normal circumstances? - OR -</td>
<td>X(^{15})</td>
<td>X(^{16})</td>
</tr>
<tr>
<td>d. a general pervasive mood of unhappiness or depression? - OR -</td>
<td>X(^{17})</td>
<td>X(^{18})</td>
</tr>
<tr>
<td>e. a tendency to develop physical symptoms or fears associated with personal or school problems?</td>
<td>X(^{19})</td>
<td>X(^{20})</td>
</tr>
<tr>
<td>2. If YES, has the student exhibited said characteristic(s) at both of these levels(^{21}):</td>
<td></td>
<td></td>
</tr>
<tr>
<td>a. for a long period of time? – AND -</td>
<td></td>
<td></td>
</tr>
<tr>
<td>b. to a marked degree?</td>
<td>X(^{22})</td>
<td>X(^{23})</td>
</tr>
<tr>
<td>3. If YES, has the condition adversely affected the student’s educational performance?(^{24})</td>
<td>X(^{25})</td>
<td>X(^{26})</td>
</tr>
<tr>
<td>4. If YES, is the student solely socially maladjusted (i.e., not also meeting the criteria in ##1-3)?(^{27})</td>
<td>X(^{28})</td>
<td>X(^{29})</td>
</tr>
<tr>
<td>5. If NO, as the result of a condition meeting the criteria in ##1-3), does the student require special education?(^{30})</td>
<td>X(^{31})</td>
<td>X(^{32})</td>
</tr>
</tbody>
</table>
extend to January 1, 2009, increased the odds of me arguably being substantially limited. The passage of the ADA Amendments Act, which went into effect concentration and possibly implicitly including behavioral control and social interaction, that may as the requisite impairment and various major life activity alternatives, expressly 504 provides an eligibility alternative based even on social maladjustment or one of its related diagnoses maladjustment.

Iowa follows the federal definition of emotional disturbance but with no exclusion for social as a partial exclusion.

New Jersey, for example, includes social maladjustment as a separate qualifying classification. Students

THE

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Shanna S. Sadeh,


regulations:

Department responded as follows in the commentary accompanying the final version recent wave of criticism of the definition of ED, including the “social maladjustment” provision, the Exclusion and State SED Pr

and 43 (1992); Russell Skiba & Kenneth Grizzle, 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].


34 C.F.R. § 300.8(a)(1).

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:

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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). As another example, both Indiana and Iowa follows the federal definition of emotional disturbance but with no exclusion for social maladjustment. 511 IND. ADMIN. CODE r. 7-41-7; IOWA ADMIN. CODE 281-41.50(2). Moreover, Section 504 provides an eligibility alternative based even on social maladjustment or one of its related diagnoses as (1) the requisite impairment and (2) various major life activity alternatives, expressly including concentration and possibly implicitly including behavioral control and social interaction, that may arguably be (3) substantially limited. The passage of the ADA Amendments Act, which went into effect on January 1, 2009, increased the odds of meeting the second and third criteria.

In addition to the aforementioned exclusions (supra note 2), the scope of coverage does not extend to OSEP policy letters. E.g., Letter to Woodson, 213 IDELR 224 (OSEP 1989); Letter to


8 The entries, represented by five successive sizes of an “X,” are only a tentative approximation on a national basis, culminating in the highest weighting for published 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.

9 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 enough to extend to disruptive behavior and clinical diagnosis beyond social maladjustment).

10 The case law concerning eligibility for other IDEA classifications often focus on the need for special education. E.g., Perry A. Zirkel, The Legal Meaning of Specific Learning Disability for IDEA Eligibility: The Latest Case Law, 41 COMMUNIQUE 10 (Jan./Feb. 2013). However, the specific extent may depend on the format for data collection and analysis. E.g., Perry A. Zirkel, ADDHD Checklist for Identification under the IDEA and Section 504/ADA, 293 EDUC. L. REP. 13 (2013) (addressing adverse effect and special education need together).

11 34 C.F.R. § 300.8(c)(4)(ii)(A)-(E).


21 34 C.F.R. § 300.8(c)(4)(i).


24 34 C.F.R. § 300.8(c)(4)(i). This criterion connects with criterion #5, which effectively provides the extent of this adverse effect.


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)(ii). 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).

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. E.g., W.G. v. N.Y.C. Dep’t of Educ., 801 F. Supp. 2d 142, 169 (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”).

Finally, in an occasional state, social maladjustment is either a separate eligibility classification or not an exclusion under the definition of ED. E.g., CAL. CODE REGS., tit. 5, § 3030; IND. ADMIN. CODE 7-41-7; IOWA ADMIN. CODE r. 41.50(2); MINN. R. 3525.1329; N.J. ADMIN. CODE 6A-14-3.5(c)(11); WIS. ADMIN. CODE (P1) § 11.36. For other state laws that exclude but define social maladjustment, see, e.g., TENN. COMP. R. & REGS. 0520-01-09-02; VT. CODE R. § 2362.1c(2). For a proposal to eliminate the exclusion in the IDEA, see Carolyn Mason, The Social Maladjustment Exclusion, 19 U.D.C. L. REV. 91 (2016).


Hansen v. Republic R-III Sch. Dist., 632 F.3d 1024 (8th Cir. 2011) (adverse effect attributable to ED and OHI); H.M. v. Weakley Cty. Bd. of Educ., 65 IDELR ¶ 68 (W.D. Tenn. 2015); Lincoln Cty,
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 24), this criterion interrelates with criterion #3.
