

**LEGAL ISSUES RELATED TO EDUCATION OF
STUDENTS WITH MENTAL HEALTH DIAGNOSES**
Selected Citations and DOE Commentary

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1. Who: Eligibility for protections under IDEA?

34 C.F.R. §300.8 Child with a Disability.

(4)(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.

Vol. 71 Fed. Reg. 156 at 46550.

Historically it has been very difficult for the field to come to consensus on the definition of emotional disturbance, 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 emotional disturbance remain unchanged. We reviewed the Act and 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 emotional disturbance.

Wyoming Emotional Disability eligibility criteria.

Eligibility is established through a comprehensive evaluation in accordance with the requirements of these rules. The initial evaluation shall be conducted by qualified

professionals as determined appropriate by the school district or public agency. The initial evaluation process shall include recommendations for social, emotional, or behavioral instruction from a qualified diagnostician, such as a licensed psychologist, school psychologist, psychiatrist, or other qualified professional. The initial evaluation process shall be comprehensive and address all areas of need resulting from the suspected disability. In accordance with the requirements of these rules, a child is identified as a child with an Emotional Disability if the following criteria are met:

- (i) Documentation from regular education positive behavioral interventions evidences that the behavior adversely affects the child's educational performance.
- (ii) The child continues to exhibit behavioral or emotional characteristics over a long period of time and to a marked degree that adversely affects the child's educational performance as evidence by one (1) or more of the following:
 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.
- (iii) The term does not apply to children who are socially maladjusted, unless it is determined that they have an Emotional Disability consistent with the criteria above.

34 C.F.R. §300.8 Child with a Disability.

(9) *Other health impairment* means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that –

- (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, rheumatic fever, sickle cell anemia, and Tourette syndrome; and
- (ii) Adversely affects a child's educational performance.

Vol. 71 Fed. Reg. 156 at 46550.

The list of acute or chronic health conditions in the definition of other health impairment is not exhaustive, but rather provides examples of problems that children have that could make them eligible for special education and related services under the category of other health impairment. We decline to include dysphagia, FAS, bipolar disorders in the definition of other health impairment because these conditions are commonly understood

to be health impairments. However, we do believe that Tourette syndrome is commonly misunderstood to be a behavioral or emotional condition, rather than a neurological condition. Therefore, including Tourette syndrome in the definition of other health impairment may help correct the misperception of Tourette syndrome as a behavioral or conduct disorder and prevent the misdiagnosis of their needs.

Wyoming Other Health Impairment eligibility criteria.

Eligibility is established through a comprehensive evaluation in accordance with the requirements of these rules. The initial evaluation shall be conducted by qualified professionals as determined appropriate by the school district or public agency. The initial evaluation process shall be comprehensive and address all areas of need resulting from the suspected disability. In accordance with the requirements of these rules, a child is identified as a child with an Other Health Impairment if the criteria below are met:

- (i) Subject to the provision below regarding attention deficit disorder or attention deficit hyperactivity disorder, documentation of an acute or chronic health problem from a licensed physician within the previous twelve (12) months for an initial evaluation;
- (ii) In concert with the above provision, as determined appropriate by a school district or public agency, a licensed psychologist or certified psychologist, in lieu of a physician may document the child meets eligibility requirements for an Other Health Impairment with respect to attention deficit disorder or attention deficit hyperactivity disorder for an initial evaluation; and
- (iii) Documentation that educational performance is adversely affected due to acute or chronic limited strength, vitality or alertness.

2. What: Services for students with mental health conditions?

IDEA requires provision of special education and related services

20 U.S.C. §1401(9) Free Appropriate Public Education.

The term ‘free appropriate public education’ means special education and related services that –

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. §1401(29) Special Education.

The term ‘special education’ means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including –

- (A) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
- (B) Instruction in physical education.

34 C.F.R. §300.39(b)(3) Specially Designed Instruction.

Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction –

- (i) To address the unique needs of the child that result from the child’s disability; and
- (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

The statute specifically identifies psychological services as related services.

20 U.S.C. §1401(26) Related Services.

(A) In General. The term “related services” means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

(B) Exception. The term does not include a medical device that is surgically implanted, or the replacement of such a device.

20 U.S.C. §1401(33) Supplementary Aids and Services.

The term ‘supplementary aids and services’ means aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate [.]

3. When: Child find for students with mental health conditions?

20 U.S.C. §1413(a)(3) Child Find.

(A) In General. All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which

children with disabilities are currently receiving needed special education and related services.

(B) Construction. Nothing in this title requires that children be classified by their disability so long as each child who has a disability listed in section 1401 of this title and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this part.

34 C.F.R. §300.101 FAPE.

(a) *General.* A free appropriate public education must be available to all children residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school [citations omitted]

...

(c) *Children advancing from grade to grade.*

(1) Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.

(2) The determination that a child described in paragraph (a) of this section is eligible under this part, must be made on an individual basis by the group responsible within the child's LEA for making eligibility determinations.

34 C.F.R. §131 Child find for parentally-placed private school children with disabilities.

(a) *General.* Each LEA must locate, identify, and evaluate all children with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district served by the LEA[.]

....

(f) *Out-of-State children.* Each LEA in which private, including religious, elementary schools and secondary schools are located must, in carrying out the child find requirements in this section, include parentally-placed private school children who reside in a State other than the State in which the private schools that they attend are located.

Wyoming Child Find.

[E]ach school district or public agency shall adopt and implement policies and procedures to ensure that all children with disabilities who reside within the school district's or public agency's educational jurisdiction, including children with disabilities attending private schools or facilities such as residential treatment centers, day treatment centers, hospitals, mental health institutions, detention and correctional facilities, children who are highly mobile, and children who are advancing from grade to grade, regardless of the severity of their disability, and who are in need of special education and related services, are located, evaluated and identified in compliance with all requirements of IDEA

Wyoming Residential placement by another entity.

Section 5(h)(i) If a child with a disability has been placed in a residential treatment facility or psychiatric hospital by another public agency or court, the residential treatment facility or hospital shall initiate action to develop, review, or revise the child's IEP

consistent with IDEA and these rules, or if necessary, evaluate and identify the child as a child with a disability according to IDEA and these rules.

(ii) The facility or hospital shall notify the child's resident school district or public agency of the child's placement at the facility or hospital. The resident school district or public agency shall participate in planning and implementing FAPE for the child.

(iii) In the event that the residential treatment facility is unable or unwilling to provide FAPE to the child as required under the IDEA, the resident school district or public agency is responsible for ensuring that the child receives FAPE.

4. Where: Placements for students with mental health conditions?

20 U.S.C. §1412(a)(5) Least Restrictive Environment.

(A) In General. To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34. C.F.R. §300.104 Residential placement.

If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

Vol. 71 Fed. Reg. No. 156 at 46581.

In situations where a child's educational needs are inseparable from the child's emotional needs and individual determination is made that the child requires the therapeutic and habilitation services of a residential program in order to "benefit from special education," these therapeutic and habilitation services may be "related services" under the Act. In such a case, the SEA is responsible for ensuring that the entire costs of that child's placement, including the therapeutic care as well as room and board, is without cost to the parents. However, the SEA is not responsible for providing medical care. Thus, visits to a doctor for treatment of medical conditions are not covered services under Part B of the Act and parents may be responsible for the cost of the medical care.

5. Why: Outcomes for students with mental health conditions?

20 U.S.C. §1400(c)(2) Findings and Purposes.

Before the date of enactment of the Education for All Handicapped Children Act of 1975(Public Law 94-142), the educational needs of millions of children with disabilities were not being fully met because –

(A) the children did not receive appropriate educational services;

- (B) the children were excluded entirely from the public school system and from being educated with their peers;
- (C) undiagnosed disabilities prevented the children from having a successful educational experience; or
- (D) a lack of adequate resources within the public school system forced families to find services outside the public school system.

6. How: Research based practices

20 U.S.C. §1400(c) Findings and Purposes.

(4) [I]mplementation of [IDEA] has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.

...

- (E) supporting high quality, intensive pre-service preparation and professional development for all personnel who work with children with disabilities in order to ensure that such personnel have the skills and knowledge necessary to improve the academic achievement and functional performance of children with disabilities, including the use of scientifically based instructional practices, to the maximum extent possible;
- (F) Providing incentives for whole-school approaches, scientifically based early reading programs, positive behavioral interventions and supports, and early intervening services to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children.

20 U.S.C. §1414(d) Individualized Education Programs.

(1)(A)(IV) [IEPs must include] a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel to enable the child –

- (aa) to advance appropriately toward attaining the annual goals;
- (bb) to be involved in and make progress in the general education curriculum . . . and to participate in extracurricular and other nonacademic activities; and
- (cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this section.

See also 34 C.F.R. §300.320 Definition of Individualized education program.

Vol. 71 Fed. Reg. No. 156 at 46664.

“Peer-reviewed research” generally refers to research that is reviewed by qualified and independent reviewers to ensure that the quality of the information meets the standards of the field before the research is published. However, there is no single definition of “peer reviewed research” because the review process varies depending on the type of information to be reviewed. We believe it is beyond the scope of these regulations to include a specific definition of “peer-reviewed research” and the various processes used for peer reviews.

Id. at 46665.

[The]Act requires special education and related services, and supplementary aids and services, to be based on peer-reviewed research to the extent practicable. States, school districts, and school personnel must, therefore, select and use methods that research has shown to be effective, to the extent that methods based on peer-reviewed research are available. This does not mean that the service with the greatest body of research is the service necessarily required for a child to receive FAPE. Likewise, there is nothing in the Act to suggest that the failure of a public agency to provide services based on peer-reviewed research would automatically result in a denial of FAPE. The final decision about the special education and related services, and supplementary aids and services that are to be provided to a child must be made by the child’s IEP Team based on the child’s individual needs.

7. The safety net: 504

29 U.S.C. 794(a). Section 504.

No otherwise qualified individual with a disability in the United States, as defined in section 706(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

34 C.F.R. 104.3j. Individual with a Disability.

A person with any “physical or mental impairment” that

- “substantially limits”
- a “major life activity” [e.g. caring for oneself, performing manual tasks, walking, seeing, speaking, breathing, learning and working]; or
- has record of such an impairment; or
- is regarded as having such an impairment

104.33 Free Appropriate Public Education

(a) *General.* A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) *Appropriate education.* (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of 104.34, 104.35, and 104.36.

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