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Notes

EDUCATIONALLY RELATED MENTAL HEALTH SERVICES FOR CHILDREN WITH SERIOUS EMOTIONAL DISTURBANCE: ADDRESSING BARRIERS TO ACCESS THROUGH THE IDEA*

In 1990, Congress found that “children with serious emotional disturbance remain the most underserved population of students with disabilities.”¹ In theory, the Individuals with Disabilities Education Act (IDEA) provides a point of access to a range of mental health services that have the potential to improve health and educational outcomes for children with serious emotional disturbance (SED)² through early identification and treatment. In practice, many factors contribute to the under-identification and inconsistency in identification of children with SED.³ Once identified, children with SED may

* The author wishes to dedicate this Comment to the memory of Stan Herr, a beloved teacher and advocate for children with disabilities.

1. H.R.REP. No. 101-544, at 39 (1990).

2. The 1997 amendments to the IDEA have renamed “Serious Emotional Disturbance,” removing the word “Serious” in an effort to destigmatize the terminology. Individuals with Disabilities Education Act Amendments for 1997, Pub. L. No. 105-17, § 602, 111 Stat. 37, 43 (1997). However, to be consistent with advocates in the mental health and special education communities, the author will use the term serious emotional disturbance (SED) in this paper. The following data collected for the Office of Special Education Programs of the U.S. Department of Education illustrates the magnitude of the issues children with SED face. Students with SED have lower grades than any other group of students with disabilities. They fail more courses and they more frequently fail minimum competency examinations than do other students with disabilities. Students with SED are also retained at grade level more often at the end of the school year. Of those who took minimum competency tests, sixty-three percent failed some part of the test. Students with SED miss more days of school per year than do students in any other disability category. Forty-two percent of youth with SED earn a high school diploma, as opposed to fifty percent of all youth with disabilities and seventy-six percent of similarly aged youth in the general population. Forty-eight percent of students with SED drop out of grades nine through twelve, as opposed to thirty percent of all students with disabilities and only twenty-four percent of all high school students. Chesapeake Institute, *National Agenda for Achieving Better Results for Children and Youth with Serious Emotional Disturbance*, 2 (Sept. 1994), available at <http://www.air.org/cecp/resources/ntlagend.html>.

3. In addition to under-identification, researchers have raised the concern that the right children may not always be the ones who are being identified. Researchers suggest that ethnicity and gender are factors in the identification of some children. See Stan Herr, *Special Education Law and Children with Reading and Other Disabilities*, 28 J.L. & EDUC. 337, 346-47 (1999); See generally Tom Parrish, Disparities in the Identification, Funding, and Provision of Special Education (Nov. 2000) (unpublished manuscript submitted to The Harvard Civil Rights Project for the Conference on Minority Issues in Special Education in

still not obtain services, and even those who do receive services do not receive them to the extent that they are entitled to. To bridge the gap between what the IDEA offers in theory and practice, advocates must identify effective strategies to cultivate interagency collaboration and administrative efficiency while addressing funding constraints.⁴

This comment examines who the special education system identifies as SED, what related mental health services the system provides, and how provisions within the IDEA should facilitate greater access. Section I provides a brief overview of the IDEA, including historical developments leading to its enactment, the objectives of the Act, and procedures for obtaining services. Sections II and III present fundamental definitional issues for children with SED who need educationally related services. Section II focuses on the regulatory definition and case law interpretations of serious emotional disturbance. Section III presents regulatory definitions of educationally related services affecting mental health needs that should be available to children with serious emotional disturbance and the case law interpretation of the related services provision. Next, Section IV summarizes the "child find" and "stay put" provisions of the IDEA in light of access to educationally related mental health services as well as the implications of IDEA disciplinary protections for children with SED not yet eligible for special education and related services. This comment then presents public policy arguments regarding why increasing access to services is critical and that school based mental health services are a part of the answer in Section V.

I. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

A. History

In 1975, Congress enacted the Education for All Handicapped Children Act, renamed the Individuals with Disabilities Education Act (IDEA) in 1990, requiring that school districts provide children with disabilities a free and appropriate public education.⁵ The legislation followed Congressional findings that of the 8 million disabled chil-

Schools, available at <http://www.law.harvard.edu/civilrights/conferences/SpecEd/parrishpaper2.html>).

4. See generally John Kastan, *School-Based Mental Health Program Development: A Case Study of Interorganizational Collaboration*, 25 J. HEALTH POL. POL'Y & L. 845 (2000). See also Jefferey A. Anderson, *The Need for Interagency Collaboration for Children with Emotional and Behavioral Disabilities and Their Families*, 81 FAMILIES IN SOCIETY: JOURNAL OF CONTEMPORARY HUMAN SERVICES 484 (2000).

5. S. REP. NO. 94-168, at 3 (1975). Several other changes were made to the Act with the 1990 amendments, including the substitution of the phrase "handicapped children" with "children with disabilities." *Id.* at § 101.

dren below the age of twenty one in 1974-1975, 2.5 million disabled children were receiving an inappropriate education, and 1.75 million children with disabilities were totally excluded from public schools.⁶ Those with emotional disabilities were among the most poorly served of disabled students. Studies revealed that in the academic year immediately preceding passage of the Act, the educational needs of eighty-two percent of all children with emotional disabilities went unmet.⁷ Congress designed the IDEA to remedy this problem by helping to finance state programs and requiring states to provide some level of educational opportunities to all disabled children as well as procedural safeguards for parents in the evaluation and placement of their children.⁸

Congress was also responding to successful federal lawsuits that challenged the denial of an appropriate education to children with disabilities. In *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania*,⁹ the United States District Court for the Eastern District of Pennsylvania entered a consent decree stating that the denial of educational services to children with mental retardation violated the Equal Protection Clause.¹⁰ The United States District Court for the District of Columbia, in *Mills v. Board of Education*,¹¹ found that the exclusion of children with disabilities from public school programs violated the Due Process Clause.¹² The IDEA addressed the equal

6. See S. REP. NO. 94-168, at 8 (1975).

7. See *id.*

8. See *id.*

9. 343 F. Supp. 279 (E.D. Pa. 1972). The court analyzed Pennsylvania statutes permitting school directors to reject students who did not have the mental capacity of a typical five-year-old, as well as laws permitting the State Board of Education to exclude "uneducable and untrainable" children from the public schools. See *id.* at 282. These statutes prevented approximately 70,000 to 80,000 children from receiving a public education. See *id.* at 281-82. A three-judge panel noted that the statutes presented serious constitutional issues concerning the children's due process and equal protection rights. See *id.* at 295-97. *PARC's* consent agreement guaranteed developmentally disabled children "access to a free public program of education and training appropriate to [their individual] capacities," with the training to take place in a regular classroom if possible. See *id.* at 314. In addition, parents were granted an active role in planning educational programs for their children. Parents were also entitled to mandatory notice of any changes in their child's education plan, an opportunity to appeal, and access to the child's records. See *id.* at 303-05.

10. See *id.* at 295-97.

11. 348 F. Supp. 866 (D.D.C. 1972).

12. The *Mills* court went a step further by explicitly holding that a statute similar to the one addressed in *PARC* was unconstitutional. See *id.* at 875-76. The statute challenged in *Mills* allowed the Board of Education to "excuse" a child from mandatory school attendance if the child was "unable mentally or physically to profit from attendance at school." See *id.* at 874. The *Mills* court held that the District of Columbia statute governing education of children with mental impairments violated constitutional due process and equal protection rights. See *id.* at 875-76. Furthermore, the *Mills* court found that "[t]he District

protection and due process issues raised in *PARC* and *Mills* through establishing the right to a free and appropriate public education in the least restrictive environment for all children with disabilities.

B. Objectives of the IDEA

The IDEA requires each state to have in effect a policy ensuring all children with disabilities the right to a free and appropriate public education (FAPE)¹³ meeting their education and related services¹⁴ needs in the least restrictive environment.¹⁵ State and local educational agencies have the responsibility of evaluating children suspected of having disabilities in order to determine their needs for special education and related services.¹⁶ Once school districts identify children with disabilities and determine the need for special education, they are responsible for annual assessments and the delivery of educationally related services necessary for the child to benefit from special education.¹⁷

The objectives of the IDEA as amended in 1997 include the following goals: ensuring that all children with disabilities have available

of Columbia's interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources." *Id.* at 876.

13. 20 U.S.C.A. § 1401(8) (West 1997) (defining a free and appropriate public education as "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, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required" under the Act). The Supreme Court has explained that a FAPE includes "personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from the instruction." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 177 (1982). However, the Court also maintained that "the requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential." *Id.* at 198.

14. See *infra* notes 96-141 and accompanying text.

15. See 20 U.S.C.A. § 1412(a)(5)(A) (West 1997). Despite the right to education in the least restrictive environment, "eighteen percent of students with SED are educated outside of their local schools, compared to six percent of all students with disabilities. Of those in their local schools, fewer than seventeen percent are educated in regular classrooms, in contrast to thirty-three percent of all students with disabilities." Chesapeake Institute, *National Agenda for Achieving Better Results for Children and Youth with Serious Emotional Disturbance*, 2 (Sept. 1994), available at <http://www.air.org/cecp/resources/ntlagend.html>.

16. 20 U.S.C.A. § 1412(a)(3)(A) (West 1997) (stating the objective that "[a]ll children with disabilities residing in the State, including 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.") [hereinafter the "child find" provision].

17. See *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 890 (1984).

to them a free appropriate public education, emphasizing special education and related services designed to meet their unique needs and prepare them for employment and independent living,¹⁸ and ensuring that the rights of children with disabilities and their parents are protected.¹⁹

The IDEA also maintains the objective of assisting states, localities, educational service agencies, and federal agencies to provide for the education of all children with disabilities.²⁰ It conveys the goal of assisting states in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families.²¹ In addition, the IDEA outlines the goals of ensuring that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting systemic-change activities, coordinated research and personnel preparation, coordinated technical assistance, dissemination, and support, and technology development and media services.²² The final stated objective of the IDEA includes the assessment and evaluation of efforts to educate children with disabilities, and efforts to ensure their effectiveness.²³

C. Procedures and Protections in the Process of Obtaining Educationally Related Services

The IDEA requires state and local education agencies to provide students suspected of having a disability with a comprehensive, culturally sensitive evaluation through the use of multiple assessment tools and strategies.²⁴ Although evaluations should occur with parental informed consent,²⁵ the agency may pursue them without consent through mediation and due process proceedings.²⁶ School personnel or the child's parents may initiate the evaluations. Reevaluation must occur every three years or if the child's teacher or parent requests it.²⁷ The evaluation should provide a determination as to whether or not

18. See 20 U.S.C.A. § 1400(d)(1)(A) (West 1997).

19. See 20 U.S.C.A. § 1400(d)(1)(B) (West 1997).

20. See 20 U.S.C.A. § 1400(d)(1)(C) (West 1997).

21. See 20 U.S.C.A. § 1400(d)(2) (West 1997).

22. See 20 U.S.C.A. § 1400(d)(3) (West 1997).

23. See 20 U.S.C.A. § 1400(d)(4) (West 1997).

24. See 20 U.S.C.A. § 1414(a)(1)(A) (West 1997).

25. See 20 U.S.C.A. § 1414(a)(1)(C)(i) (West 1997).

26. See 20 U.S.C.A. § 1414(a)(1)(C)(ii) (West 1997).

27. See 20 U.S.C.A. § 1414(a)(2) (West 1997).

the child has a disability.²⁸ If the child has a disability, the evaluation should determine his or her educational needs.²⁹

Furthermore, the IDEA requires the development of an Individualized Education Program (IEP) for children with disabilities by an interdisciplinary team that includes the child's parents and at least one of the child's special education teachers and regular classroom teachers.³⁰ Parents must also be included in any decisions regarding their child's educational placement.³¹ The IDEA requires schools to provide all services written into the child's IEP.³²

The IEP documents the child's current educational performance, including how the disability affects involvement and progress in the general curriculum.³³ It lists goals and objectives for improvement,³⁴ describes the instruction and related services that will enable the child to meet those objectives,³⁵ and describes how the goals will be evaluated.³⁶ The 1997 amendments require schools to inform parents of their child's progress toward the annual goals.³⁷ The IEP also outlines the extent the child may or may not participate in the general classroom,³⁸ and includes the projected date of the beginning of services.³⁹ The IEP process is the vehicle by which individualized special education and related services are planned, provided, and evaluated.

The IDEA provides procedural safeguards for disabled children and their parents. All records relating to the provision of a FAPE must be available to the parents of a disabled child.⁴⁰ The parents must be given an opportunity to participate in meetings with respect to the "identification, evaluation, and educational placement of the[ir] child."⁴¹ Prior written notice must be given to the parents if the educational "agency proposes to initiate or change; or refuses to

28. See 20 U.S.C.A. § 1414(a)(1)(B)(i) (West 1997).

29. See 20 U.S.C.A. § 1414(a)(1)(B)(ii) (West 1997).

30. See 20 U.S.C.A. § 1414(d)(1)(B) (West 1997).

31. See 20 U.S.C.A. § 1414(f) (West 1997).

32. See 20 U.S.C.A. § 1414(d)(2)(A) (West 1997).

33. See 20 U.S.C.A. § 1414(d)(1)(A)(i) (West 1997), *see also* 20 U.S.C.A. § 1414(d)(1)(A)(i)(I) (West 1997).

34. See 20 U.S.C.A. § 1414(d)(1)(A)(ii) (West 1997).

35. See 20 U.S.C.A. § 1414(d)(1)(A)(iii) (West 1997).

36. See 20 U.S.C.A. § 1414(d)(1)(A)(viii)(I) (West 1997).

37. See 20 U.S.C.A. § 1414(d)(1)(A)(viii)(II)(aa) (West 1997).

38. See 20 U.S.C.A. § 1414(d)(1)(A)(iv) (West 1997).

39. See 20 U.S.C.A. § 1414(a)(2) (West 1997).

40. See *id.*

41. 20 U.S.C.A. § 1415(b) (West 1997).

initiate or change; the identification, evaluation, or educational placement of the child, . . . or the provision of a [FAPE] to the child."⁴²

In addition, the IDEA guarantees parents "an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the[ir] child, or the provision of a [FAPE] to [their] child."⁴³ The IDEA provides for voluntary mediation,⁴⁴ as well as for an impartial due process hearing when the parents of a child with a disability file a complaint.⁴⁵ The IDEA provides for an appeals process if the parents are dissatisfied with the results of the hearing.⁴⁶

II. SERIOUS EMOTIONAL DISTURBANCE DEFINED

Unlike many physical disabilities, SED manifests in many ways and may be invisible. Children with SED may have no physical control over their impulses, or they may have learned maladaptive behavioral responses to social situations. They may be severely depressed and sit silently in class, or constantly break school rules and social norms, externalizing mental illness with defiant behavior.⁴⁷ Furthermore, the causes of SED vary greatly, and may be biological, environmental, or both.⁴⁸ The range of causes and behaviors impedes the identification and treatment of the majority of these children.⁴⁹

The ambiguous regulatory definition of serious emotional disturbance and inconsistencies in judicial interpretation⁵⁰ create additional obstacles to the access of educationally related mental health services. The definition's construction gives the judiciary unnecessarily broad discretion leading to different outcomes in similar cases.

The Code of Federal Regulations defines Serious Emotional Disturbance as follows:

(i) The term 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:

42. *Id.*

43. *Id.*

44. *See id.*

45. *See* 20 U.S.C.A. § 1415(f) (West 1997).

46. *See* 20 U.S.C.A. § 1415(g) (West 1997).

47. *See generally* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4TH ED. 1994).

48. *Id.*

49. *Id.*

50. *See infra* notes 51-99 and accompanying text.

- (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) The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance.⁵¹

The regulation does not adequately account for the array and intensity of symptoms experienced by children with mental illness. To fall within the definition of serious emotional disturbance, section (i) requires that the condition or conditions exhibiting characteristics within subsections (A) through (E) result in an adverse effect upon the child's educational performance. Determination of the duration ("a long period of time") and intensity ("to a marked degree") of the characteristics is completely subjective. However, even for brief periods, any of the characteristics may episodically lead to adverse effects on educational performance. Section (ii) sets forth the exclusion from the definition of SED for children who are "socially maladjusted," unless a determination has been made that the child is emotionally disturbed. The regulation thereby excludes children who are "socially maladjusted" but do not otherwise meet criteria for SED, and includes children who meet the criteria for SED and are "socially maladjusted."

The case law addressing whether or not a child has serious emotional disturbance varies, turning on the courts' interpretation of the adverse effect clause and the "socially maladjusted" exclusion. The requirement for adverse effect on educational performance excludes children with SED who are not disruptive because they are less likely to be identified for evaluation by educators. The "socially maladjusted" characterization excludes children who are disruptive because school districts and the judiciary perceive their behavior as bad conduct or a discipline problem rather than the manifestation of SED. Therefore, existing case law demonstrates the unfortunate fact that children may have SED for clinical and treatment purposes, but not

51. 34 C.F.R. § 300.7(b)(4) (1997).

meet the legal definition and thus fail to access educationally related mental health services.

A. *Conditions Adversely Affecting a Child's Education*

Neither the IDEA nor the federal regulations define the meaning of adverse effect on educational performance, leaving it to the states to give substance to the clause. Application of the adverse effect clause demonstrates the willingness of the courts to narrowly interpret regulatory definitions of SED. The court in *Doe v. Board of Education of Connecticut*⁵² used a restrictive adverse effect definition to exclude a child from related mental health services, despite his behavior and mental state as indicated by teachers, parents, and his therapist. In *Hoffman v. East Troy Community School District*,⁵³ the court applied a broader state definition of adverse effect that included social and emotional processes as well as the child's performance at home and in the community to exclude a child. In *J.D. v. Pawlet School District*,⁵⁴ the Second Circuit applied Vermont's adverse effect clause, linking the definition to a list of basic skill areas. Although the court found no adverse effect, the school district offered the child mental health services under Section 504.

In *Doe v. Board of Education of Connecticut*⁵⁵ the court applied the adverse effect clause and found that a child did not meet the threshold for SED. Doe's parents found it necessary to hospitalize him for emotional deterioration, major depression and violent behavior.⁵⁶ He broke eighteen windows during a violent outburst.⁵⁷ His psychiatrist described his condition as episodes of rage as a "last ditch effort to ward off a total experience of dysphoria."⁵⁸ The court even noted that "his sixth grade science teacher commented that his 'behavior gets in the way of his education.'"⁵⁹

The court found that his behavior and emotional difficulties did not adversely affect his educational performance.⁶⁰ Instead of consid-

52. 753 F. Supp. 65 (Conn. 1990).

53. 38 F. Supp. 2d 750 (E.D. Wis. 1999).

54. 224 F.3d 60, 65 (2d Cir. 2000).

55. *Doe*, 753 F. Supp. at 65.

56. *Id.* at 66.

57. *Id.* at 66 n.1.

58. *Id.* at 69.

59. *Id.* at 66 n.1.

60. *Id.* at 70. Connecticut law and regulations highlight the restriction to educational outcomes as indicators of SED rather than social, mental and emotional processes. Connecticut law defines a "socially and emotionally maladjusted child" as "one who is incapable of fully profiting from the general educational programs of the public schools because of some serious social or emotional handicap . . . , but who is expected to profit from

ering the condition underlying the child's behavior and the fundamental adverse effects on his educational performance, the court emphasized his grades and test scores. The child's grades and achievement test scores before, during, and after hospitalization were satisfactory or above.⁶¹ Therefore, the court reasoned that his condition did not fall within the definition of SED.⁶²

For another court, the measure of an adverse effect on academic performance through grades was not enough. In *Hoffman v. East Troy Community School District*,⁶³ the court evaluated the child's behavior and grades. He began having behavioral problems during tenth grade, including temper outbursts, shoplifting, using his parent's car without permission, using their credit cards and sleeping in class.⁶⁴ He was diagnosed with clinical depression and entered therapy, including treatment with medication.⁶⁵ His parents, like the parents in *Doe*, found it necessary to hospitalize him.⁶⁶ In addition to his behavioral issues, diagnosis, and hospitalization, the child's grades declined precipitously.⁶⁷ However, the court maintained that there was no adverse effect on his academic performance, and that the school district had no reason to even suspect that he met the criteria for SED.⁶⁸

special education." CONN. GEN. STAT. § 10-76a(i) (2000). Connecticut Regulations further define this term as "a child with a psychological condition, stemming from inter- or intrapersonal conflict, which manifests itself in behavior which significantly impedes the child's rate of educational development." CONN. AGENCIES REGS. § 10-76a-2(m) (2000). Connecticut General Statute § 10-76a(c) defines an "exceptional child" as a "child who deviates either intellectually, physically, socially or emotionally so markedly from normally expected growth and development patterns that he or she is or will be unable to progress effectively in a regular school program and needs a special class, special instruction, or special services." CONN. GEN. STAT. § 10-76a(c) (2000).

61. *Doe v. Bd. of Educ. of Conn.*, 753 F. Supp. 65, 70 (Conn. 1990).

62. *Id.*

63. 38 F. Supp. 2d 750 (E.D. Wis. 1999).

64. *Id.* at 753-54.

65. *Id.*

66. *Id.* at 756.

67. *Id.* at 754.

68. *Id.* at 767. Wisconsin Administrative Code SED definition, unlike the Connecticut code, includes the child's emotional, social, behavioral processes and outcomes in addition to educational outcomes:

Emotional disturbance is characterized by emotional, social and behavioral functioning that significantly interferes with the child's total educational program and development including the acquisition or production, or both, of appropriate academic skills, social interactions, interpersonal relationships intrapersonal adjustment. The condition denotes intraindividual and interindividual conflict or variant or deviant behavior or any combination thereof, exhibited in the social systems of school, home and community and may be recognized by the child or significant others. WIS. ADMIN. CODE § PI 11.35(g)(2).

Despite the broader characterization and the glaring decline in the child's grades, the Wisconsin court found no reason to suspect SED. *Hoffman*, 38 F. Supp. 2d at 767.

In *J.D. v. Pawlet School District*,⁶⁹ the District Court of Vermont specifically looked to the child's grades and achievement test scores and found no adverse effect, and the Second Circuit affirmed.⁷⁰ The child experienced "frustration, boredom, alienation, apathy, and hopelessness"⁷¹ that, according to his therapist, led to passive resistance as well as aggressive behavior at school.⁷² Although school officials found that he had an "emotional behavioral disability" within the meaning of the Vermont statutes, they could not reach a consensus as to whether it adversely affected his educational performance.⁷³ Although they concluded that his disability had no adverse effect on his educational performance, the school officials offered him individual counseling and training in peer relationship skills under Section 504.⁷⁴

In *Johnson v. Metro Davison County School District*,⁷⁵ the court found that although Tiffiney's grades were satisfactory, her condition had an adverse effect on her educational performance because she was unable to remain in school.⁷⁶ The court characterized Tiffiney as impulsive, manipulative, and inclined to oppositional behavior toward authority figures.⁷⁷ With deference to expert testimony regarding her diagnoses of Attention Deficit Hyperactivity Disorder, Oppositional Defiant Disorder, and Bipolar Disorder, the court noted that the record demonstrated severe behavior problems over her lifetime.⁷⁸ The

69. *J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60 (2d Cir. 2000).

70. *Id.* at 65.

71. *Id.* at 63.

72. *Id.*

73. *Id.* Vermont Special Education Regulations Rule 2362(2)(b) defines "adverse effect of the disability on educational performance" as follows:

To establish that a disability has an adverse effect on the student's educational performance, the Basic Staffing Team shall determine and document that the student is functioning significantly below expected age or grade norms, in one or more of the basic skills. This determination of adverse effect . . . shall be documented and supported by two or more measures of school performance. These measures may include but are not limited to: parent or teacher observation, grades, curriculum-based measures, work or language samples [or] other test results.

VSER 2362(2)(b) (2000).

In addition, the regulations provide: "[U]nless otherwise stated in an individual category of disability (Rule 2362.1), basic skill areas are defined as: (a) oral expression; (b) listening comprehension; (c) written expression; (d) basic reading skills; (e) reading comprehension; (f) mathematics calculation; (g) mathematics reasoning; and (h) motor skills." VSER 2362(3) (2000).

74. *J.D.*, 224 F.3d at 63-64.

75. 108 F. Supp. 2d 906 (E.D. Tenn. 2000).

76. *Id.* at 918-19.

77. *Id.* at 909.

78. *Id.* at 918.

parties disputed whether the behavior affected her educational performance.⁷⁹ Noting that Tiffney was expelled from two schools, the court found that the inability to remain in school while in a regular school environment indicated that her needs were not accommodated within the regular education system.⁸⁰ Thus, Tiffney was eligible for special education services under the IDEA due to her emotional disturbance.⁸¹

The application of the adverse effect clause is inconsistent. Despite clinical diagnoses and hospitalizations, some courts use only grades and achievement test scores as indicators of adverse effect. Other courts do factor in underlying conditions and long-term consequences such as absenteeism. However, the adverse effect clause generally operates to exclude children from educationally related mental health services.

B. Socially Maladjusted Behavior

When the court makes a determination that a child is socially maladjusted and therefore does not have SED, that child does not qualify for related services under the IDEA. The judgment as to when a child is merely exhibiting characteristics of social maladjustment rather than a diagnosable and treatable condition, when left to the courts, can be inconsistent and arbitrary.⁸²

In *Springer v. Fairfax County School Board*,⁸³ the Fourth Circuit affirmed that Edward was "socially maladjusted" rather than emotionally disturbed, focusing on the delinquent behavior that was an outward manifestation of his illness rather than the condition behind the behavior.⁸⁴ Although he scored in the average to superior range on standardized tests, his grades fell due to a high rate of absenteeism.⁸⁵ He was disciplined for driving recklessly on school property, cutting

79. *Id.* The Special Education Manual of Tennessee discusses the meaning of adverse effect on educational performance and notes that it "pertains to the child's diminished academic performance in the classroom, impaired school learning experience, and/or failure to master skill subjects." *Id.* The problems caused by emotional disturbance must be "significant enough to require interventions that cannot be provided without special education services." *Id.* Additionally, the manual notes that if the student is "making reasonable progress and their needs can be accommodated within regular education, the special education services should not be provided to these students." *Id.*

80. *Id.*

81. *Johnson v. Metro Davison County Sch. Dist.*, 108 F. Supp. 2d 906 (E.D. Tenn. 2000).

82. See *infra* notes 83-103 and accompanying text.

83. 134 F.3d 659 (4th Cir. 1998).

84. *Id.*

85. *Id.* at 666.

classes, forgery, leaving school grounds without permission, and fighting.⁸⁶ A psychiatrist diagnosed him with conduct disorder and dysthymic disorder,⁸⁷ an affective disorder with chronic and pervasive depressive symptoms.⁸⁸ However, the hearing officers relied on the school psychologist's tests, which did identify the conduct disorder, but failed to identify the dysthymia.⁸⁹

In *A.E. v. Independent School District No. 25*,⁹⁰ the Tenth Circuit affirmed the finding that a child who was hospitalized for attempting suicide was socially maladjusted, and therefore did not meet the criteria for SED.⁹¹ A.E.'s psychiatrists diagnosed her with conduct disorder related to emotional problems and borderline personality disorder.⁹² Like Edward, A.E. exhibited delinquent behavior; she was suspended for theft, fighting, tardiness, smoking, disruptions of class, and the use of improper language.⁹³ She experienced difficulties with peer interaction, impulse control, and excessive anxiety.⁹⁴ The Tenth Circuit, like the Fourth Circuit, focused on the behavior that was an outward manifestation of an illness. The court reasoned that A.E. was socially maladjusted, and therefore was not SED.⁹⁵

Yet, in *Muller v. Committee on Special Education of the East Islip Union Free School District*,⁹⁶ the Second Circuit affirmed that a child who exhibited behavior problems and attempted suicide met the criteria for SED.⁹⁷ Upon hospitalization for her suicide attempt, Treena was diagnosed with conduct disorder and depression.⁹⁸ Due to continued problems with anger, depression and impulse control, she was later

86. *Id.* at 662.

87. *Id.*

88. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 345-49 (4th ed. 1994). According to the DSM-IV, "In children, Dysthymic Disorder . . . often results in impaired school performance and social interaction. Children and adolescents with Dysthymic Disorder are usually irritable and cranky as well as depressed. They have low self-esteem and poor social skills and are pessimistic." *Id.* at 347. However, the Fourth Circuit dismissed the disorder by characterizing it as "a sort of low-grade depression . . . indicat[ing] only that Edward suffered from mild or moderate depression, if anything." *Springer*, 134 F.3d at 666.

89. *Springer v. Fairfax County Sch. Bd.*, 134 F.3d 659, 664 (4th Cir. 1998).

90. *A.E. v. Indep. Sch. Dist. No. 25*, 936 F.2d 472 (10th Cir. 1991).

91. See *id.* at 473-74.

92. *Id.*

93. *Id.* at 473.

94. *Id.*

95. See *id.* at 476.

96. 145 F.3d 95 (2d Cir. 1998).

97. See *id.* at 104.

98. See *id.* at 98.

readmitted with a diagnosis of conduct disorder, with a notation of "dysphoric" mood.⁹⁹

The District Court concluded that Treena's behavior, in combination, indicated that she exhibited "inappropriate types of behavior or feelings under normal circumstances for a long period of time and to a marked degree."¹⁰⁰ However, her behavior was similar to A.E.'s and Edward's, and included a suicide attempt, arson attempts, lies, cutting classes, failure to complete homework, stealing things, defiance, poor grades and academic performance.¹⁰¹ The District Court reversed the Impartial Hearing Officer and State Review Officer's determinations that she only met the criteria for social maladjustment, and not SED.¹⁰² In addition to affirming the District Court's finding, the Court of Appeals found that Treena met additional SED criteria through exhibiting a "generally pervasive mood of unhappiness or depression for a long time and to a marked degree" despite the fact that she was not formally diagnosed with clinical depression.¹⁰³

The case law indicates inconsistency in the use of the adverse effect and social maladjustment exclusions in the regulatory definition of SED. Courts may disregard behavior resulting from underlying mental illness, hospitalizations, and suicide attempts as indicators of SED. When excluding vulnerable children who have a predisposition toward suicidality or violence through the technicalities of the adverse effect and social maladjustment clauses, courts fail to follow the spirit of the IDEA.

III. RELATED MENTAL HEALTH SERVICES UNDER THE IDEA

Under the IDEA and enabling regulations, an extensive array of educationally related mental health services are available to identified children. However, the gap between what the law challenges states to provide and what children who have SED actually receive is extensive. Existing case law illustrates the circumstances under which children with SED currently receive services. In light of the related services holding in *Cedar Rapids v. Garret F.*,¹⁰⁴ the range of services mandated

99. *See id.*

100. *Id.* at 104.

101. *See id.*

102. *Muller v. Comm. on Spec. Educ. of the East Islip Union Free Sch. Dist.*, 145 F.3d 95, 98 (2d Cir. 1998).

103. *Id.* at 104.

104. 526 U.S. 66 (1999). The Court held that continuous nursing services for a quadriplegic, ventilator dependent were "related services" that the school district was required to provide during school hours under the IDEA. *Id.* at 73. Such services were held to be supportive services rather than medical services. *Id.* Furthermore, the Court found

in federal regulations should become more accessible to disabled children than in previous case law.

A. *Regulatory Definitions of Related Services Affecting Mental Health*

According to definitions within the IDEA and enabling regulations, a broad array of educationally related mental health services are available to students with SED. Related services as defined by the regulations include developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education.¹⁰⁵ They include psychological services, occupational therapy, and recreation, including therapeutic recreation.¹⁰⁶ Related services also include early identification and assessment of disabilities in children as well as counseling services, including rehabilitation counseling.¹⁰⁷ Under the regulations, medical services for diagnostic or evaluation purposes are also included.¹⁰⁸ In addition, the term includes school health services, social work services in schools, and parent counseling and training.¹⁰⁹

Psychological services as defined by the Code of Federal Regulations that can be provided under the IDEA include the administration and interpretation¹¹⁰ of "psychological and educational tests, and other assessment procedures."¹¹¹ Additionally, such services include "[o]btaining, integrating and interpreting information about child behavior and conditions relating to learning."¹¹² School personnel involved in planning the child's school program are required to determine how to meet the needs of disabled "children as indicated by psychological tests, interviews, and behavioral evaluations; and [p]lanning and managing a program of psychological services, including psychological counseling for children and parents."¹¹³ Psychological services also include assistance with the development of positive behavioral intervention strategies.¹¹⁴

that factors such as the nature and cost of the service are not determinative as to whether that service is a "medical service" excluded from the definition of "related service" under the IDEA. *Id.* at 76. The effect of the related services holding in *Garret F.* has yet to be determined for children with SED.

105. *See* 34 C.F.R. § 300.24(a) (1997).

106. *See id.*

107. *See id.*

108. *See id.*

109. *See id.*

110. *See* 34 C.F.R. § 300.24(b)(9)(ii) (1997).

111. 34 C.F.R. § 300.24(b)(9)(i) (1997).

112. 34 C.F.R. § 300.24(b)(9)(iii) (1997).

113. 34 C.F.R. § 300.24(b)(9)(iv) (1997).

114. *See* 34 C.F.R. § 300.24(b)(9)(v) (1997).

Social work services in schools include “[p]reparing a social or developmental history”¹¹⁵ of the disabled child and “[g]roup and individual counseling with the child and family.”¹¹⁶ The services must consider the child’s living situation, such as their “home, school and community [which] affect the child’s adjustment in school,”¹¹⁷ and school and community resources must be mobilized “to enable the child to learn as effectively as possible in his or her educational program.”¹¹⁸ Social work services in schools also include assisting with the development of positive behavioral intervention strategies.¹¹⁹

Counseling services include those “provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.”¹²⁰ On the other hand, rehabilitation counseling services for students with disabilities include “services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community.”¹²¹ Medical services, excluded under the statute, include “services provided by a licensed physician to determine a child’s medically related disability that results in the child’s need for special education and related services.”¹²²

Occupational therapy, which may involve services for children with SED, includes “[i]mproving, developing or restoring functions impaired or lost through illness, injury or deprivation;¹²³ . . . improving [the child’s] ability to perform tasks for independent functioning when functions are impaired or lost;”¹²⁴ and early intervention to prevent “initial or further impairment or loss of function.”¹²⁵ The IDEA and enabling regulations indicate that school districts are responsible for providing a broad range of educationally related mental health services to children with SED.

B. Case Law Interpretation of “Related Services”

Courts have applied the plain meaning of the statute when the question of whether a mental health service is a related service within

115. 34 C.F.R. § 300.24(b)(13)(i) (1997).

116. 34 C.F.R. § 300.24(b)(13)(ii) (1997).

117. 34 C.F.R. § 300.24(b)(13)(iii) (1997).

118. 34 C.F.R. § 300.24(b)(13)(iv) (1997).

119. *See* 34 C.F.R. § 300.24(b)(13)(v) (1997).

120. 34 C.F.R. § 300.24(b)(2) (1997).

121. 34 C.F.R. § 300.24(b)(11) (1997).

122. 34 C.F.R. § 300.24(b)(4) (1997).

123. 34 C.F.R. § 300.24(b)(5)(ii)(A) (1997).

124. 34 C.F.R. § 300.24(b)(5)(ii)(B) (1997).

125. 34 C.F.R. § 300.24(b)(5)(ii)(C) (1997).

the meaning of the IDEA has been at issue. In *Papacoda v. State of Connecticut*,¹²⁶ the court rejected the defendant's argument that therapy is not a related service within the meaning of the IDEA, reversing the decision of the impartial hearing officer. The court indicated that the argument was inconsistent with the plain meaning of the statute, and that therapy was not an excluded medical or diagnostic service.¹²⁷

In *T.G. v. Board of Education of Piscataway*,¹²⁸ the question of whether psychotherapy was a related service was at issue. According to a policy statement issued by the New Jersey Department of Education, "psychotherapy" other than necessary for diagnostic and evaluative purposes, was not a "related service" for which a local school district would be responsible under the mandate of the Act.¹²⁹ The court found that, "while no explicit reference to 'psychotherapy' is made in either the Act or the regulations, the definitions of 'related services' which are provided are indicative of a Congressional intent to include it where appropriate among those services to be provided at no cost to the parents under the Act."¹³⁰

Furthermore, in *Max M. v. Thompson*,¹³¹ the court asserted that services that could only be provided by a psychiatrist fall under the classification of medical services and need to be provided only for diagnostic and evaluative purposes.¹³² However, psychotherapy and similar psychological services that other professionals can provide did not become non-reimbursable under the IDEA because a psychiatrist performed them.¹³³

The court in *Chris D. v. Montgomery County Board of Education*¹³⁴ found that the school failed to establish an adequate system of behavioral control. Instead of teaching the child skills to control his own behavior, the school used an outdated approach of rules and reinforcement, isolating him from the other students.¹³⁵ In addition, the court found that the school system ignored another component of a proper behavioral control program by failing to counsel and instruct his parents on how to complement at home the training he should

126. 528 F. Supp. 68 (D.Conn. 1981).

127. *See id.* at 72.

128. 576 F. Supp. 420 (D.N.J. 1983), *aff'd*, 738 F.2d 420 (3d Cir. 1984).

129. *Id.* at 422.

130. *Id.* at 423.

131. 572 F. Supp. 1437 (D.C. Ill. 1984).

132. *See id.* at 1445.

133. *See id.*

134. 753 F. Supp. 922 (M.D. Ala. 1990).

135. *See id.* at 932.

have received at school.¹³⁶ The court emphasized that related services included counseling and training to assist parents in understanding the special needs of their child and providing information about child development.¹³⁷

In *County of San Diego v. California Special Education Hearing Office*,¹³⁸ the Ninth Circuit applied three tests to hold the special education system responsible for residential placements: "(1) where the placement is 'supportive' of the pupil's education; (2) where medical, social or emotional problems that require residential placement are intertwined with educational problems; and (3) when the placement is primarily to aid the student to benefit from special education."¹³⁹ The court found that the residential placement was supportive of the child's education because it provided the structure, discipline, and support necessary for her to achieve her IEP and mental health goals.¹⁴⁰ The court also found that her difficulties included substantial educational problems that related to non-educational problems.¹⁴¹ In addition, the court found that her primary problems were educationally related.¹⁴² Therefore, her primary therapeutic need was educational and the primary purpose of her residential placement was an educationally related service.¹⁴³

Courts have applied the plain meaning of the IDEA and enabling regulations when determining whether mental health services are educationally related for children with SED. Parents willing to take due process procedures up through the courts have favorable precedent with regards to related mental health services. In addition to drawing on the weight of the related services holding in *Garret F.*, the aforementioned case law indicates strong precedent in favor of interpreting the related mental health services regulations broadly.

136. *See id.* at 933.

137. *See id.*

138. 93 F.3d 1458 (9th Cir. 1996). The mother unilaterally placed the child in the residential treatment facility having concluded that the adolescent day treatment program provided her with an inadequate public education under the IDEA. *Id.* at 1463.

139. *Id.* at 1468.

140. *See id.*

141. *See id.*

142. *See id.*

143. *See id.*

IV. IDENTIFICATION OF CHILDREN WITH SED THROUGH THE
 "CHILD FIND" AND "STAY PUT" PROVISIONS AND ACCESS
 IMPLICATIONS FOR STUDENTS YET TO BE IDENTIFIED

Education agencies have the responsibility of identifying and screening children suspected of having SED through two IDEA provisions. The "child find" provision directly requires the state to identify, locate, and evaluate disabled children.¹⁴⁴ The "stay put" provision indirectly addresses the need for identification, screening, and evaluation by enabling parents to identify and address their children's needs, unilaterally place them in an appropriate educational setting, and seek retroactive reimbursement from the school district.¹⁴⁵ According to the original purpose of the "stay put" provision, once parents have requested an evaluation, their child has the right to remain in their current educational placement until the evaluation is completed.¹⁴⁶

Because the IDEA provides disciplinary protection for children with SED not yet eligible for services, school districts are also responsible for the identification and assessment of children when families challenge expulsion because of behavior relating to an unidentified disability.¹⁴⁷ Unidentified children with SED are entitled to the same protections with regards to disciplinary proceedings under the IDEA as identified children, if the school district knew or should have known about the condition but failed to act.¹⁴⁸

144. See *supra* note 16 and accompanying text.

145. See *Burlington v. Dep't. of Educ. of Massachusetts*, 471 U.S. 359 (1985).

146. See 20 U.S.C.A. § 1415(j) (West 1997).

Maintenance of current educational placement. Except as provided in subsection (k)(7), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed. *Id.*

147. See 20 U.S.C.A. § 1415(k)(8)(A) (West 1997). A child who has not been determined to be eligible for special education and related services under this subchapter and who has engaged in behavior that violated any rule or code of conduct of the local educational agency, including any behavior described in paragraph (1), may assert any of the protections provided for in this subchapter if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred. *Id.*

148. See *Hacienda La Puente Unified Sch. Dist. of Los Angeles v. Honig*, 976 F.2d 487, 494 (9th Cir. 1992) (stating that "all disabled students, whether or not possessing 'previously identified exceptional needs,' are entitled to the procedural protections afforded under the IDEA.").

A. *The "Child Find" Provision*

The "child find" duty exists in three separate sections of the IDEA, assigning the responsibility to locate disabled children among state and local officials. Section 1412 indicates the state department of education's duty to find disabled children.¹⁴⁹ A condition for receiving federal IDEA funding is that the department of education must establish a statewide plan for identifying, locating and evaluating all children who are disabled.¹⁵⁰ The plan must include children who "are not currently receiving special education."¹⁵¹

Section 1414 addresses the local education association's (LEA's) duty to find disabled children.¹⁵² A condition for receiving IDEA funding through the state is that the LEA must assure that it is spent on programs that identify, locate and evaluate all children with a disability.¹⁵³ In addition, the LEA must assure that there are practical methods in place for determining "which children are not currently receiving such special education and services."¹⁵⁴

Section 1415 establishes procedural safeguards guaranteed to students with disabilities in a school district that receives federal IDEA funds.¹⁵⁵ The procedures required by this section include an opportunity to present complaints regarding any matter relating to the identification, evaluation, or educational placement of a child.¹⁵⁶ The procedures also include opportunity to present complaints regarding the provision of a free appropriate public education a child.¹⁵⁷

B. *The "Stay Put" Provision and Burlington*

IDEA states that "during the pendency of any proceedings conducted, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement."¹⁵⁸ The "stay put" provision was established in the landmark case of *Honig v. Doe*,¹⁵⁹ where the Court held that the IDEA

149. See 20 U.S.C.A. § 1412(a)(3)(A) (West 1997).

150. See *id.*

151. *Id.*

152. See 20 U.S.C.A. § 1414(a)(1)(A) (West 1997).

153. See *id.*

154. *Id.*

155. See 20 U.S.C.A. § 1415(b)(1)(E) (West 1997).

156. See 20 U.S.C.A. § 1415(b)(1)(E) (West 1997).

157. See 20 U.S.C.A. § 1415(b)(1)(E) (West 1997).

158. 20 U.S.C.A. § 1415(j) (West 1997).

159. 484 U.S. 305 (1988).

prohibited a school's unilateral expulsion of a child whose misconduct is a manifestation of his or her disability.¹⁶⁰

In *Burlington v. Department of Education of Massachusetts*¹⁶¹ the Court interpreted the "stay put" provision to include the power of the court to order school authorities to reimburse parents for their expenditures on private special education for a child.¹⁶² If a court determines that such placement, rather than the school district's proposed IEP, is proper, school districts must reimburse the parents.¹⁶³

In *Burlington*, the Court held that the district court should consider two factors in determining whether a public school district is required to reimburse the child's parents. First, the court should consider whether the school district's placement pursuant to its IEP is inappropriate, and second whether the private placement desired by the parents is appropriate.¹⁶⁴ Furthermore, according to the Court's holding in *Florence County School District Four v. Carter*¹⁶⁵ the parents do not need to place their child in a school local school authorities.¹⁶⁶

C. *The Unidentified Student*

Children with unidentified SED are entitled to protection under the IDEA's "stay put" provision if the school district had knowledge of the condition but failed to act.¹⁶⁷ According to the statute, a local educational agency shall be deemed to have knowledge that a child has a disability if:

- (i) the parent of the child has expressed concern in writing (unless the parent is illiterate or has a disability that prevents compliance with the requirements contained in this clause) to personnel of the appropriate educational agency that the child is in need of special education and related services;
- (ii) the behavior or performance of the child demonstrates the need for such services;
- (iii) the parent of the child has requested an evaluation of the child pursuant to section 614 [20 USC §1414]; or
- (iv) the teacher of the child, or other personnel of the local educational agency, has expressed concern about the behav-

160. *See id.* at 323.

161. 471 U.S. 359 (1985).

162. *See id.* at 369.

163. *See id.*

164. *Id.* at 370.

165. 510 U.S. 7 (1993).

166. *See id.* at 13-14.

167. *See Hacienda La Puente Unified Sch. Dist. of Los Angeles v. Honig*, 976 F.2d 487, 494 (9th Cir. 1992).

ior or performance of the child to the director of special education of such agency or to other personnel of the agency.¹⁶⁸

In *Hacienda La Puente Unified School District of Los Angeles v. Honig*, the Ninth Circuit applied the “stay put” provision to a junior high student who was suspended, and ultimately expelled during the pendency of the proceedings to determine his eligibility for special education services.¹⁶⁹ The Ninth Circuit held that “[t]he IDEA and accompanying federal regulations . . . make it plain that, even though not previously identified as disabled, the student’s alleged disability may be raised in an IDEA administrative due process hearing.”¹⁷⁰ The court articulated “that all disabled students, whether or not possessing, ‘previously identified exceptional need,’ are entitled to the procedural protections afforded under the IDEA.”¹⁷¹

Notwithstanding the limitations of the regulatory definition and case law interpretations of SED, the IDEA establishes education agencies’ integral roles and responsibilities as facilitators of free and appropriate public education and related services. The “child find” and “stay put” provisions convey the Congressional intent that school districts identify and provide children with SED with educationally related mental health services. The “child find” provision conveys the top down expectation that school districts will identify, locate, and evaluate children with disabilities. The line of cases following *Burlington* interprets the “stay put” provision to indicate that parents can unilaterally obtain educationally related services for their children and seek reimbursement, creating a bottom up requirement for school districts. Children yet to be identified with SED create an additional expectation from the bottom up when parents challenge disciplinary decisions because the child’s behavior was related to a disability that school officials had notice of, but did not acknowledge.

V. CHILDREN WITH SERIOUS EMOTIONAL DISTURBANCE AND PUBLIC POLICY

A. *Public Policy, Preventable Youth Violence and Suicide, and Children with SED*

The school district’s role in increasing access to the mental health system for children with SED by providing educationally re-

168. 20 U.S.C.A. § 1415(k)(8)(B) (West 1997).

169. See *Hacienda*, 976 F.2d at 489.

170. *Id.* at 492.

171. *Id.* at 494.

lated psychological services and referral for medically necessary services is critical because of the increase in preventable public tragedies of youth suicide¹⁷² and youth violence.¹⁷³

According to the Surgeon General's Call to Action to Prevent Suicide, "[b]etween 1952 and 1996, the reported rates of suicide among adolescents and young adults nearly tripled. From 1980 to 1996, the rate of suicide among persons aged 15-19 years increased by 14% and among persons aged 10-14 years by 100%."¹⁷⁴ In addition, the Report indicates "there is good evidence that over 90 percent of children and adolescents who commit suicide have a mental disorder before their death."¹⁷⁵ School systems and the IDEA have a role in preventing this needless loss of life through identifying susceptible children and facilitating early intervention. Suicide rates of children with SED are disproportionately high and rapidly increasing.¹⁷⁶ School systems must be a partner in the system of care and take a key role through more effective identification, educationally related mental health treatment, and referral to psychiatric services.

Furthermore, in population-based studies of youth violence, serious violent offenders were more likely than either non-serious offenders or non-offenders to have mental health problems.¹⁷⁷ In one study, twenty-eight percent of serious offenders aged eleven to seventeen were classified as having mental health problems, compared to thirteen to fourteen percent of non-serious delinquent youths and nine percent of non-offenders.¹⁷⁸ Another study found that although thirty-six percent of adolescents with personality disorders committed

172. See DEP'T OF HEALTH AND HUMAN SERVICES, MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 150-60 (1999) (stating that "there is good evidence that over 90 percent of children and adolescents who commit suicide have a mental disorder before their death."); see also DEP'T OF HEALTH AND HUMAN SERVICES, THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT SUICIDE 3 (1999) (also asserting that "Among persons aged 15-19 years, firearms-related suicides accounted for 96% of the increase in the rate of suicide since 1980. For young people 15-24 years old, suicide is currently the third leading cause of death, exceeded only by unintentional injury and homicide. More teenagers and young adults die from suicide than from cancer, heart disease, AIDS, birth defects, stroke, pneumonia and influenza, and chronic lung disease combined. During the past decade, there have also been dramatic and disturbing increases in reports of suicide among children. Suicide is currently the fourth leading cause of death among children between the ages of 10 and 14 years.").

173. See generally DEPARTMENT OF HEALTH AND HUMAN SERVICES, YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL (2001).

174. See DEP'T OF HEALTH AND HUMAN SERVICES, THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT SUICIDE 3 (1999).

175. *Id.*

176. *Id.*

177. See SURGEON GENERAL, *supra* note 173.

178. See *id.*

violent acts against others during adolescence, only thirteen percent of that thirty-six percent received mental health services in the previous year.¹⁷⁹

When parents and teachers express concern regarding a child's behavior and performance that may be related to SED, school districts should have efficient systems in place as well as the resources to effectively screen and identify children, offer educationally related services, refer for psychiatric services and coordinate services. Educators and mental health service providers should be able to act as partners in addressing problem behaviors and possible disorders through early intervention strategies.

B. School Based Mental Health Services

According to the Surgeon General's Report on Mental Health, over one in five children and adolescents between the ages of nine and seventeen experience a mental disorder in a given year.¹⁸⁰ Only thirty percent of these children receive treatment.¹⁸¹ However, since forty-eight million children sit in classrooms approximately six to eight hours a day for approximately one hundred and eighty days a year, teachers and classmates are in a unique position to know when a child has an emotional or behavioral problem.¹⁸² Therefore, if mental health services are available in the school setting, there is a greater likelihood that these problems will be addressed.¹⁸³

States fund school-based mental health services from a range of sources.¹⁸⁴ Some states do use IDEA funding to provide preventive mental health services for children with SED.¹⁸⁵ Revenue from state general funds is generally not targeted directly to adolescent mental health services, but to school-based health services that include mental health. Most of these funds are not specific budget line items,

179. *See id.*

180. *See* SURGEON GENERAL, *supra* note 173, at 27.

181. *See id.*

182. *See* Nicole Kendell, *Adolescent Health: School Based Mental Health*, ISSUE BRIEF: HEALTH POLICY TRACKING SERVICE (Jan. 1, 2000), available at <http://www.stateserv.hpts.org/public/pubhome.nsf>.

183. *See generally* Mark D. Weist et al., *Collaboration Among the Education, Mental Health, and Public Health Systems to Promote Youth Mental Health*, 52 *PSYCHIATRIC SERVICES* 1348 (2001).

184. According to the Health Policy Tracking Service of the National Conference of State Legislatures, sixteen states have enacted legislation focusing specifically on comprehensive school based mental health services. These states include California, Connecticut, Florida, Hawaii, Idaho, Illinois, Louisiana, Maryland, Maine, Michigan, Minnesota, New Jersey, Rhode Island, Tennessee, and Texas. *See* Kendell, *supra* note 182, at 28.

185. *See* SURGEON GENERAL, *supra* note 173, at 27.

but instead are part of the Department of Education or Department of Health budget. Depending on the state's plan, Medicaid is another source of reimbursement. Private insurers, and federal block grants such as the Maternal and Child Health (MCH) Block Grant and the Community Mental Health Services (CMHS) Block Grant¹⁸⁶ as well as private foundation funding, such as the Robert Wood Johnson Making the Grade grant, are used to pay for school based mental health services for adolescents.¹⁸⁷

The identification and treatment of children with SED through school based mental health services is an innovative strategy that fosters collaboration among teachers, mental health professionals, and families. In addition, school-based treatment destigmatizes the delivery of mental health services for vulnerable children and families. Through existing funding sources as well as private sector support, school districts should develop school based mental health centers to address the access and utilization issues children with SED face. In the long term, school based mental health centers will assist school districts in identifying and treating SED early, and in mediating poor educational and mental health outcomes.

VI. CONCLUSION

Through the IDEA, statutory and case law mechanisms are in place for schools to play a greater role in addressing the unmet social need to prevent youth suicide and violence through the access and delivery of mental health and behavioral health interventions. School districts identify children with SED upfront through the "child find" provision when referred by school personnel and families, as well as through circumstances under the "stay put" when families challenge districts to provide services at a more intensive level of care than those initially found necessary through unilateral placement.¹⁸⁸ School districts can also identify children as emotionally disturbed when families

186. According to the National Conference of State Legislatures, states are using funds from the Community Mental Health Services Block Grant for school-based mental health services. In Kentucky, the CMHS provided thirty three grants in 1998, ranging from \$250 to \$60,000 for eight programs and twenty-five mini-grants for school-based mental health services for children with serious emotional disturbance and their families. Tennessee provides community-based mental health services for rural children through a school-based program through CMHS block grant funds. As of fiscal year 1997-1998, nineteen sites were receiving between \$35,000 and \$105,000. Wisconsin has used a portion of its funds for two school-based mental health programs for children with serious emotional disturbances. See Kendell, *supra* note 182, at 28.

187. See SURGEON GENERAL, *supra* note 173, at 27.

188. See *supra* notes 144-60 and accompanying text.

challenge disciplinary attempts for behavioral matters that may be disability related and the child has yet to be identified.¹⁸⁹

To close the gap between what the IDEA offers in theory and practice to children with SED, advocates must identify effective strategies to cultivate interagency collaboration and administrative efficiency while addressing funding constraints. As a matter of public policy, our systems of care must address the need for the effective identification and treatment of students in need. Innovative, child-centered delivery systems of care such as school based mental health services provide policymakers, educators, and health care providers with the opportunities to partner in facilitating positive educational and mental health outcomes.

LUCY W. SHUM

189. See *supra* notes 161-65 and accompanying text.