



Empire Justice Center
Making the law work for all New Yorkers

Students with Emotional Disabilities and the Law

Presented by:

Jane Gabriele, Esq.
Empire Justice Center

Jonathan Feldman, Esq.
Empire Justice Center

Empire Justice Center
The Honorable Michael A.
Telesca Center for Justice
One West Main Street
Suite 200
Rochester, NY 14614
www.empirejustice.org

February 11, 2010

12:30 p.m. - 2:00 p.m.

Hall of Justice, Rochester New York



TABLE OF CONTENTS

1. Definition of Emotional Disturbance.....	Pg 1
2. Scenarios: Difficulty of Getting an ED classification.....	Pg 2
3. Behavior problems, Discipline and the Law.....	Pg 4
4. Scenarios: Dysfunction in the Discipline Process.....	Pg 31
5. A Guide to Special Educationese.....	Pg 33

Definition of Emotional Disturbance

REGULATIONS OF THE COMMISSIONER OF EDUCATION PART 200 – STUDENTS WITH DISABILITIES (Updated 2/09)

(zz) *Student with a disability* means a student with a disability as defined in section 440(1) of Education law, who has not attained the age of 21 prior to September 1st and who is entitled to attend public schools pursuant to section 3202 of the Education Law and who, because of mental, physical or emotional reasons, has been identified as having a disability and who requires special services and programs approved by the department. The terms used in this definition are defined as follows:

(4) *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 student's educational performance:

- (i) an inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (ii) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- (iii) a generally pervasive mood of unhappiness or depression; or
- (iv) a tendency to develop physical symptoms or fears associated with personal or school problems.

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

Scenarios of Students Seeking a Classification of Emotional Disturbance

1. It's suspected that this boy suffered from Fetal Alcohol Syndrome as an infant. There are no visible signs of the damage. His mother couldn't handle him and he was adopted at 4 months by another family. This family was equally challenged and the boy ended up suffering from Emotional Neglect in addition to delays caused by the pre-natal damage. He was never able to engage emotionally with adults or peers. As a result, while brilliant, he did only adequately in school. By the time he hit adolescence, he was running away from home and committing petty thefts and vandalism. His family got him on PINS diversion, but never sought any real help for him. The school declined to classify him.
2. This girl passed through several school districts and the family was evicted from at least one apartment because of her behavior. After being mental health arrested from her home, she was finally diagnosed as Bi-Polar. The school classified her as Other Health Impaired for her Attention Deficit Hyperactivity Disorder issues and put her in a 6:1:1 classroom. She was given a Behavior Intervention Plan, but despite some serious problems, it was never implemented. She was absent 51 days and her grades were failing. She had scored 1s and 2s on the NYS standardized tests. The testing revealed regression from gains made in elementary school. The school was unwilling to change her classification to Emotional Disturbance and alter her placement despite the fact that there had been physical and verbal assaults and the mother had been banned from the school.
3. This boy suffers from Tourette's Syndrome, Obsessive Compulsive Disorder and ADHD. He is non-compliant with his meds because he has an irrational fear of chemicals. This fear is so intense that his family has built a cement block room to their home so that he can feel comfortable. He refuses to go to chemistry class and won't use the school bathrooms or cafeteria. He is bright and this is revealed in his testing. His grades are marginal and require a lot of remediation by the teacher, but his NYS standardized test scores were all at level 3 and 4. The school refuses to classify claiming that his testing show academic success and he is receiving a Free and Appropriate Public Education. This case is complicated by the fact that the boy does not believe there is anything wrong with him and has specifically stated that he does not need a different placement.
4. This girl first came to our attention when she was starting fifth grade. She was failing all her academic classes, lacked focus, was aggressive and often got into fights. According to her teachers, she wouldn't listen, lacked motivation, refused to follow directions and couldn't accomplish her academics without 1:1 support. The school refused to classify despite an internal report stating that she required an alternate placement. We assisted the family and got a classification of Emotional Disturbance. We were able to show that, despite regular attendance, she had regressed entire grade levels academically. That was three years ago. This year, we again assisted the family. Her behaviors were accelerating and the school

believed that this student's behavior was being reinforced by the parent. They wanted to place blame on the student (and her mother) rather than seek an out-of-district placement.

5. Since second grade, M.L. had been making gains at a day treatment program that integrates the education, counseling needs and medication management of a disabled student. His parents were notified that M.L. would not be attending there this year. The school claimed that they could provide a free appropriate education within the District. The parents had concerns about the appropriateness of the placement. At first, school told the parents that it was a program for autistic students, then informed them that it was vocational—but not his vocation (auto shop). The District couldn't answer questions about how M.L.'s behaviors would be handled in the new educational setting. His parents attended a mediation, but the District stated they were inflexible. A District official informed the parents that the District would bring an Impartial Hearing to force the issue. Since starting the program at the local high school, there has been no communication and no homework coming home with their son. Despite the fact that M.L. suffered a blow to his head while at school (he has a shunt), they had no knowledge of the incident.

Behavior Problems, Discipline, and the Law

Challenging Behaviors Conference, October 30, 2008

By Jonathan Feldman, Esq.
Empire Justice Center



Good news:

- Students with disabilities who have behavioral challenges retain meaningful rights in the special education process, both inside and outside the context of discipline

- These rights include the right to positive behavioral interventions
- Such positive approaches must be pursued by school districts by developing:
 - Functional behavioral assessments (“FBAs”); and
 - Behavior intervention plans (“BIPs”)

Bad news:

- Under certain circumstances, students with disabilities can still be punished for their behavior -- some examples:
 - ❑ Out-of-school suspension;
 - ❑ Expulsion; and even
 - ❑ Referral to the criminal justice system

More bad news:

In 2004, when amending the Individuals with Disabilities Education Act (IDEA), Congress weakened some of the protections afforded to students with disabilities in the discipline process.

Why? Because of perception that students with disabilities get “special privileges” in the meting out of discipline.

Reality: Several studies have shown that, for the same behavior, a student with a disability is more likely both to 1) receive punishment in the first place and 2) receive a punishment that is harsher than a student without a disability.

But a silver lining:

- ✓ The weakening of legal protections by Congress was more of a “tweaking” of rights than a wholesale evisceration of rights

Now let's meet Johnny, and see how he fares in the disciplinary process . . .

- [Will Johnny get a "treat" from his school district, or will he instead be "tricked?"]



Facts about Johnny:

- ✓ He is 12 years old
- ✓ He has ADHD, and can be “impulsive”
- ✓ He has Asperger’s
- ✓ He is extremely interested in electronic gadgets (to the point where, at times, he can be “fixated” on such gadgets)
- ✓ When he is very intrigued by a gadget, Johnny will impulsively seek to explore the gadget by holding it, pushing all its buttons, and seeing all the things it can do
- ✓ This can become a “behavioral issue” when the gadget belongs to someone else or it is not an appropriate time to explore the gadget
- ✓ Johnny was classified as “Other health-impaired” two years ago, in 2006
- ✓ Johnny’s program and placement consist solely of regular ed classes with indirect consultant teacher support

The CSE process for a student with behavioral issues: “in the case of a student whose behavior impedes his or her learning or that of others, [the CSE must] consider strategies, including positive behavioral interventions, and supports and other strategies to address that behavior.”

And if the CSE determines that the student needs such strategies in order to receive a free appropriate public education, then those strategies must be added to the IEP.

Source: Part 200.

In what form are positive behavioral interventions typically offered?

In the form of a FUNCTIONAL BEHAVIORAL ASSESSMENT –

“Functional behavioral assessment means the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment. The functional behavioral assessment . . . shall include, but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it.”

Source: Part 200.

And in the form of a BEHAVIORAL INTERVENTION PLAN –

- ***“Behavioral intervention plan*** means a plan that is based on the results of the functional behavioral assessment and, at a minimum, includes a description of the problem behavior, global and specific hypotheses as to why the problem behavior occurs and intervention strategies that include positive behavioral supports and services to address the behavior.”

Source: Part 201.



So when Johnny was first classified, he received an FBA and BIP that were based precisely on the regulatory language . . . [true or false]?

What types of approaches and strategies might be employed in his FBA and BIP?

One day, during math class, Johnny sees his friend Frank pull out his new cell phone. Johnny is fascinated by it, and he wishes that he had one. When Frank is not looking, Johnny takes it and starts playing with it. Frank does not notice that is missing until English class. He tells the teacher that someone has stolen his cell phone. Johnny is still playing with it, so he is caught red-handed.

The principal tells Johnny that he will be suspended for stealing. The school district will decide shortly upon the length of the suspension.

Under New York State law (which applies to all students, whether classified or not), a “short-term suspension” is defined as five days or less.

- ✓ Principal can issue suspension
- ✓ Parent has right to an informal conference
- ✓ Parent must receive notice within 24 hours
- ✓ Home tutoring must begin, essentially, right away (in practice, however, it rarely does)

Under New York State law, a “long-term suspension” is defined as more than five days.

- ✓ Only the Superintendent can issue a long-term suspension
- ✓ And only after conducting a hearing to determine innocence or guilt, at which witnesses can be called and cross-examined

Under federal special education law (IDEA), a suspension in excess of ten school days constitutes a “change in placement,” and cannot be issued without going through the CSE

- (Note: “ten days” can either mean ten consecutive days, or a series of short-term suspensions that add up to ten days [if they are part of a “pattern” of suspensions])

“Manifestation Determination” required

- If a school district is seeking to suspend a student with a disability for longer than 10 days, it must conduct a manifestation determination
- First, a Superintendent’s hearing must be held – if student is found “guilty,” manifestation determination is scheduled
- CSE members, including the parent, make the determination
- Info that is reviewed can include the IEP, teacher observations, and information from the parent
- **Two questions to be resolved at the meeting:**
 - 1) **Was the conduct caused by (or did it have a direct and substantial relationship to) the child’s disability?;
and/or**
 - 2) **Was the conduct a direct result of the district’s failure to implement the IEP?**

In Johnny's case, the District decided that stealing was a serious offense, and it sought to impose a long-term suspension exceeding 10 days.

At the Superintendent's hearing, Johnny was found guilty of stealing the cell phone. He then went to the manifestation determination.

What do you think was the outcome of the manifestation determination (or what should it have been)?

If a manifestation is found:

- The child must be returned to the placement from which he or she was removed (unless the parent and district agree upon a new placement)
- If the CSE has not yet conducted an FBA and/or a BIP, it must do so
- If the child already has a BIP, the CSE must review and modify the BIP, with the aim of preventing similar behavior in the future
- If the behavior was a direct result of the district's failure to implement the IEP, the district "must take immediate steps to remedy those deficiencies" (Part 201)
- How might this play out for Johnny?

If no manifestation is found, child can be disciplined in same manner as a child without a disability (i.e., can be suspended long-term – no right to return to original placement until suspension is over)

- **CAVEAT – student must still be provided a “free appropriate public education” (FAPE) while serving the suspension! (more on this in a minute . . .)**

- Now fast-forward one year – Johnny is now 13 and is still in middle school. He has done fairly well over the past year – at least, no more long-term suspensions. He still is fascinated by all gadgets, but he has developed a passion for a special kind of gadget . . . weapons! He has no interest in hurting anyone, he just thinks that weapons are really cool, and tries to learn as much as he can about them.
- One day, while at recess, Johnny discovers an old BB gun that is buried in the dirt. He is very excited about this, and he eagerly brings it to class so he can show it to everyone.
- You can predict the rest . . .

The 45-day suspension

- If a student with a disability has a weapon or drugs at school, or has inflicted "serious bodily injury" on another while at school . . .
- The District can suspend for up to 45 school days (which can amount to more than two calendar months)
- Does not matter if the offense is a manifestation of disability or not – if you are found guilty, you can automatically be suspended for 45 school days
- The suspension is to be served in an "interim alternative educational setting" (IAES)
- Such as the student's home? Yes, home instruction is a permissible IAES (although it cannot be the sole IAES option employed by the District)
- Remember, though, you are still entitled to FAPE, which means . . .

- For a student placed in an IAES due to a long-term suspension, the right to FAPE means the right to “educational services which enable the child to continue to participate in the general education curriculum [although in another setting] and to progress toward meeting the goals set out in the child’s IEP.” Part 201.
- As a practical matter, what does this mean?
- According to one case, you do not have the right to exactly the same services in exactly the same setting as you did before you were suspended
- But neither is two hours of home instruction sufficient to provide FAPE, especially when the IEP calls for daily special ed services exceeding two hours!
- So there must be some middle ground reached – no clear answers, still a work in progress, determined on a case-by-case basis

Finally, before we conclude, a few words about Johnny's friend, Janie



- Like Johnny, Janie is 13. She is an average student and has not been viewed as having a disability.
- Recently, however, Janie witnessed a violent incident in her neighborhood, and she became very upset. This experience triggered some serious mental health issues, and Janie has just been diagnosed with post-traumatic stress disorder, anxiety disorder, and depression.
- Janie has started “acting out” in school, but the school has not picked up on this, until one day . . .
- A teacher “gets in Janie’s face” about something, and Janie reacts by screaming at the teacher and punching her in the chin.
- The school district now wants to suspend Janie for the rest of the school year.
- Does Janie have any rights at this point?

Students presumed to have a disability for discipline purposes

- Even though Janie is not yet classified, she will have the same rights in the discipline process as a classified student if, prior to the incident, she fell within one of these three categories:
 - 1) Her parent had expressed concern in writing to supervisory or administrative personnel, or to a teacher, that she was in need of special education;
 - 2) Her parent had requested a special ed evaluation for Janie; or
 - 3) Her teacher had expressed “specific concerns about a pattern of” behavior directly to a supervisor.

Source: Part 201.

The End

Thank you for coming and I look forward to working with you.

Jonathan Feldman
Empire Justice Center
1 West Main Street, Suite 200
Rochester, NY 14614
jfeldman@empirejustice.org
Phone: 585-454-4060
Fax: 585-454-2518
www.empirejustice.org



Difficulties Within the Disciplinary Process for Students With Disabilities

1. A psychological evaluation done by this student's school stating, "Reports indicated that R.S. has had behavioral difficulties since Kindergarten." He is now in the eighth grade. CSE refused to classify, claiming his academics were too high. The School Principal stated that they lacked the resources to comply with an educational plan, anyway. They continued to put him out of school for ongoing problems with behavior. As a result, R.S. was long-term suspended. No Superintendent's hearing was held for 2 months. He returned to school in a month after that. He was again suspended. A Superintendent's hearing was scheduled after one month. No notice was received by the family—they heard about it by sheer coincidence. Upon arrival, the District said it had been cancelled by the school. R.S.'s mother did not receive notification of the cancellation. In complete contravention of NYS Education Law, the school decided to hold a manifestation hearing in advance of the Superintendent's Hearing. No such meeting has ever been held. The student is now on PINS. The psychologist report re-inforces the diagnosis of Oppositional Defiant Disorder and Anxiety Disorder made by the mental health programs.
2. As a first grader, CSE refused to classify M.G. because no internal psychological evaluation had been done by them as required by law. Within weeks, a report including a diagnosis was provided to the Committee by the family from an external mental health program. The school sent the family a letter five months later declining to classify M.G. as a student with a disability and refusing to provide services. The family had not received notice of that meeting. M.G. was suspended 12 times during the 2007-2008 school year. In June, 2008, he was classified as Learning Disabled. During academic year 2008-09, he locked himself in a classroom, talked about killing himself and tried to drown himself. He was long term suspended on 3/9/2009. At the 4/30/09 CSE program review meeting (an annual meeting held to evaluate effectiveness and appropriateness of the IEP), he talked about how it would be ok if his teacher wanted to tie him to his chair like last year's teacher had. He was put on home tutoring and moved to a day treatment program as a result of that meeting.
3. This boy was de-classified in the third grade for Speech/Language. He struggled with attention and focus, but was given only informal supports at school. His grades were marginal. He failed math and English in 6th grade; Math, Science and Spanish in 7th grade and was finally given a 504 Plan for ADHD. He was hit by a car and suffered a traumatic brain injury in 8th grade. Unknown to his family, he had suicidal thoughts which he attempted to act on several times after that. He was suspended for marijuana use and returned to school after a month. He told the other students he intended to kill another student and he was suspended for the remainder of the year. The CSE Committee determined that the incident was not the result of his disability (ADHD). The principal required proof from a psychiatrist before he would be re-admitted. He went into partial hospitalization

four days after this suspension. The parents took the psychiatrist's report to the school within a few weeks of the suspension, but was told that they would not allow him to return until the following year. His diagnosis is Bi-Polar, ADHD, TBI and seizure disorder.

4. This young man moved from a large City school district to a smaller suburban school. Over the course of his entire school career, he had been classified as suffering from an emotional disturbance and placed in self-contained classrooms. The new school evaluated him and changed his classification to Other Health Impaired for his ADHD issues, placing him in regular education classrooms. Over the next few years, he got a reputation as being a 'troublemaker' with his behaviors being lower key at the beginning of the year and building as the school year passed. This year, he was suspended four times for having a cell phone at school. The last time, he took a cell phone from another student's locker and was verbally confrontational with a school staff member about the incident. He was suspended on October 2. No Superintendent's Hearing was held until December 15. At the manifestation determination held December 18, no connection was found between his behaviors and his ADHD.

Alphabet Soup! Special Educationese

Terms:

- AIS = Academic Intervention Services
- AT = Assistive Technology
- BIP = Behavioral Intervention Plan
- BOCES = Board of Cooperative Educational Services
- CPI = Crisis Prevention Intervention
- CSE = Committee on Special Education
- ERSS = Educationally Related Support Services
- ESY = Extended School Year
- FAPE = Free Appropriate Public Education
- FBA = Functional Behavioral Assessment
- FERPA = Family Education Rights and Privacy Act
- IAES = Interim alternative educational setting
- IDEA = Individuals with Disabilities Education Act
- IEE = Independent Educational Evaluation
- IEP = Individualized Education Plan
- ISS = In School Suspension
- IST = Instructional Support Team
- LEA = Local Educational Agency (i.e. the school district)
- LRE = Least Restrictive Environment
- OSS = Out of School Suspension
- OT = Occupational Therapy
- PBIS = Positive Behavioral Interventions and Supports
- PINS = Persons In Need of Supervision
- PT = Physical Therapy
- Pull-Out = Support services given to student outside of the regular classroom
- Push-In = Support services given to student inside the regular classroom
- RTI = Response to Intervention
- SLD = Specific Learning Disability
- TCI = Therapeutic Crisis Intervention
- VESID = Vocational and Educational Services for Individuals with Disabilities

Conditions:

- ADD = Attention Deficit Disorder
- ADHD = Attention Deficit Hyperactivity Disorder
- APE = Adaptive Physical Education
- ASD = Autism Spectrum Disorder
- AS = Asperger's Syndrome (high-functioning form of Autism)
- BD = Behavioral Disorder
- BP = Bi-Polar
- DD = Developmental Disorder/Developmentally Delayed
- DS = Downs Syndrome
- ED = Emotionally Disturbed

- FAS = Fetal Alcohol Syndrome
- HI = Hearing Impaired
- LD = Learning Disabled
- MH = Multiply Handicapped or Mental Health
- MR = Mentally Retarded/Mental Retardation
- MMR = Mildly Mentally Retarded
- NVLD = Non-Verbal Learning Disability
- OCD = Obsessive Compulsive Disorder
- ODD = Oppositional Defiant Disorder
- OHI = Other Health Impaired
- PDD = Pervasive Developmental Disorder
- SD = Seizure Disorder
- SLI = Speech Language Impaired
- TBI = Traumatic Brain Injury
- TS = Tourette's Syndrome

Tests:

- GAF = Global Assessment of Functioning scale
- PLOP = Present Levels Of Performance
- WIAT = Wechsler Individual Achievement Test
- WISC = Wechsler Intelligence Scale for Children
- WRAT = Wide Range Achievement Test

How to Decode Test Score Reports:

	<i>Developmentally Delayed</i>	<i>Borderline</i>	<i>Low Average</i>	Average	<i>High Average</i>	<i>Superior</i>	<i>Very Superior</i>
<i>Standard Score</i>	-69	70-79	80-89	90-109	110-119	120-129	130+
<i>Scaled Score</i>	-3	4-5	6-7	8-12	13-14	15+	
<i>Percentile</i>	-2	2-8	9-23	25-73	75-90	91-97	98+

Educational Placements

- Consultant Teacher = special education teacher assigned to a classroom (or student) for direct educational support in the classroom
- 6:1:1 = Six students, 1 special education teacher, 1 aide
- 8:1:1 = Eight students, 1 special education teacher, 1 aide
- 12:1:1 = Twelve students, 1 special education teacher, 1 aide
- 15:1 = fifteen students, 1 special education teacher
- Integrated Co-Teach = a classroom assigned a regular and special education teacher that has regular and special education students, but no more than 12 students with an IEP.
- Day Treatment Program = alternate setting that integrates the education, counseling needs and medication management of a student with a disability
- Residential Treatment Program = a living arrangement that is responsible for all physical, mental and emotional needs of a child.