

# EMOTIONAL DISTURBANCE (ED)

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NELI DISABILITY CONDITION SERIES 2024

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## TOPICS

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Statistics

Definition/Criteria for ED

Assessment/Evaluation of ED

Common challenges in identification and evaluation

Case examples

Litigation issues and implications

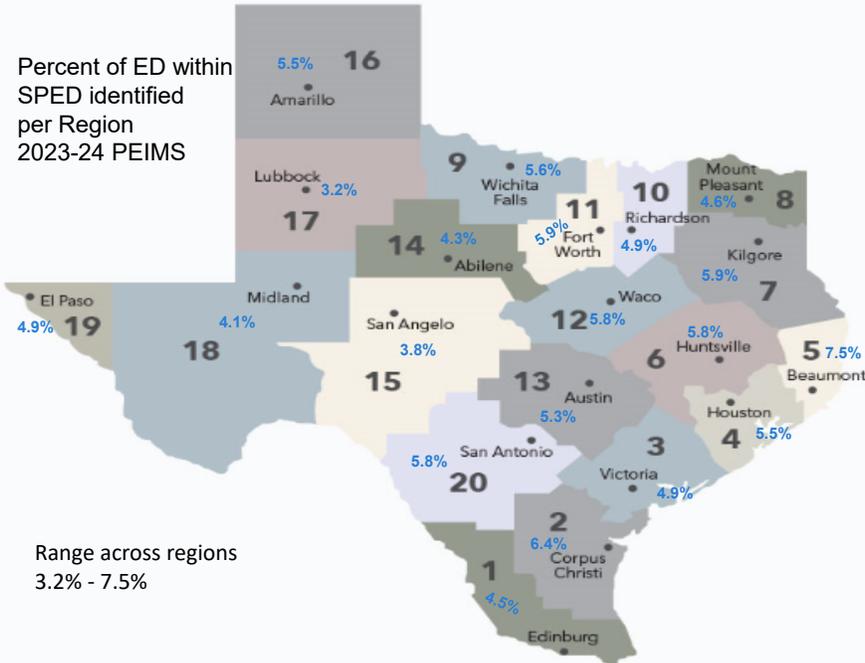
# TEXAS PEIMS DATA ED 2017-2024

2017-18 to 2023-24 percentage of ED students in Texas remained relatively stable, at approximately 5-6%. Number identified over the 7-year period increased by 12,719.

2017-18	2018-19	2019-20	2020-21	2021-22	2022-23	2023-24
5.82%	5.97%	6.16%	6.19%	6.0%	5.68%	5.39%
29,029	31,789	36,197	37,461	38,122	39,925	41,748

Percentage of ED based on National Center for Education Statistics (21-22) = 5%; (22-23) = 4%

Percent of ED within SPED identified per Region 2023-24 PEIMS



Range across regions  
3.2% - 7.5%

## Historical Information - ED

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The federal definition of ED is based on the work of Eli Bower. Bower and associates developed a protocol for identifying students in California who were in need of receiving services due to severe emotional and behavioral problems.

Bower's definition proposed that "emotionally handicapped" students had to exhibit one or more of 5 major characteristics to a marked extent and over a long period of time.

**Original definition first proposed in 1957; Adopted within PL 94-142 about 20 years later. The 5 characteristics have remained unchanged since PL 94-142 was adopted in 1975.**

## Definition/Criteria

But the federal definition included some additions in wording (Thus original definition altered)

- Adverse impact on educational performance
- Types of conditions that could be included (e.g., Schizophrenia) and excluded [e.g., Social Maladjustment (SM)]

*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.*

Social Maladjustment was not part of Bower's original definition.

Social maladjustment first appeared in a bill to fund teacher training in 1957. The bill stated that exceptional children were maladjusted, emotionally and socially, including the institutionalized delinquent. In 1963 the bill passed the Senate, but when it got to the House, the wording was changed.

It has been written that the intent of the clause was to exclude juvenile delinquents who were not emotionally disturbed, and it is assumed that the clause was added by legislators who did not want schools to be mandated to provide services to delinquent and antisocial students.

Currently, the clause and the term are considered outdated, illogical and unclear.

## Commentary Final Version 2006 Regulations

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Historically, it has been very difficult for the field to come to consensus on the definition of [ED], which has remained unchanged since 1977. On February 10, 1993, the Department published a “Notice of Inquiry” in the Federal Register (58 FR 7938) soliciting comments on the existing definition...The comments received...expressed a wide range of opinions and no consensus on the definition was reached. Given the lack of consensus and the fact that Congress did not make any changes that required changing the definition, the Department recommended that the definition of [ED] remain unchanged...Therefore, we decline to make any changes to the definition of [ED].

## ED in Texas = Emotional Disability

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### EMOTIONAL DISABILITY

This term is taking the place of the federal term “emotional disturbance” (the eligibility criteria is not changing).

Emotional Disturbance  
is now  
**Emotional Disability**



ED -

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*Exhibit one or more of the following characteristics*

- *over a long period of time*
- *to a marked degree*
- *adversely affects a child's educational performance*

## ED – The 5 Characteristics

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*Inability to learn that cannot be explained by intellectual, sensory, or health factors*

*Inability to build or maintain satisfactory interpersonal relationships with peers and teachers*

*Inappropriate types of behavior or feelings under normal circumstances*

*A general pervasive mood of unhappiness or depression*

*A tendency to develop physical symptoms or fears associated with personal or school problems*

## The additional clause

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*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.*

You are not differentiating between SM and ED.

If the student is SM, he/she can also be ED.

Focus of the FIE is the determination of ED, not SM.

Over 30 years ago, a task force report said this:

- TEA and TDMMR Joint Task Force report (1990, p. 16): “The heart of the diagnostic matter is that while there is presently no need, justification, or method for defining social maladjustment, there is a clear need to define emotional disturbance if the child is to receive special education services. ... Assessment personnel should concentrate on describing and documenting the emotional condition stated in the federal law to label any child E.D.”

## SM: Definition/Criteria???

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Social Maladjustment Definition: NONE

The IDEA does not define SM (SM has never been defined in the federal law).

The DSM-5 does not define this term (there is no diagnostic label of SM in the mental health field).

There are no criteria listed for determining SM and no single description that is universally recognized.

ED and SM are educational terms, not clinical terms.

Typically, SM refers to a pattern of behavior that violates societal norms (e.g., truancy, drug or alcohol abuse, significant problems with authority).

# SM

SM is often referred to as a pattern of antisocial behavior - failure to conform to social norms and laws, deceitfulness (e.g., lying, conning others), impulsivity, irritability and aggressiveness (e.g., physical fights), disregard for others' safety, irresponsibility, lack of remorse

This pattern is typically viewed as willful, deliberate and planned behavior that is within the student's control; a willful choice to disregard rules

Many view the term SM consistent with oppositional defiant (ODD) and conduct disorder (CD) diagnoses/characteristics

But, it is not a good idea to consider ODD and CD diagnoses as equivalent to SM

Texas Partners Resource Network puts Conduct Disorders in list of ED conditions

## Why not ODD and CD?

ODD	CD
Angry/Irritable Mood	Aggression to people and animals
Argumentative/Defiant Behavior	Destruction of Property
Vindictiveness	Deceitfulness or Theft
	Serious Violations of Rules
Only 4 of 8 symptoms required	There are 15 criteria and need only 3 to be present
Can be ODD without negative mood	Can be CD if truant, lies, and steals; but can also be CD if physically aggressive, cruel, and sexually assaultive

## Disruptive, Impulse-Control and Conduct Disorders DSM-5 pp.461-480

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In the DSM-5, these diagnoses are part of Disruptive, Impulse-Control, and Conduct Disorders and involve problems in self-control of emotions and behaviors.

While the behaviors violate the rights of others or bring the individual in conflict with societal norms or authority figures, these behaviors can be the result of poorly controlled emotions such as anger.

The FIE typically does not include such diagnoses, but often students are evaluated privately and given the diagnosis. If applied, must know the exact symptoms/behaviors exhibited to warrant the diagnosis. Cannot simply equate ODD and CD with SM.

These disorders frequently co-occur with ADHD, mood, and anxiety disorders and other psychiatric conditions

And even if the student has these characteristics, that does not preclude identification as ED.

## So why is this still a thing?

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If we do not have a definition of SM and cannot say you are not ED due to SM, then why is this such a big deal?

Schools have many students who exhibit behavior problems and disruptive, rule-breaking actions and at times, parents and educational personnel infer that this indicates a disability.

In *Springer v. Fairfax County* (1998), it was noted that “a ‘bad conduct’ definition of serious emotional disturbance might include almost as many people in special education as it excluded. ... such a definition would require the schools to dispense criminal justice rather than special education.”

## Springer v. Fairfax County Public Schools US Court of Appeals 4<sup>th</sup> Circuit

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Access at: <https://law.resource.org/pub/us/case/reporter/F3/134/134.F3d.659.97-1482.html>

Educational History in elementary and middle school, including private school from 7<sup>th</sup>-9<sup>th</sup> grade, was successful.

10<sup>th</sup> grade returned to high school in Fairfax County: C+ average, positive relationships with peers and teachers, participated in church group, Boy Scouts and high school wrestling team.

Developed significant behavioral problems in 11<sup>th</sup> grade: arrested and put on probation; would sneak out of the house; stole from parents and others; used marijuana and alcohol; broke school rules; truant; stole a car and kept it for a week of joy-riding.

## Springer v. Fairfax County Public Schools

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In response to behavior problems, parents enrolled Edward in a private residential school, filed a hearing and claimed he was ED; parents also had a psychiatrist write a letter to the juvenile court saying he was both conduct disordered and suffered from dysthymia (depressive disorder)

The district evaluated and found no ED, and stated that the pattern was one of conduct disorder

Parents won the hearing with the hearing officer relying on the letter written by the psychiatrist.

District appealed to the state and hearing officer decision was overturned saying no ED. Found that the letter had been written to persuade a judge to sentence him to a camp in Idaho rather than incarceration, and the letter was “insufficient in detail and dignity” to use

## Springer v. Fairfax County Public Schools

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Parents appealed the overturn.

The finding of social maladjustment “does not end the inquiry...a student may be socially maladjusted and suffer an independent serious emotional disturbance”

But, several separate evaluations had been conducted saying no ED (school psychologist, and two private psychologists)

So final decision was to uphold the district court decision and rule that he did not exhibit ED

## Springer v. Fairfax County Public Schools

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This case also addressed the concept of adverse impact on educational functioning

“Even if they had been able to demonstrate that Edward exhibited one or more of the five characteristics ... the Springers still have failed to establish the critical causal connection between the condition and the educational difficulties Edward experienced ... Edward’s delinquent behavior appears to be the primary cause of his troubles.”

## Adverse impact?

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Remember to be ED, must have been over a long period of time, to a marked degree that adversely affects educational performance. We have a few cases where the ED, even if present, is not the reason for the educational difficulty.

- *Nguyen v. District of Columbia*, 54 IDELR 18 (D.D.C. 2010)  
Truancy and drug use led to educational difficulties, not diagnosed depression
- *Mr. and Mrs. N.C. v. Bedford Central Sch. Dist.*, 51 IDELR 149 (2nd Cir. 2008). Drug use, not ED caused educational difficulties

But

- *H.M. by J.M. v. Weakley County Bd. of Educ.*, 65 IDELR 68 (W.D. Tenn. 2015) severe depression and social maladjustment were present and not just misconduct caused problems in school, so reversed ineligibility of ED.
- *Eschenasy ex rel. Eschenasy v. New York City Dept. of Educ.*, 52 IDELR 66, 604 F. Supp. 2d 639 (S.D.N.Y. 2009) Conduct disorder and ED

## Marie K. v. Round Rock ISD 142-SE-1295

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17 years of age, high school senior, attending private school in Arizona

Elementary – private schools through 6<sup>th</sup> grade, high achiever

7<sup>th</sup> – 8<sup>th</sup> grades – public school in RRISD, in gifted and talented classes and made A's and B's

High school – enrolled on and off 4 times, frequently truant

Troubles began when Marie ran away from home multiple times in 9<sup>th</sup> grade, skipped classes, was defiant of authority, ... She was placed by her parents in various hospitals and then a residential center

## Marie K. v. Round Rock ISD 142-SE-1295

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Returns to RRISD and has discipline referrals for tardiness and truancy. Drug abuse in 10<sup>th</sup> grade and goes to a wilderness program in Utah

Put on probation for truancy: “forbade Marie to associate with drug or narcotic users or to visit the Sixth Street nightclub area in Austin...” Hospitalized again and then put at an academy in Utah – she ran away, stole a car and drove to New Mexico

Enrolls in private school in Austin and asked to leave; re-enrolls in RRISD but only stays 3 months then put in another private school and was expelled within one month; back to several hospitalizations, some private schools, a summer camp school in New Hampshire (still running away or not allowed to remain), in a residential treatment facility for one year in Alabama ...

## Marie K. v. Round Rock ISD 142-SE-1295

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Eventually at a boarding school in Arizona

Parents want reimbursement for all placements

Throughout these years, many evaluations were conducted and diagnostic impressions indicated conduct disorder and many other diagnoses: depression, bipolar, ODD, personality disorder, substance abuse

RRISD never referred or evaluated Marie for special education

It was noted that Marie was socially maladjusted, but “a socially maladjusted student is IDEA-eligible if he or she meets the criteria for serious emotional disturbance in addition to being socially maladjusted ... Marie should have been evaluated to determine this very issue.”

## Marie K. v. Round Rock ISD 142-SE-1295

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Hearing Officer found Marie eligible as ED

RRISD failed to refer, failed to evaluate, failed to identify, denied FAPE

Reimbursement for Alabama and Arizona was granted

No reimbursement for various psychiatric hospitalizations and private schools

## Student v. West Valley School District

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OAH Docket No. 06-2019-OSPI-00793 (Washington)

5<sup>th</sup> grade – multiple disciplinary infractions including disruptive behavior or disrespect, defiance, or failure to comply with staff; then possession of vape pen, destroying 2 cell phones in locker room; ultimately, stole juice from the kitchen, leading to MDR

Parent had requested school evaluation, had the student evaluated externally, diagnosed with ADHD and PTSD, and “other specified disruptive, impulse-control, and conduct disorder.” Then another evaluation concluded ODD.

34 discipline referrals for 18-19 school year and missed 54 full or partial days

School said no causal relationship due to no identifiable disability condition. History of stealing. Not due to a trauma or triggering event.

## Student v. West Valley School District

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Considered evaluation, but attributed poor academic performance due to absences and lack of motivation and poor behavior due to social maladjustment

- *...the Student would not be eligible under this category because he met the definition of social maladjustment. ... None of the District witnesses were able to provide the definition of social maladjustment that was used by the team. However, Ms. Lewis provided some explanation of this term to the team during the meeting... Further, Ms. Forrest testified that a conduct disorder can be thought of as social maladjustment.*

District violated Child Find, did not provide FAPE, did not consider all disability categories (OHI-ADHD, SLD, EBD) for evaluation or MDR, conducted an improper MDR

## Student v. West Valley School District

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*The PWN declining to evaluate the Student stated "In addition, [the Student's] diagnosis would preclude him from being eligible for special education in another category due to exclusionary factors in the Washington Administrative Code (WACs)." This statement reflects the evaluation team's conclusion that the Student would not be eligible under the EBD disability category because his diagnosis of conduct disorder proves he is socially maladjusted. ... Similar to its analysis of SLDs, it appears the evaluation team made assumptions about what the outcome of the Student's evaluation would be without any assessments to back up the conclusion. The PWN provided limited information and none of the evaluation team members could explain the definition of "socially maladjusted." Further, the District admitted that a Student who is socially maladjusted can also be eligible under the EBD category in some circumstances or can be eligible under a completely different category. Social maladjustment does not preclude a Student from being eligible for special education.*

## TAKE-AWAYS

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A pattern of misbehavior does not automatically indicate ED, but cannot determine ED without an evaluation designed to address it. It would be prudent not to determine the need for an evaluation based on SM vs. ED.

**Focus of FIE is to determine presence or absence of ED, not SM. This is not a differential classification. The presence of SM does not automatically exclude ED.**

Our FIEs must be designed to investigate ED and be educationally focused.

What behaviors are interfering with educational functioning?

Investigate and delineate the pattern of the student's behavior and how that leads to adverse impact.

It would be wise to include a functional behavioral assessment (FBA) as part of any FIE to determine ED (investigate under what conditions does the behavior occur)

## So what if student has a SM pattern?

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In the FIE Conclusions, can write something like this:

Johnny does display a pattern of behavior typically associated with social maladjustment (SM). For Johnny these behaviors involve theft (various materials from classmates, two phones, and money from his parents) and defiance of authority (argues with teachers, does not comply with non-instructional requests from teachers and the principals, violates rules in the classroom and educational environment). There are 8 discipline referrals regarding these specific types of behaviors. It should be noted that compliance does occur when highly sought after reinforcers are present (e.g., tokens to exchange for money at home, time on a preferred activity such as a video game).

However, the presence of SM does not preclude the presence of an emotional disturbance (ED). Therefore, this assessment investigated the characteristics associated with ED.

## ED Characteristics

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The Conclusions then go on to address each of the ED characteristics:

*Inability to learn that cannot be explained by intellectual, sensory, or health factors*

- Johnny does not display this characteristic. His overall level of intelligence falls in the high average range (WISC-V FSIQ=113), academic achievement is average (KTEA-3 Reading Composite=103, Math Composite=109, Written Expression=98), and he is on grade-level for academic performance (MAP results; has passed STAAR in all areas)

*Inability to build or maintain satisfactory interpersonal relationships with peers and teachers.*

- Johnny does not display this characteristic. He has several friends, is outgoing, and is part of an athletic group (community baseball). Relationships with some teachers are strained in that Johnny is often defiant and has difficulty following classroom rules, especially in ELA and Social Studies. However, he has a good relationship with his math teacher and PE coach.

## ED Characteristics

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*A general pervasive mood of unhappiness or depression*

- Johnny does not display this characteristic. There were no elevations on parent, teacher or self-report rating scales in this area (BASC-3 and CDI). Both the parent and teacher describe Johnny as having a pleasant disposition and that there is no indication of sadness.

*A tendency to develop physical symptoms or fears associated with personal or school problems*

- Johnny does not display this characteristic. The Somatization scales on the BASC-3 were not elevated and no specific fears were reported. Measures of anxiety (BASC-3 and RCMAS) fell within normal limits.

## ED Characteristics

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This is the characteristic that is typically problematic for this decision, although several cases have had SM and depression.

### *Inappropriate types of behavior or feelings under normal circumstances*

- Johnny does not display this characteristic. He does display a disregard for demands or expectations, especially as applied to rules at school. He conforms to such rules in community activities (baseball). Johnny understands expectations, but does not like rules and will challenge them. He is viewed as oppositional, but mostly in classes that he dislikes (e.g., ELA vs. Math). Some teachers refer to him as having a “bad attitude,” but indicate that he can be conforming at times if he likes what topic is being discussed and if he will get something for conforming.

Therefore, Johnny does not display any of the 5 characteristics of an emotional disturbance.

WHAT YOU CANNOT SAY IS THAT JOHNNY IS NOT ED BECAUSE HE IS SM.

## Do you have to include SM in your FIE?

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If the student meets the criteria for ED, then your conclusions will address which of the 5 characteristics is/are met.

Would there be a need to address social maladjustment if the student clearly meets ED criteria?

How much of a pattern of behavior associated with social maladjustment does a student have to exhibit before you address it in your FIE?

## Example: Douglas

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*A general pervasive mood of unhappiness or depression: Douglas has been experiencing significant depression for over one year and is under psychiatric care (precipitating event was suicidal statements). Current rating scales (BASC-3 and CDI; parent, teacher and self-report) yield clinically significant levels of depression. Douglas displays a sad mood (blunted affect) at school and is not very interactive with peers. He does interact for academic purposes (e.g., answers questions, participates in a group activity), but is mostly withdrawn in social activities. Both at home and school, Douglas has become more and more disinterested in activities he previously enjoyed. He expresses feelings of inadequacy, will cry if he does not do well on a test, and acknowledges feelings of hopelessness (e.g., things will not get better).*

Now, let's assume that Douglas has a history of truancy and drug use (marijuana). The marijuana use is recent and no indications of use during school hours.

Would you simply report this? Probably Yes

If so, do you use a term such as social maladjustment in your FIE for Douglas? Probably No

## Issues and Implications

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- ED is a difficult determination – (Kauffman, Brigham & Mock, 2004)
  - personal philosophy (e.g., some people do not like this classification)
  - definitional imprecision (e.g., vague, ambiguous)
  - pragmatic concerns (e.g., discipline issues, placement)

### Dimensional

- ED is a collection of problems involving behaviors, emotions, and thoughts that all people experience to some extent (Kauffman, et. al., 2004)
- ED is extreme form of ordinary behavior
- ED is a severe condition – atypical, not expected based on age, cultural or ethnic norms

Adverse impact on educational performance not defined only by academics but also social, vocational, personal/adaptive

Must be evident in school and in an additional setting

General education interventions insufficient

## Issues and Implications

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Comorbidity rule versus exception (most behavior problems occur in combination with other problems)

Should have RtI and data gathered in RtI becomes part of decision-making

### Must know developmental level when interpreting behavior

- ADHD – estimated 30% lag in social-emotional development (e.g., kid is 13, social-emotional development=9)
- Students with emotional disturbance and cognitive impairments will display immaturity in problem-solving and pro-social behaviors

## Co-occurring conditions

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Common co-occurring conditions with ED: ADHD and SLD

Common request for differentiation: AU (Remember: assess constructs such as Theory of Mind, Social Referencing and Reciprocity; assess skills in Verbal and Nonverbal Communication and include a speech-language evaluation; and obtain a thorough developmental history)

Remember: If ED primary, AU does not apply

But, if AU primary, you may also be ED.

Which possibilities would this involve:

- Inability to learn ...
- Inability to establish relationships ...
- Inappropriate behavior or feelings under normal conditions
- General, pervasive mood of unhappiness or depression
- Tendency to develop physical symptoms or fears

## “Best Practices” in Multimethod Assessment of ED: RIOT

Review of Records/History	Interviews	Observations	Tests
Cumulative file, Special Education file, Discipline records, Referral information	Parent Teachers & Other School Personnel Community personnel if applicable	Multiple settings Structured and less structured activities and specific tasks Different times of day	Standardized Rating Scales (e.g., BASC-3, CCBRS)
Previous interventions	External Service Providers and Agencies (if applicable)	Identification of antecedents and consequences for behavior pattern	Standardized Self-Report Scales (e.g., BASC-3, CDI, RCMAS)
Previous Evaluations	Student	In situations where behavior does and does not occur	FBA (e.g., FAST, MAS) Social Skills (e.g., SSIS) Executive Function (e.g., BRIEF, D-REF, CEFI)

## Evaluation Strategies

Review of Records, Interviews and Observations should come first (may have to re-interview and observe again, but general interview and observations first)

### How do you select the tests to use?

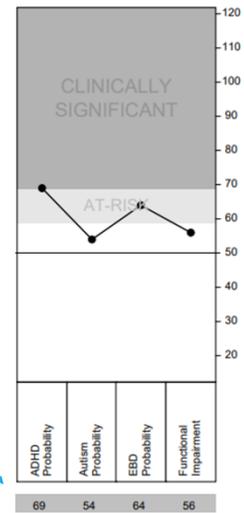
- Student characteristics – e.g., cognitive ability and reading skills for self-report measures; willingness to cooperate
- Broadband versus Narrowband Measures
- Frequency versus Yes-No formats
- Multiple norm comparisons and Special Scales (e.g., ADHD vs. Clinical Norms; Content Scales or Second Order Scales) – select scales that have data on clinical samples and differential profiles

# Example A: BASC-3 Likely ADHD not ED

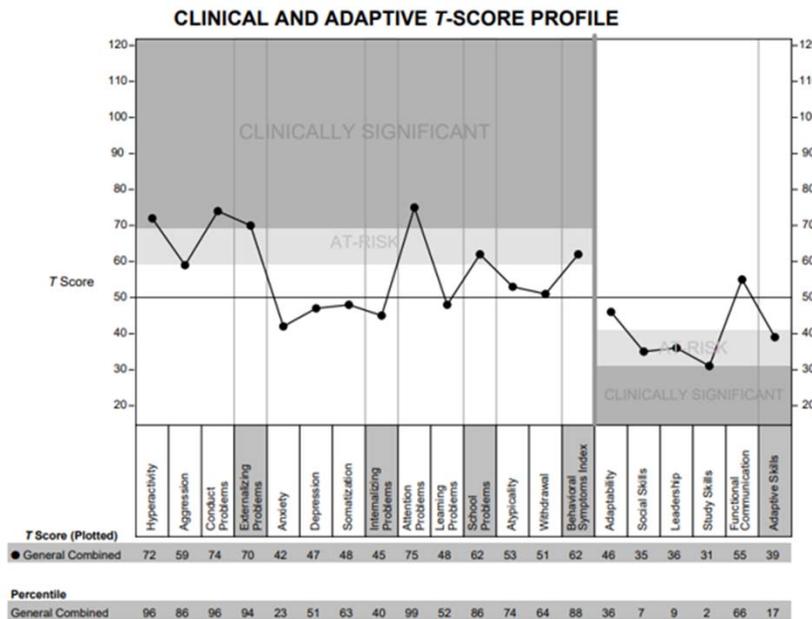
ADHD and EBD not clearly differentiated on Clinical Probability Index

## EXECUTIVE FUNCTIONING INDEX SUMMARY

Overall Executive Functioning Index	Problem Solving Index	Attentional Control Index	Behavioral Control Index	Emotional Control Index
Elevated Raw Score: 52	Not Elevated Raw Score: 18	Extremely Elevated Raw Score: 25	Elevated Raw Score: 9	Not Elevated Raw Score: 0



## Example A



## Example B: BASC-3 Clinical Probability Index: Likely ED not ADHD

Clinical Probability Scales	Mother	Reading Teacher	Math Teacher
ADHD	64	58	68
AU	52	54	54
EBD	72	78	74

### Example B w/ additional data:

J's prominent pattern of characteristics is consistent with an emotional disorder. While there are elevations in the area of attention, follow-up interviews with the parent and teachers indicate that inattentiveness and need for assistance to remain focused and complete tasks are associated with his mood and need for reassurance. Specifically, J displays significant anxiety and depression. He is fearful of many things, but especially of bugs, getting hurt (he broke his arm last year in a fall and has been very concerned that this could happen again), and the dark (at home). At school, he remains close to his teachers when outdoors and is very careful in physical activities. J also appears sad as evidenced by a blunted affect and crying under certain conditions (if he perceives someone has rejected him, if he does poorly on a test). His teachers and mother describe him as sensitive. As noted in the FIE, J has been diagnosed with anxiety and depression and is prescribed Zoloft. He also receives private counseling. On narrow-band self-report measures of both depression and anxiety (CDI, RCMAS), J's scores fell in the clinically significant range.

### EMOTIONAL DISTURBANCE QUALIFICATION SCALES (EDQs) SUMMARY

The EDQ scales were developed to reflect clinical and adaptive scale combinations that are grouped specifically to align with the constructs of emotional disturbance (ED) represented in the federal Individuals with Disabilities Education Improvement Act (IDEIA, 2004) disability definition. These constructs serve as the minimum criteria used to determine a student's eligibility for special education and related services under the classification of ED. Because of the breadth of assessment provided by the BASC-3, examiners are advised to consider other BASC-3 clinical, adaptive, and content scales, the history of the behaviors they measure, and the duration of any behavioral or emotional problems when making special education and related services eligibility recommendations.

Emotional Disturbance Qualification Composites (EDQCs)	Raw Score	T Score	Percentile Rank	90% Confidence Interval	Clinical Indicator
EDQC 1: Unsatisfactory Interpersonal Relationships	364	63	89	60-66	At-Risk
EDQC 2: Inappropriate Behavior/Feelings	354	51	62	48-54	Acceptable
EDQC 3: Unhappiness or Depression	105	53	68	49-57	Acceptable
EDQC 4: Physical Symptoms or Fears	90	44	37	39-49	Acceptable
EDQC 5: Schizophrenia and Related Disorders of Thought	285	59	81	56-62	Acceptable
<b>Social Maladjustment Indicator</b>					Absent

## 5 Components to include in ED FIE

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Assessment of Social Skills

Functional Behavior Assessment

Asset-based assessment

Executive Function assessment

Counseling/Psychological Services assessment (your evaluation is also addressing related services; use observations, interviews, rating scales and self-report measures to determine if such services are needed)

# Primary Uses of ED Report

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Establish the presence or absence of a condition

Recommendations for behavioral supports and interventions –  
FBA part of ED evaluation will be relied on for diagnostic and  
intervention purposes (e.g., BIPs)

Will be relied on for decisions regarding MDR

Evaluation for counseling and/or psychological services as a  
related service

# ED Litigation

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**Zirkel (2011) NASP Communique: overrepresentation of litigation in proportion to  
classification percentage**

## **Analysis of Special Education Due Process Hearings in Texas**

**G. Thomas Schanding<sup>1</sup>, Gail M. Cheramie<sup>1</sup>, Hannah Hyatt<sup>1</sup>,  
Sarah E. Praytor<sup>1</sup>, and Jessica R. Yellen<sup>1</sup>**

SAGE Open  
April-June 2017: 1-6  
© The Author(s) 2017  
DOI: 10.1177/2158244017715057  
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approximately 8% of the hearings in this review. It is important to note that in Texas, autism, emotional disturbance, and other health impairment eligibilities make up approximately 29% of the special education population (Texas Education Agency PEIMS Standard Reports Overview, 2016); however, they account for approximately 65% of all hearings.

## **Due Process Case Issues for Students With Emotional Disturbance**

**Mertie M. Gomez<sup>1</sup>, Valerie R. Morgan<sup>2</sup>,  
G. Thomas Schanding, Jr.<sup>2</sup>, and Gail M. Cheramie<sup>3</sup>**

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January-March 2022: 1-14  
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journals.sagepub.com/home/sgo  
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Most common categories:  
1<sup>st</sup>: IEP programming & placement  
2<sup>nd</sup>: Evaluation

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Hochbaum, Daniel. Emotional Disturbance and Social Maladjustment: Doing Away with the IDEA's "Social Maladjustment Exclusionary Clause"

Various presentations by Dr. Stephen E. Brock can be accessed which discuss this issue

Some states have guidelines on ED that include SM (e.g., Colorado, Michigan, Connecticut)

# DUE PROCESS AND LITIGATION ISSUES

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# STUDENT, B/N/F PARENT, V. UNIVERSAL ACADEMY, DOCKET NO. 203-SE-0322 (2024)

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## Factual Background

When the student enrolled at the charter school in August of 2022, the parent reported the student had some diagnoses, but provided no information of the severity or duration of these conditions. Upon enrollment, the school received the student's prior 504 plan. In August 2022, the school convened a Section 504 meeting and reviewed Student's prior 504 Plan. The Student's prior Section 504 Plan did not mention, or provide for, any mental health condition. The mother stated that the student had an additional diagnosis. The 504 Committee decided to meet again after it received additional information from the student's physician.

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In September 2022, the 504 Committee reconvened to review additional medical information from the physician that had been received. The physician reported that the student had another diagnosis and that the student was on medication for this condition. The physician recommended several accommodations to address the diagnosis, such as allowing the student to rest for fifteen or twenty minutes before returning to class; dim the lights in the classroom if possible; and providing the student with a break outside the classroom if the student's condition was causing anxiety. All of the accommodations were added to the 504 plan.

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The parent sent an email in September 2022, that alleged that the student was being bullied. The school investigated and the allegation was unsubstantiated. The parent alleged that the student did not want to come to school. At that time, school staff had not observed any unusual or significant issues at school.

Also in September, the parent placed the student in a hospital program and asked the school to provide assignments. The school asked for two releases, one to provide the school work to the program and another to obtain information from the program, including intake information and evaluations. The parent only allowed the release of school information. Another 504 meeting was held in October. The parent agreed to the plan.

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After the student was released from the hospital program, the parent did not return the student to the school and withdrew the student in January 2023.

In February, when enrolled in another school, the parent shared a psychologist's evaluation that was completed in the fall. A 504 meeting was held to review the Student's most recent Section 504 Plan as well as the private psychological evaluation. The Committee noted the Student's absences during fall 2022 both excused and unexcused and determined that these massive absences, coupled with failing grades in one of the grading cycles and the fall semester at facility required Student to repeat the grade in the 2023-2024 school year.

The 504 Committee agreed to adopt the accommodations recommended in the evaluation; determined that the student was making progress in the general education curriculum; and concluded there was no suspicion of a need for specialized instruction at that time. Student's Parent agreed with these decisions during the February 2023 meeting.

However, after the meeting, the Parent's requested a special education evaluation. The school conducted and concluded the FIIE on May 2023. Because of the timing, the initial ARD meeting was held on August 2023 and reconvened in October 2023. As of October 2023, the ARD committee determined that the student met the special education criteria due to ED and OHI for ADHD.

## Court's Findings

The hearing officer found that although the student was enrolled at the charter school for the entire fall semester of 2022, the student only physically attended for a limited number of school days between the student's enrollment in August 2022, and the student's withdrawal in January 2023. While the student officially withdrew in January 2023, the student never returned to the School after she was in a hospital type program. The student's scattered attendance resulted from the student's numerous absences for health problems and doctor's visits, the lengthy placement at the hospital setting and the parent's failure to return the student to school between the student's release from the facility in December 2022, and the student's withdrawal in January 2023. The hearing officer held that this, coupled with the Parent's failure to provide the school with critical educational information, precluded a logical determination that Student had a qualifying disability that required special education services.

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## Lessons Learned

- The child-find obligation is triggered when the school district has reason to suspect the student (i) has a disability; and (ii) needs special education services.
- Educational need is not strictly limited to academics but also includes behavioral progress and the acquisition of appropriate social skills as well as academic achievement.
- While the achievement of passing marks and the advancement from grade to grade is important in determining educational need, it is but one factor in the analysis.
- If a district has reason to suspect a student has a disability and requires special education, then the school does not meet its child-find obligation by waiting for a parent to request for evaluation.

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- However, when a parent chooses to withhold information about a child, it interferes with the district's ability to consider fully a student's circumstances and potential need for special education. In such a case, the district has no reason to suspect a disability until the parent makes the request for evaluation.
- Once the child-find obligation is triggered, the District must initiate the evaluation process within a reasonable time.
- A child-find violation turns on three inquiries:
  - (1) the date the child-find requirement was triggered due to notice of a disability;
  - (2) the date the child-find duty was satisfied; and
  - (3) the reasonableness of the delay between these two dates.

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- When evaluating a school's actions related to an alleged child-find violation, courts and hearing officers examine only the information and resources possessed by the school at a given point in time.
- The pivotal question in a child find inquiry is what did the school staff know and when did they know it?
- No single circumstance triggers a school's child-find obligation.
- The inquiry of whether a school should reasonably suspect a child has a disability under IDEA relies on several factors, of which hospitalization is but one.

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- No child-find violation occurs where a school district appears to be invested in addressing the student's needs and in providing appropriate instruction and interventions before rushing to special education identification.
- In finding that Student qualified under the ED category, Student's ARDC had to find that Student exhibited one or more of the following delineated characteristics:
  - (1) an inability to learn that cannot be explained by intellectual, sensory, or health factors;
  - (2) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
  - (3) inappropriate types of behavior or feelings under normal circumstances;
  - (4) a general pervasive mood of unhappiness or depression; or
  - (5) a tendency to develop physical symptoms or fears associated with personal or school problems. 34 C.F.R. § 300.8 (c)(4)(i).

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- IDEA requires that before a student is found to have an ED, the student exhibits one or more of these characteristics over a long period of time and to a marked degree that adversely affects a student's educational performance.
- In determining that a student has an ED, the school must not focus solely upon the student's academic performance; it must base this determination on a holistic view of the student's behavior, academic performance, and other indications.

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# STUDENT V. FRISCO ISD, SOAH DOCKET NO. 701-23-18991

(2024)

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## Factual Background

The student was enrolled at the district from 2017 until the student's withdrawal in 2019. Thereafter, the student attended another school. Student qualified for services under the eligibilities of ED and OHI. He was placed in a self contained setting which was designed to address students with behavioral and emotional challenges with intensive intervention.

The student re-enrolled in Frisco in January 2021. He was placed in a comparable program that was not located on the student's home campus. Multiple ARD meetings and evaluations were conducted at the request of the parent, including an Autism evaluation. The evaluation found that the student did not meet the eligibility criteria for Autism. Over time, the student's behavior improved which resulted in improved academic performance.

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## Factual Background

In April of 2023, the student engaged in misbehavior that constituted a DAEP offense. Rather than send the student to the DAEP, the administrator chose to suspend the student for three days. When the student did not return after the three days, the school sent a letter inquiring about the absences. Thereafter, the parent chose to homeschool the student. The parent filed for a due process hearing, challenging the student's evaluations, program and placement.

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## Court's Findings

The hearing officer ruled in favor of the district, finding the evaluations and placement appropriate. The hearing officer found that the parent did not prove the District failed to conduct timely evaluations in all areas of suspected disabilities. The hearing officer held that each evaluation addressed the student's educational strengths, deficits, and needs and continued to support the student's abilities and needs.

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## Lessons Learned

- When a student is evaluated for ED, an FBA needs to be conducted as well.
- A student's eligibility under ED can explain a student's inability to build and maintain social relationships and can be the root cause of Student's deficits in social functioning, rather than autism. The basis for the social deficits needs to be determined by the evaluation.
- It is important to remember that a student with autism can also be eligible as ED.

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- The determination of whether a student can be educated in the general education settings requires an examination of the nature and severity of the student's disability, the student's needs and abilities, and the school district's response to the student's needs.
- This determination requires an examination of:
  1. a school district's efforts to provide the student with supplemental aids and services in the general education setting;
  2. a school district's efforts to modify the general education curriculum to meet the student's individual needs;
  3. the educational benefit a student is receiving while placed in the general education setting; and
  4. the impact the presence of the student with a disability has on the other students.

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- When a student's behaviors require a structured learning environment with multiple personnel implementing the student's IEP, and this level of structure and staff cannot be accomplished in the general education setting, placement in a self-contained setting is the least restrictive environment.
- When a student's BIP requires multiple staff for escalated behavior, that student can be placed in a self-contained setting.

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## KRAWIETZ V. GALVESTON INDEPENDENT SCHOOL DISTRICT, NO. 17-40461

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(5<sup>th</sup> Circuit, 2018)

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## Factual Background

The student was born in 1996 and had behavioral issues and various disorders since she was very young. In 2004, the student was evaluated and determined eligible for special education services and an IEP was developed to address learning and behavioral challenges. In 2008, the student was withdrawn and homeschooling after an incident where she tried to harm another student.

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In 2013, she returned to school as a freshman. At that time, the parent reminded the school staff that her daughter had been eligible for special education services. The school staff could not locate the previous documentation and assumed she had been dismissed from special education. In September of that school year, the student was suspended and placed in the DAEP following an incident where she had sexual relations with two other students in the restroom. In November, the school referred her to Section 504. She was failing most of her classes. The 504 committee determined that she qualified for Section 504 due to PTSD, ADHD and OCD and put accommodations in place. No FBA was conducted and no BIP was put in place. With the accommodations in place, she successfully completed her freshman year.

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The next school year, 2014-2015, however, she continued to struggle. She completed less than half of her credits for the fall semester. She was hospitalized for two months when she stole \$1500 from her mother. The parent filed for a due process hearing on February 9, 2015 asserting that the school untimely evaluated the student and did not provide FAPE. The parent asked for private school placement. On the date the due process hearing was filed, the school sent notice of a 504 meeting. At the resolution session, the district offered to conduct an FIE to which the parent agreed. The evaluation was completed on April 15, 2015 and found that the student qualified for special education services as ED.

## Court's Findings

The due process hearing was held, and the hearing officer ruled in favor of the parent, finding that the district did not meet its Child Find obligations and that they failed to provide FAPE, however, the hearing officer did not order residential placement.

The parent filed for attorneys' fees in district court and the district challenged the hearing officer's findings. The district court upheld the hearing officer's decision and awarded attorney's fees. In so doing the judge found the following:

Ashley's academic decline, hospitalization, and incidents of theft during the [fall 2014] semester—taken together—were sufficient to cause GISD to suspect that her several disabilities created a need for special education services. The Court finds that, conservatively, GISD should have suspected the need for an IEP by October 2014. GISD did not attempt to conduct an evaluation until April 2015. The evaluation occurred at least six months after GISD should have suspected that one was required, and three months after Ashley requested a Due Process Hearing. The Court further finds that this six-month delay was unreasonable. . This is especially true given the extensive notice to GISD and the dire circumstances involved.

The district appealed the decision to the Court of Appeals. The school contended that the student's hospitalization in the fall of 2014 was insufficient to put it on notice of her need for special education services. The Court of Appeals rejected the argument pointing to the fact that the district court did not rely on the hospitalization alone; it relied on a combination of factors, including the student's deteriorating academic performance. The school suggested that the student's academic decline did not become manifest until the fall semester officially ended on January 21, 2015. However, the Court of Appeals found that there was sufficient evidence of her declining performance earlier in the semester as well.

The school also argued that the district court miscalculated the period of delay by using an incorrect end date. According to school, the proper end date for determining the timeliness of its compliance with its Child Find obligation was not the date on which it completed the evaluation (April 21, 2015), but rather the date on which it requested consent from the student's mother to conduct the evaluation. (February 16, 2015). The Court found that even if the two months it took to conduct the evaluation was removed, there still was a four month delay from October 2014 until February 16, 2015 which was unreasonable, and that was a sufficient basis for the Court of Appeals to affirm the district court's decision.

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During those four months, the Court found that the school did not take any appreciable steps toward complying with its Child Find obligation and, it was only after Ashley's family requested a due process hearing that the school sought consent to conduct the evaluation.

The school also argued that the student's family failed to "act with any urgency" until late January 2015. The Court emphasized that the IDEA imposes the Child Find obligation upon school districts, not the parents of disabled students.

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## Lessons Learned

- If a student was previously identified, the school should at least monitor the student under MTSS.
- If the school receives outside diagnoses of PTSD and OCD, the school needs to consider a referral for special education under the eligibility of Emotional Disturbance.
- When a student is having behavioral problems, an FBA needs to be conducted and a BIP developed whether the student is served under IDEA or Section 504.

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- When a student is hospitalized, the district needs to request a release to obtain the any evaluations and discharge papers on the student to determine if there is reason to suspect a disability.
- If a student is failing, the school does not need to wait until the end of the semester to refer a student for special education services if there is reason to suspect that the student is in need of specialized instruction.

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