

IS BAD BEHAVIOR A DISABILITY?

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BAD BEHAVIOR IS NOT ALWAYS A DISABILITY



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THE DIFFERENCE: BAD BEHAVIOR & DISABILITY

- Look for patterns:
 - Triggers
 - Similar behaviors
 - Time of day
 - Duration
- Collect background information
- Attempt interventions and document response
- Monitor, and
- Document, document, document

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THE STUDENTS

Student #1 <ul style="list-style-type: none">You know who I'm talking about!Let's describe him:<ul style="list-style-type: none">Blurting outFoul languageTruancySometimes physicalOffice referralsFills up a room	Student #2 <ul style="list-style-type: none">No one really knows this student.Let's describe her:<ul style="list-style-type: none">Head downLimited eye contactTruancyLimited/no friendsIsolatesNo one knows she is in the room.
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THE CONVERSATION

- Either of these students could be eligible under the IDEA.
- How do you know which student has a disability?
- What should you do?

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BEHAVIOR AND CHILD FIND

- "Child Find" is the affirmative, ongoing obligation of states and local districts to identify, locate, and evaluate all children with disabilities residing within the jurisdiction that either have, or are **suspected of having, an IDEA disability AND need special education** as a result of those disabilities.
- See 34 C.F.R. §300.111.

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 **BEHAVIOR AND CHILD FIND**

- **Child Find must include:**
 - Children experiencing behavioral difficulties, even if they are passing from grade to grade.
 - Highly mobile children, including homeless and immigrant children.
- You may want to take a closer look at some students who exhibit chronic behavioral difficulties.

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 **CHILD FIND**

- **Whose obligation is it to find IDEA eligible children?**
 - The local school district or public agency.
 - Typically, this is the resident district.
 - How does school choice affect a school district's Child Find obligation?
 - What about homelessness? The children of temporary or seasonal workers?

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 **CHILD FIND**

- **Viewed from a special education perspective,**
 - If the student is residing in your district, even temporarily, the child find obligation is your district's. A district is never relieved of the child find obligation for resident students.
 - If the student is attending school in your district through open enrollment or school choice, the child find obligation is your district's.
 - If the student is located in your district for the purpose of attending a private school within your boundaries, the child find obligation is your district's.

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SOURCES OF INFORMATION

- PBIS or other intervention data
- Grades and report cards
- Disciplinary records:
 - Office referrals;
 - Removals;
 - Behavior Intervention Plans (BIPs); and
 - Data collections.
- Attendance
- Student hospitalization, incarceration, etc.
- Parent concerns and/or referrals
- School concerns and/or referrals
- Threat assessments

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BEHAVIOR AND CHILD FIND

When does the Child Find obligation “mature?”

When the school district **SUSPECTS**

an IDEA disability,
AND
the need for special education.

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SUSPICION ≠ ACTUAL KNOWLEDGE

- The standard for triggering the Child Find duty is suspicion of a disability rather than factual knowledge of a qualifying disability.
- For example, a court found a Child Find violation when a student was admitted to a psychiatric hospital and unable to attend classes. The court considered the admission to a psychiatric hospital a “clear sign of a disability.” See *Regional Sch. Dist. No. 9 Bd. of Educ. v. M.M.*, 53 IDELR 8 (D. Conn. 2009).

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CRITICAL DISCUSSION

- The “suspicion” requirement is linked to two elements:
 - Suspicion of an IDEA disability, AND
 - Suspicion of a need for special education.
- Look to the definitions or criteria of IDEA disability categories for guidance.
- Suspicion of a disability may be inferred from parental concern, the behavior or performance of the child, teacher concern, or parental request for evaluation. *Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 36 IDELR 34 (D. Utah 2002).

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CRITICAL DISCUSSION

- 34 C.F.R. §300.8(c)(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 child's educational performance":
 - An inability to learn that cannot be explained by intellectual, sensory, or health factors.
 - An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

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CRITICAL DISCUSSION

- 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.
- Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.

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CRITICAL DISCUSSION

- 34 C.F.R. §300.8(c)(9): *Other health impairment* means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—
 - Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and
 - Adversely affects a child's educational performance.

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ASK . . .

- Does the student demonstrate _____.
(Fill in the blank with elements of the criteria.)
- Has this been happening for long period of time?
- Do you suspect that this behavior adversely affects educational performance?

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ASK . . .

- Does the student demonstrate _____.
(Fill in the blank with elements of the criteria.)
- Is it due to a chronic or acute health condition?
- Do you suspect that this condition adversely affects educational performance?

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AFFIRMATIVE = WITHOUT ASKING

- Districts are responsible for conducting child find evaluations and identifying all IDEA-eligible students that reside in their jurisdiction.
- Because the child find obligation is an affirmative one, a parent is not required to request that a district identify and evaluate a child.
- See *Robertson County Sch. Sys. v. King*, 24 IDELR 1036 (6th Cir. 1996). See also *D.G. v. Flour Bluff Indep. Sch. Dist.*, 59 IDELR 2 (5th Cir. 2012).

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AFFIRMATIVE = SEEK OUT

- A district may not take a passive approach and wait for others to refer the student for special education services. The district must seek out IDEA-eligible students.
- See *Compton Unified Sch. Dist. v. Addison*, 54 IDELR 71 (9th Cir. 2010), cert. denied, 132 S. Ct. 996, 112 LRP 1321 (2012).

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AFFIRMATIVE = ULTIMATE RESPONSIBILITY

- The district cannot use a parent's interference to excuse its responsibility for child find.
- The district has the ultimate responsibility for child find, despite the fact that a parent has hindered the child find process.
- See *M.J.C. v. Special Sch. Dist. No. 1*, 58 IDELR 288 (D. Minn. 2012).

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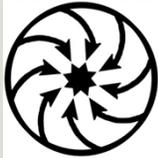
 **AFFIRMATIVE = ULTIMATE RESPONSIBILITY**

- School districts cannot abdicate their responsibilities under the IDEA.
- Even if a child's parents have the ability to obtain an evaluation, the district still has a responsibility to evaluate the child in all areas of suspected disability.
- **BOTTOM LINE:** Districts cannot require parents to obtain an evaluation.
- See *N.B. v. Hellgate Elem. Sch. Dist.*, 50 IDELR 241 (9th Cir. 2008).

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 **ADVERSELY EFFECT EDUCATION**

- The second element of a mature Child Find obligation is the suspicion of the need for special education.
- Another way of testing this prong is to look for adverse educational impact.
- This is not a linear if then inquiry. Think circular:



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 **ADVERSELY EFFECT EDUCATION**

- Substantiate through a convergence of data, including
 - Grades and report cards
 - Attendance
 - Office referrals and disciplinary records
 - Teacher reports
 - Intervention team reports



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ADVERSELY EFFECT EDUCATION

- The 7th Circuit Court of Appeals overturned a decision and criticized the ALJ's finding that a "student's educational performance could be affected if he experienced pain or fatigue.
- "This is an incorrect formulation of the test. It is not whether something, when considered in the abstract, can adversely affect a student's educational performance, but whether in reality it does."
- *Marshall Joint Sch. Dist. No. 2 v. C.D.*, 54 IDELR 307 (7th Cir. 2010).

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ADVERSE EFFECT & AVERAGE GRADES

- Adverse effect must be determined based on the student across environments, rather than just focusing on grades.
- Concluding that there was evidence that the middle school student's emotional disturbance may have taken a toll on his classroom performance, the court allowed his parents to proceed with charges that the district failed to properly evaluate him.

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ADVERSE EFFECT & AVERAGE GRADES

- The district acknowledged that the student, who had a history of behavioral and discipline problems, and who was diagnosed with depression, engaged in inappropriate types of behavior or feelings under normal circumstances.
- However, it found the student ineligible because of his grades.
- The court agreed that there was a genuine dispute regarding whether the district violated the IDEA procedurally. It pointed out that the district's eligibility determination rested on its view that the student's emotional difficulties did not adversely impact his education because he was maintaining a C average.

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 **ADVERSE EFFECT & AVERAGE GRADES**

- However, the student's ability was above average, the court observed.
- Thus, the district had at least some basis for believing the student's behavioral problems were negatively impacting his performance in class.
- *Moore v. Hamilton Southeastern Sch. Dist.*, 113 LRP 35214 (S.D. Ind. 2013).

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 **ADVERSE EFFECT & THE HOME ENVIRONMENT**

- A student who engaged in violent tantrums at home was not eligible for IDEA services as a child with an emotional disturbance.
- Pointing to the student's solid academic performance and generally good behavior at school, the court concluded that her behavior did not adversely affect her educational performance.
- The student's IEP classified her as a student with a speech-language impairment. Following the student's multiple tantrums at home, in one case leading to police involvement, the parents alleged that the district should have found her eligible as a student with an ED.
- The court acknowledged that the student exhibited, to a marked degree, behaviors required for establishing eligibility under the IDEA as a student with an emotional disturbance.

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 **ADVERSE EFFECT & THE HOME ENVIRONMENT**

- However, the parents could not establish the other eligibility requirement -- that the behavior adversely impacted the child's education.
- Noting that there was a "distinct divide" between her behaviors at school and home, the court pointed to evidence that she was generally respectful to adults and most of her classmates. She had a few conflicts at school, but according to teachers, it was nothing out of the ordinary. Neither her grades nor her assessments reflected any negative impact at school.
- Therefore, the district satisfied its obligation to provide FAPE.
- *G.H. v. Great Valley Sch. Dist.*, 61 IDELR 63 (E.D. Penn. 2013).

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IN PRACTICE

Student A

- Multiple disciplinary referrals:
 - Threatening
 - Fighting
 - Disrespecting
- Limited social skills
- Poor grades
- Failed standardized tests
- ADHD diagnosis

Student B

- Multiple disciplinary referrals:
 - Truancy
 - Theft
 - Drug use
- Lack of motivation
- Poor Grades
- Above average standardized tests
- Social maladjustment diagnosis

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IN PRACTICE

Hansen v. Republic R-III Sch. Dist., 56 IDELR 2 (8th Cir. 2011)

- Although the diagnosis of ADHD alone does not entitle the student to special education services, the student was hyperactive, impulsive, and exhibited inattentive behavior.
- Those behaviors interfered with learning.
- The student was IDEA eligible.

Springer v. Fairfax County Sch. Bd., 27 IDELR 367 (4th Cir. 1998)

- Finding the student socially maladjusted does not end the inquiry.
- There was no evidence of an emotional disturbance.
- The student's difficulty in school was attributed to social maladjustment.
- The student was **NOT** IDEA eligible.

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IN PRACTICE

Student C

- Psychiatric hospitalization after suicide attempt
- Recurrent hospitalizations for suicide treatment
- Mental health diagnosis
- Inability to attend school for psychiatric reasons

Student D

- Depressive behavior
- Exhibiting anger and anxiety
- Violent behavior
- Poor academics
- Drug use

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IN PRACTICE

Lauren G. v. West Chester Area Sch. Dist., 60 IDELR 4 (E.D. Pa. 2012)

- The district ignored the student's psychiatric diagnoses, her inpatient and outpatient psychiatric hospitalizations, and cutting class.
- The student was IDEA eligible because the psychiatric hospitalizations adversely affected her education.
- The student was IDEA eligible.

P.C. v. Oceanside Union Free Sch. Dist., 56 IDELR 252 (E.D.N.Y. 2011)

- The court noted that all of the instances in which the student appeared angry or anxious, became aggressive, or struggled academically occurred when the student was using drugs and alcohol.
- The substance abuse was the cause of his academic and behavioral problems, NOT the result of them.
- The student was **NOT** IDEA eligible.

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IN PRACTICE

Student E

- A, B, and C grades
- 43 absences
- Grade level standardized tests
- Concerns expressed in personal and social development

Student F

- A and B grades
- Suspended and disciplined for punching, tripping & bullying
- Aggressive since kindergarten
- Classroom progress reports satisfactory, playground reports unsatisfactory

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IN PRACTICE

Mowery v. Bd. of Educ. Springfield, 56 IDELR 126 (W.D. Mo. 2011)

- Despite a number of absences, the student was doing reasonably well.
- Discipline referrals had decreased.
- Although concerns existed, the student performed satisfactorily academically and socially.
- The student was **NOT** IDEA eligible.

Torrance Unified Sch. Dist. v. E.M., 51 IDELR 11 (C.D. Cal. 2008)

- The court finds that the inability to attend school deprives a student "the IDEA's guarantee to a basic floor of opportunity."
- Mere absence alone may not establish adverse effect, but the student was prevented from attending due to her behavior.
- The student was IDEA eligible.

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 **MAKE A RECORD**

- When a district suspects that a child has an IDEA disability and a need for special education, the district must propose a comprehensive initial evaluation. How does this happen?
- A district proposing to conduct an initial evaluation to determine if a student qualifies as a child with a disability must, after providing notice consistent with 34 C.F.R. §300.503, obtain informed consent from the parent before conducting the evaluation.
- See *Jefferson County Sch. Dist. R-1 v. Elizabeth E.*, 60 IDELR 91 (10th Cir. 2012).

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 **STUDENT DISCIPLINE**

IDEA provisions provide an umbrella of protection for students who are subject to discipline BUT HAVE NOT YET BEEN IDENTIFIED AS A STUDENT WITH A DISABILITY.



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 **PROTECTIONS FOR CHILDREN NOT YET ELIGIBLE**

- A previously unidentified student with a disability facing disciplinary action such as suspension, expulsion, or a change in placement to an interim alternative educational setting may nonetheless claim the procedural safeguards of the IDEA if the district had knowledge that the student was a child with a disability "before the behavior that precipitated the disciplinary action occurred."
- 34 C.F.R. §300.534.

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PROTECTIONS FOR CHILDREN NOT YET ELIGIBLE

- The district will be deemed to have knowledge if:
 - ① The parent of a child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services.

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PROTECTIONS FOR CHILDREN NOT YET ELIGIBLE

- ② The parent of the child requested an evaluation of the child pursuant to 34 C.F.R. §§300.300 through 300.311.
- ③ The teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency.
 - 34 C.F.R. §300.534.

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HOW ARE THESE CLAIMS ASSERTED?

- As child find violations.
- Failing to meet child find requirements is a matter of serious concern that can deprive FAPE to a student that a district should have identified.
- This failure to identify may entitle the student to compensatory education or tuition reimbursement accruing from the time the district first should have suspected the disability.
- See *Robertson County Sch. Sys. v. King*, 24 IDELR 1036 (6th Cir. 1996); *Lakin v. Birmingham Pub. Schs.*, 39 IDELR 152 (6th Cir. 2003); and *Department of Educ. v. Cari Rae S.*, 35 IDELR 90 (D. Hawaii 2001).

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CHILD FIND & DISCIPLINE

- A Section 504 team's discussion of a 10th-grader's failing grades, inability to remain in class, and hospitalization for attempted suicide undercut a district's argument that it had no obligation to conduct an MD review before placing the student in an alternative school.
- Determining that the district had notice of the student's likely status as a "child with a disability," the District Court affirmed an expedited administrative decision in the parent's favor.

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CHILD FIND & DISCIPLINE

- The court explained that a student who has not yet been found eligible for IDEA services is still entitled to the IDEA's procedural protections, including the right to an MD review, if the district had knowledge of the student's disability before the misconduct at issue occurred.
- A district is deemed to have such knowledge if a teacher or other staff member expresses specific concerns about a "pattern of behavior" to the special education director or other district supervisor.

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CHILD FIND & DISCIPLINE

- The court rejected the notion that the "pattern of behavior" refers only to disciplinary issues, noting that many students with disabilities may engage in behaviors that do not violate school rules. Furthermore, the court observed that the knowledge provision at issue did not require teachers to suggest a special education evaluation.
- This student's emotional disturbance would have been apparent to the "lay person."

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CHILD FIND & DISCIPLINE

- Concluding the student was entitled to the procedural protections of the IDEA, the court upheld an administrative order requiring the district to conduct an MD review.
- *Anaheim Unified High Sch. Dist. v. J.E.*, 61 IDELR 107 (C.D. Cal. 2013).

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- Are there any bad behaviors that are not protected by IDEA?
- YES, but proceed with caution. The exceptions can appear in tandem or concurrently with an IDEA disability.
- If co-occurrence exists, then the student is IDEA eligible.
- Keep in mind the same conditions may serve as Section 504 eligibility.



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IDEA CHILD FIND EXCLUSIONS

- Social maladjustment: The IDEA Regulations specifically exclude social maladjustment from the definition of emotional disability. 34 C.F.R. §300.8(c)(4).
- Courts struggle with the definition. The distinction is less than absolute.
- "We do not believe, however, that the analysis can be limited to a stark distinction between unwillingness and inability to behave appropriately. There is a grey area between normal, voluntary conduct and involuntary psychological response. . ." *Indep. Sch. Dist. No. 284 v. A.C.*, 35 IDELR 59 (8th Cir. 2001).

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IDEA CHILD FIND EXCLUSIONS

- The parents of a student who endured years of sexual abuse by a relative sued a district, attesting their child qualified for special education services because of a severe emotional disturbance.
- Testimony indicated that the student's behavioral problems at school stemmed from drug use rather than an emotional disturbance and was more akin to social maladjustment.
- *N. C. v. Bedford Central Sch. Dist.*, 51 IDELR 149 (2nd Cir. 2008).

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IDEA CHILD FIND EXCLUSIONS

- The IDEA does not recognize drug addiction or alcoholism as qualifying disabilities.
- Drug and alcohol rehabilitation programs are considered medical, not educational. *Field v. Haddonfield Bd. of Educ.*, 18 IDELR 253 (D.N.J. 1991).
- Generally, students whose drug or alcohol use adversely affects their education may not be classified as children with disabilities under the IDEA, because they do not meet the specific criteria of 34 C.F.R. §300.8(c). See *Springer by Springer v. Fairfax County Sch. Bd.*, 27 IDELR 367 (4th Cir. 1998); *P.C. v. Oceanside Union Free Sch. Dist.*, 56 IDELR 252 (E.D.N.Y. 2011).

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IDEA CHILD FIND EXCLUSIONS

- Section 504 does not recognize current drug use as an impairment.
- However, recovering addicts are eligible for protection.
- Proceed with caution.

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 **IDEA CHILD FIND EXCLUSIONS**

- A student who is a current illegal drug user is not covered under either Section 504 or the Americans with Disabilities Act based on his drug addiction. ADA regulations, applicable to Section 504 as well, define current illegal use of drugs as "illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem." This clear mandate to evaluate on a case-by-case basis whether use is current has generated litigation about how far in the past a "current" use can be.

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 **IDEA CHILD FIND EXCLUSIONS**

- Appendix A to the Education Department's Section 504 regulations state that drug addiction is a "physical or mental impairment" within the meaning of 29 USC 706 (8)(B).
- Drug-addicted students are therefore students with disabilities for purposes of Section 504 if the addiction substantially limits a major life activity.

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 **IDEA CHILD FIND EXCLUSIONS**

- A student with alcoholism may be eligible for protection and services under Section 504 if his impairment substantially limits one or more major life activities. See *Pinellas County (FL) Sch. Dist., 20 IDELR 561 (OCR 1993)* (establishing eligibility under Section 504 on the basis of addiction to alcohol where parents presented evidence that the student's addiction to alcohol was a mental disability requiring psychological treatment and student's ability to perform major life activities was substantially limited when he was under the influence of alcohol).

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CAUTION

- The IDEA covers children in public health facilities, including those who are hospitalized for medical and psychiatric purposes. The law clearly considers that children will be provided with education while hospitalized. *34 C.F.R. §300.39(a)(i)*. See *Letter to Power*, 211 IDELR 31 (OSEP 1978).

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CAUTION

- Thus, regardless of the reason for the hospitalization, districts may find themselves faced with an obligation to deliver a program of special education and related services to a student during extended stays at such facilities, whether on a temporary or permanent basis. See *Timothy W. v. Rochester, N.H., School District*, 441 IDELR 393 (1st Cir. 1989).
- While a district may not be financially responsible for the drug treatment program itself, **the district is still responsible for the provision of FAPE during the time he student is hospitalized in these facilities.** See *Letter to Scariano*, 213 IDELR 133 (OSEP 1988) (if residential treatment is necessary for an addicted special education child, the district is responsible only for those services enabling a child to receive FAPE).

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IDEA CHILD FIND EXCLUSIONS

- **Troubled parent-child relationships:** The fact that a student has a turbulent relationship with is parents or engages in problem behaviors at home will not, in itself, qualify the student as a child with an emotional disturbance. See *Letter to Anonymous*, 213 IDELR 247 (ODEP 1989); *Letter to McNulty*, 213 IDELR 108 (OSEP 1987).

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IDEA CHILD FIND EXCLUSIONS

- The hallmark case of *Forest Grove Sch. Dist. v. T.A.*, 56 IDELR 185 (9th Cir. 2011) turned on the IDEA exclusion:
- A single statement on a high schooler's application for enrollment in a private, therapeutic boarding school helped an Oregon district avoid financial responsibility for the student's private placement.

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IDEA CHILD FIND EXCLUSIONS

- Concluding that the placement was unrelated to the student's depression and ADHD, the 9th Circuit affirmed a decision that the parents were not entitled to reimbursement.
- The court noted that the parents decided to enroll the student in the residential school after the student's behavioral and drug problems escalated. In response to a question on the enrollment application asking which "specific events precipitated" the student's enrollment, the father wrote "inappropriate behavior, depression, opposition, drug use, runaway."

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IDEA CHILD FIND EXCLUSIONS

- Although the father indicated on other sections of the application that he hoped the student would achieve certain educational objectives, the court observed that those statements alone did not show that the student's enrollment was academic in nature.
- "This is particularly true in light of the fact that [the student] was enrolled at [the boarding school] after several months of escalating drug abuse and behavioral problems -- and *directly after* he attempted to run away from home -- and not during the two-year period when ADHD and poor scholastic performance alone, ... were the problem."
- The court explained it was not holding that reimbursement is unavailable if a private placement addresses a student's nonacademic needs as well as his educational needs.

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IN CLOSING

- Bad behavior can serve as the basis for a mature child find obligation, just not in every case.
- Reliance on a convergence of data when making these decisions is critical.

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IN CLOSING

- Remember, IDEA disability and adverse effect on education are both required for eligibility.
- Documenting decisions, proposals, and refusals in the form of a PWN is mandatory (and REALLY good idea).
- The exclusions do not DISQUALIFY a student as IDEA eligible, they simply can't serve as the basis for eligibility. Remember CO-OCCURRENCE.

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THANK YOU

QUESTIONS?