Mental Health & Child Find

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MENTAL HEALTH & CHILD FIND

I. INTRODUCTION

Children and adolescents suffer from a wide range of mental illnesses. In some circumstances mental illness in children may be readily apparent to parents and school staff, but for some children, mental illness remains a hidden illness. Some children suffer silently through the school day, trying to contain explosive feelings and erupt upon walking through the front door at 3:00 PM. Other students experience paralyzing anxiety that prevents them from walking out the front door in the morning, never even making it to the school building or classroom. And there are students who are frequent flyers at the nurse’s office, somatic complaints barely camouflaging anxiety and depression. Students with mental illness are at risk for being the target of bullying or being bullies themselves. Sadly, some adolescents attempt suicide, and some students drape clothing over scars to conceal repeated “cutting.” What is the school district’s obligation to identify and evaluate students with mental illness?

Federal and New York State laws and regulations impose an affirmative duty on school districts to seek out, identify and evaluate students who have emotional disabilities or are suspected of having emotional disabilities and need special education as a result. This “child find” obligation is challenging and critically important as it relates to students with mental illness who may experience adverse impact on their educational performance and require specialized instruction in order to derive meaningful educational benefits.

II. MENTAL HEALTH DISORDERS IN CHILDREN

Many children and adolescents have mental health issues that interfere with normal development and manifest themselves in difficulty in the school setting. Children with emotional disorders are reportedly the most under-identified category of all students with disabilities. Mental disorders in children are a significant concern for families, educators and society as a whole.

A. MENTAL HEALTH FACTS & STATISTICS

1. National Alliance on Mental Illness (NAMI)
   - Approximately 50% of students age 14 and older that are living with a mental illness drop out of high school.²
   - Youth with unidentified mental disorders also tragically end up in jails and prisons.³

2. National Institute of Mental Health (NIMH)
   - About 11 percent of adolescents have a depressive disorder by age 18. Girls are more likely than boys to experience depression. The risk for depression increases as a child gets older.⁴
   - Children who are depressed may complain of feeling sick, refuse to go to school, cling to a parent or caregiver, or worry excessively that a parent may die. Older children and teens may sulk, get into trouble at school, be negative or grouchy, or feel misunderstood.⁵

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² See National Alliance on Mental Illness (NAMI) website Facts on Children’s Mental Health in America (July 2010) at http://www.nami.org/Template.cfm?Section=federal_and_state_policy_legislation&template=/ContentManagement/ContentDisplay.cfm&ContentID=43804.
³ See National Alliance on Mental Illness (NAMI) website Facts on Children’s Mental Health in America (July 2010) at http://www.nami.org/Template.cfm?Section=federal_and_state_policy_legislation&template=/ContentManagement/ContentDisplay.cfm&ContentID=43804 (“According to a study funded by the National Institute of Mental Health—the largest ever undertaken—an alarming 65 percent of boys and 75 percent of girls in juvenile detention have at least one mental illness. We are incarcerating youth living with mental illness, some as young as eight years old, rather than identifying their conditions early and intervening with appropriate treatment.”).
3. Centers for Disease Control and Prevention (CDC)\(^6\)

- A total of 13%–20% of children living in the United States experience a mental disorder in a given year, and surveillance during 1994–2011 has shown the prevalence of these conditions to be increasing. Morbidity and Mortality Weekly Report (MMWR), May 17, 2013, Vol. 62, No. 2 at p. 1.

- Suicide, which can result from the interaction of mental disorders and other factors, was the second leading cause of death among children aged 12–17 years in 2010. Id. at p. 1.

- All demographic groups are affected by mental disorders in childhood, although the prevalence estimates vary by all demographic groups. Id. at p. 15.

- Based on self-reported data for the 2005–2010 data cycles, 8.3% of adolescents aged 12–17 years reported ≥14 mentally unhealthy days in the past month, representing nearly 2 million adolescents. Id. at p. 14.

- The prevalence of all conditions and indicators increased with age, with the exception of ASD, which was highest in the group aged 6–11 years. Id. at p. 15.

- Boys were more likely than girls to have most of the disorders, including ADHD, behavioral or conduct problems, ASD, anxiety, Tourette syndrome, and cigarette dependence, and boys were more likely than girls to die by suicide. Id.

- Girls were more likely to have an alcohol use disorder, and adolescent girls were more likely to have depression. Id.

- NHIS data indicate that parents of 8.5% of children aged 3–17 years in 2009–2010 and 8.4% in 2011 had ever been told their child had ADHD. Id. at p. 9.

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For the purposes of the report, CDC described mental disorders in children as “‘serious deviations from expected cognitive, social, and emotional development’ and include conditions meeting criteria described by the Diagnostic and Statistical Manual of Mental Disorders, 4th edition, Text Revision (DSM-IV-TR) or the International Classification of Diseases (ICD). Note that the DSM was updated and revised recently. The American Psychiatric Association released the DSM-5 at its Annual meeting in May 2013. See DSM-5 website at www.dsm5.org.
B. MOST COMMON MENTAL DISORDERS IN CHILDREN

NIMH lists the following mental disorders occurring in children:\(^7\):

- Anxiety Disorders\(^8\)
- Panic Disorders\(^9\)
- Attention Deficit Hyperactivity Disorder (ADHD)\(^10\)
- Autism Spectrum Disorders
- Bipolar Disorder\(^11\)
- Depression\(^12\)
- Dysthymia\(^13\)
- Eating Disorders
- Schizophrenia

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\(^9\) In an article entitled Anxiety: Panic Disorder (Jan. 19, 2005), Steve Bressert, Ph.D. explains that people with panic disorders begin to avoid situations where they fear an attack may occur, and children may be reluctant to go to school or be otherwise separated from their parents. [http://psychcentral.com/disorders/anxiety/panic.html](http://psychcentral.com/disorders/anxiety/panic.html).

\(^10\) ADHD is thought to be a neurological impairment that affects a child’s ability to control impulses and is characterized by short attention spans, difficulty sitting still or wait turns. [http://psychcentral.com/lib/the-abcs-of-adhd](http://psychcentral.com/lib/the-abcs-of-adhd).


\(^12\) Depression in children and adolescents is characterized by feelings of sadness or anxiety. Adolescents and teens suffering with a major depressive disorder (also referred to as major depression) experience symptoms that are disabling and interfere with daily activities such as studying, eating and sleeping. See [http://www.nimh.nih.gov/health/publications/depression-and-high-school-students/index.shtml](http://www.nimh.nih.gov/health/publications/depression-and-high-school-students/index.shtml). According to the NIMH, children who are depressed may “complain of feeling sick, refuse to go to school, cling to a parent or caregiver, or worry excessively that a parent may die. Older children and teens may sulk, get into trouble at school, be negative or grouchy, or feel misunderstood.” See [http://www.nimh.nih.gov/health/publications/depression-in-children-and-adolescents/index.shtml](http://www.nimh.nih.gov/health/publications/depression-in-children-and-adolescents/index.shtml).

\(^13\) The DSM-5 has replaced dysthymia (Depressed mood most of the day for more days than not, for at least 2 years along with symptoms such as poor appetite, fatigue and feelings of hopelessness) with “persistent depressive disorder” which includes both chronic major depressive disorder and the previous dysthymic disorder. [http://pro.psychcentral.com/2013/dsm-5-changes-depression-depressive-disorders/004259.html](http://pro.psychcentral.com/2013/dsm-5-changes-depression-depressive-disorders/004259.html); [http://www.ncbi.nlm.nih.gov/books/NBK64063/](http://www.ncbi.nlm.nih.gov/books/NBK64063/).
C. DSM DIAGNOSIS v. EMOTIONAL DISTURBANCE CLASSIFICATION

1. The American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders DSM-IV TR and DSM-5\textsuperscript{14} set forth criteria for the diagnosis and classification of mental disorders. The ICD is also standard diagnostic tool, and it is used to classify diseases and other health problems.

2. It is important to note that the federal and state special education laws lay out disability classifications and definitions\textsuperscript{15} that are not aligned with the DSM or the ICD. See infra Sec. II, A, 2.

3. For purposes of school districts identifying children with mental disorders, it is critical to focus on the statutory disability classifications and definitions while keeping in mind that private professional evaluations (i.e., psychiatrists’ letters, psycho-educational evaluations, neuropsychological evaluations, and neurologists’ reports) provided to the school district that specify DSM or ICD diagnoses may be relevant to the process of identifying students with mental illness and related disabilities. DSM Diagnoses may trigger the school district’s

\textsuperscript{14} The American Psychiatric Association released the DSM-5 at its Annual meeting in May 2013. See DSM-5 website at www.dsm5.org.

\textsuperscript{15} IDEA, 20 U.S.C. §1401(3)(A)(i); 34 C.F.R. § 300.8(c); New York Regulations of the Commissioner of Education (Commissioner’s Regulations) Part 200, 89 N.Y.C.R.R. §200.1(zz); and Rehabilitation Act of 1973, 34 C.F.R. §104.3(j).
child find obligation to identify and evaluate a student, but a DSM diagnosis is not dispositive of the issue of whether the student meets IDEA criteria for a disability classification.

4. Typically, school psychologists employed by public schools do not list DSM diagnoses in their evaluations.

5. Compare DSM-5’s criteria for Autism Spectrum Disorders, Attention Deficit Disorder and Depression and Anxiety disorders to Commissioner’s Regulations disability classifications of Autism, Other Health Impairment, and Emotional Disturbance. See Commissioner’s Regulations §200.1(zz)

6. Think about DSM diagnoses in the context of Section 504 of the Rehabilitation Act of 1973 that defines a disability as “a physical or mental impairment which substantially limits one or more major life activities.” 34 C.F.R. §104.3(j) and see infra Sec. II, B.

D. IMPACT OF MENTAL ILLNESS ON THE SCHOOL ENVIRONMENT AND EDUCATIONAL PERFORMANCE

1. Common Behaviors
   - Absenteeism
   - Difficulty remaining in class
   - Aggression
   - Bullying
   - Disciplinary Code violations

2. According to the NIMH, children who are depressed may “complain of feeling sick, refuse to go to school, cling to a parent or caregiver, or worry excessively that a parent may die. Older children and teens may sulk, get into trouble at school, be negative or grouchy, or feel misunderstood.” http://www.nimh.nih.gov/health/publications/depression-in-children-and-adolescents/index.shtml.

3. In a June 2012 National Association of School Psychologists summary entitled Research on the Relationship Between Mental Health and Academic Achievement (http://www.nasponline.org/advocacy/Academic-MentalHealthLinks.pdf), Jeffrey L. Charvat, Ph.D NASP Director of Research, reported:
   - In summarizing studies on the relationship between children’s emotional distress and achievement behavior, researchers found that students with frequent feelings of internalized distress (e.g., sadness, anxiety, depression) show diminished academic functioning and those with externalized distress (e.g., anger, frustration, and fear) exhibit school difficulties including learning delays and poor achievement (Roeser, Eccles, & Strobel, 1998).
Adolescents with depression are at increased risk for impairment in school and educational attainment (Asarnow, Jaycox, Duan, LaBorde, et al., 2005).

E. PUBLIC PERCEPTION OF MENTAL DISORDERS

1. The social stigma of mental illness persists to some degree.\(^\text{16}\)

2. Parents and school staff may be concerned that a student with mental illness or suspected of having an emotional disability may be stigmatized by an Emotional Disturbance classification.

F. TRIGGERS FOR SCHOOL DISTRICTS TO CONSIDER CHILD FIND OBLIGATIONS TO IDENTIFY AND EVALUATE STUDENTS SUSPECTED OF HAVING EMOTIONAL DISABILITIES

1. Receipt of parents’ private evaluation reports documenting student’s mental illness and/or listing diagnostic formulations and other parental input regarding mental illness

2. Report of student as the target of bullying or as the perpetrator of bullying

3. Disciplinary Code violations

4. Absenteeism\(^\text{17}\) and difficulty remaining in classes

5. Difficulty with social relationships

6. Withdrawal, unhappiness, or depression

7. Inappropriate behavior in classroom

8. Precipitous decline in grades or erratic educational performance

9. Inability to work with peers in pairs (i.e., lab partners) or in groups

10. Expression of angry or violent feelings

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\(^\text{16}\) See National Alliance on Mental Illness (NAMI) website Facts on Children’s Mental Health in America (July 2010) at http://www.nami.org/Template.cfm?Section=federal_and_state_policy_legislation&template=/ContentManagement/ContentDisplay.cfm&ContentID=43804; see also The stigma of child mental disorders: A conceptual framework, NIH Public Access, Abraham Mukolo, Ph.D., Craig Anne Heflinger, Ph.D., and Kenneth A. Wallston, Ph.D., http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2904965/ (“In child mental health services research, the role of stigma has not been well-conceptualized though it is presumed to be significant.”).

\(^\text{17}\) In Application of a Student with a Disability, Appeal No. 10-009 (March 29, 2010), the State Review Officer found that the student’s cutting of classes was not necessarily evidence that the student was a student with an emotional disturbance.
11. Violent or aggressive behavior

12. Signs of cutting (scars) or other self-harm

13. Suicidal ideation relayed or reported to school staff

14. Suicide attempts

G. CHALLENGES OF IDENTIFYING STUDENTS WITH MENTAL ILLNESS

1. Mental illness can be a “hidden illness” – students and/or parents may attempt to conceal illness for fear of social stigma.

2. Mental illness symptoms may be more apparent in the student’s home than in the school setting, yet mental illness may impact educational performance.

3. Some school staff may be unfamiliar with symptoms of mental illness and may inadvertently attribute declining educational performance to causes other than mental illness.

II. DISABILITY CLASSIFICATIONS & DEFINITIONS

A. IDEA REGULATIONS & NY COMMISSIONER’S REGULATIONS

1. IDEA Regulations, 34 C.F.R. § 300.8
   Child with a disability.
   (a) General. (1) Child with a disability means a child evaluated in accordance with §§ 300.304 through 300.311 as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as “emotional disturbance”), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

2. New York Regulations of the Commissioner of Education Updated July 2013 (Commissioner’s Regulations)
   8 N.Y.C.R.R. § 200.1(zz)
   Student with a disability means a student with a disability as defined in section 4401(1) of the 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 (emphasis added):

(1) **Autism** means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects a student’s educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. The term does not apply if a student's educational performance is adversely affected primarily because the student has an emotional disturbance as defined in paragraph (4) of this subdivision. A student who manifests the characteristics of autism after age 3 could be diagnosed as having autism if the criteria in this paragraph are otherwise satisfied.

(2) **Deafness** . . .

(3) **Deaf-blindness** . . .

(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 (emphasis added):

   (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) inappropriate types of behavior or feelings under normal circumstances;

   (iv) a generally pervasive mood of unhappiness or depression; or

   (v) 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. See also 34 C.F.R. § 300.8(c)(4)

(5) **Hearing impairment** . . .

(6) **Learning disability** . . .

(7) **Intellectual disability** . . .

(8) **Multiple disabilities** . . .
(9) Orthopedic impairment . . .

(10) 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, including but not limited to a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, diabetes, attention deficit disorder or attention deficit hyperactivity disorder or tourette syndrome, which adversely affects a student's educational performance.

(11) Speech or language impairment . . .

(12) Traumatic brain injury . . .

(13) Visual impairment including blindness . . .

3. Consider the elements of IDEA’s Emotional Disturbance classification

(a) What constitutes “a long period of time”? Several days, months, or years?

(b) What constitutes “a marked degree”?

(c) What constitutes an adverse affect on educational performance?

(d) Does a child find obligation exist where the student displays emotional difficulties at home and not at school?

(e) Under what circumstances is a student considered “socially maladjusted”?

B. SECTION 504 OF THE REHABILITATION ACT OF 1973

Person with a Disability is defined as follows:
34 C.F.R. § 104.3
(j) Handicapped person — (1) Handicapped persons means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(2) As used in paragraph (j)(1) of this section, the phrase:
(i) Physical or mental impairment means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

[emphasis added]
(ii) *Major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(iii) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

### III. CHILD FIND FRAMEWORK UNDER IDEA & COMMISSIONER’S REGULATIONS

#### A. WHAT IS CHILD FIND?

1. “*Child find*” is a statutory mandate requiring school districts to identify, locate and evaluate students with disabilities who have or are suspected of having disabilities and need special education in order to address those disabilities. 34 C.F.R. § 111.

2. Child find relates to school districts’ *affirmative obligations*; therefore, school districts may not wait for parents or other professionals to request that a child be identified and evaluated or to refer a student for special education services.

3. Note that a child who is identified through the child find process is not automatically classified as a student with a disability and eligible for special education services; rather, children who are identified through the child find process must be evaluated in order to determine eligibility for services. 34 C.F.R. § 300.301.

4. Child find includes the obligation to identify, locate and evaluate students suspected of having disabilities even if they are advancing from grade to grade. 34 C.F.R. § 300.8.

5. Child find requires school districts to have in place procedures in place that will enable them to find children suspected of having disabilities and in need of special education. *Application of a Student with a Disability*, Appeal No. 10-009 (March 29, 2010).

#### B. WHAT IS THE PURPOSE OF CHILD FIND?

The purpose behind the child find provisions is to locate children with disabilities who are eligible for special education services who might otherwise go undetected. *Handberry v. Thompson*, 436 F.3d 52, 65 (2d Cir. 2006).
C. WHICH STUDENTS MUST BE IDENTIFIED?

1. School district’s child find obligations extend to:
   (a) children residing within the school district’s boundaries, including students who are homeless or wards of the state;\(^{18}\) and
   (b) students with disabilities who are attending private schools, including religious elementary and secondary schools, located within a school district’s boundaries.\(^{19}\)

2. Obligation to students who reside out-of-state
   (a) The child find obligation extends to students who reside outside of the state where the private school is located. 34 C.F.R. § 300.131(f).
   (b) This obligation exists in order to ensure equitable participation of parentally placed private school students as well as an accurate count of these students.

D. WHICH SCHOOL DISTRICTS ARE CHARGED WITH CHILD FIND DUTIES?

Child find obligations may exist in both the District of Location and the District of Residence

(a) Where a parent places their child in a private school outside the district of residence, the parent may request that the district of residence evaluate the child. In this instance the district of residence may not refuse to conduct the evaluation and make an eligibility determination for FAPE because the child attends a private school in another state or school district. Letter to Eig, Office of Special Education Programs, 52 IDELR 136, 109 LRP 14258 (January 28, 2009); see also J.S. v. Scarsdale UFSD, 826 F. Supp. 2d 635, 58 IDELR 16 (S.D.N.Y. 2011), infra Sec. VII, 3.

(b) While the U.S. Department of Education “generally discourages parents from requesting evaluations from two LEAs, if a parent chooses to request

\(^{18}\) See Handberry v. Thompson, 436 F.3d 52, 45 IDELR 2 (2d. Cir. 2006) (“Indeed, the IDEA’s apparent purpose in requiring screening is to find eligible inmates who might otherwise not be identified – without an effective screening mechanism in place, it is impossible for the City defendants, or anyone else, to identify inmates who should be referred for evaluation.”)

\(^{19}\) See Letter to Eig, Office of Special Education Programs, 52 IDELR 136, 109 LRP 14258. (January 28, 2009); see also Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools, Office of Special Education Programs, 111 LRP 32532 (April 1, 2011) (clarifying that child find obligations require that school districts, “after timely and meaningful consultation with private school representatives, conduct a thorough and complete child find process to determine the number of parentally placed children with disabilities attending private schools located within the LEA regardless of where those students live.”)
evaluations from the LEA responsible for providing the child with a program of FAPE and a different LEA that is responsible for considering the child for the provision of equitable services, both LEAs are required to conduct an evaluation.” Letter to Eig.

E. RELEVANT STATUTES

1. IDEA Regulations

34 C.F.R. § 300.111

Child Find

(a) General. (1) The State must have in effect policies and procedures to ensure that—

(i) All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated; and

(ii) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services.

(c) Other children in child find. Child find also must include—

(1) Children who are suspected of being a child with a disability under § 300.8 and in need of special education, even though they are advancing from grade to grade; and

(2) Highly mobile children, including migrant children.

(d) Construction. Nothing in the Act requires that children be classified by their disability so long as each child who has a disability that is listed in § 300.8 and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under Part B of the Act.


34 C.F.R. § 300.131

Child find for parentally-placed private school children with disabilities.

(a) General. Each LEA must locate, identify, and evaluate all children with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district served by the LEA, in accordance with paragraphs (b) through (e) of this section, and §§ 300.111 and 300.201.

(b) Child find design. The child find process must be designed to ensure—

Note that 34 C.F.R. § 300.111 is broader than 34 C.F.R. § 300.131. Section 300.111 addresses the child find responsibilities relating to all children in the state, including children residing in the state and those attending private schools while section 300.131 is limited to child find responsibilities relating to students enrolled by their parents in private elementary and secondary schools. Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools, Office of Special Educations and Rehabilitative Services, 111 LRP 32532 (April 1, 2011) at Question B-9.
(1) The equitable participation of parentally-placed private school children; and
(2) An accurate count of those children.
(c) Activities. In carrying out the requirements of this section, the LEA, or, if applicable, the SEA, must undertake activities similar to the activities undertaken for the agency's public school children.
(d) Cost. The cost of carrying out the child find requirements in this section, including individual evaluations, may not be considered in determining if an LEA has met its obligation under § 300.133.
(e) Completion period. The child find process must be completed in a time period comparable to that for students attending public schools in the LEA consistent with § 300.301.
(f) Out-of-State children. Each LEA in which private, including religious, elementary schools and secondary schools are located must, in carrying out the child find requirements in this section, include parentally-placed private school children who reside in a State other than the State in which the private schools that they attend are located.

34 C.F.R. § 300.301
Initial evaluations.
(a) General. Each public agency must conduct a full and individual initial evaluation, in accordance with §§ 300.304 through 300.306, before the initial provision of special education and related services to a child with a disability under this part.
(b) Request for initial evaluation. Consistent with the consent requirements in § 300.300, either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.21
(c) Procedures for initial evaluation. The initial evaluation—
(1)(i) Must be conducted within 60 days of receiving parental consent for the evaluation; or
(ii) If the State establishes a timeframe within which the evaluation must be conducted, within that timeframe; and
(2) Must consist of procedures—
(i) To determine if the child is a child with a disability under § 300.8; and
(ii) To determine the educational needs of the child.
(d) Exception. The timeframe described in paragraph (c)(1) of this section does not apply to a public agency if—
(1) The parent of a child repeatedly fails or refuses to produce the child for the evaluation; or
(2) A child enrolls in a school of another public agency after the relevant timeframe in paragraph (c)(1) of this section has begun, and prior to a determination by the child's previous public agency as to whether the child is a child with a disability under § 300.8.

The exception in paragraph (d)(2) of this section applies only if the subsequent public agency is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and subsequent public agency agree to a specific time when the evaluation will be completed. See also 20 U.S.C. § 1414 for corresponding IDEA provision.

2. **Commissioner’s Regulations §200.2(a)(7) is similar to 34 C.F.R. § 300.131 and provides:**

   Procedures to locate, identify, and evaluate all nonpublic private elementary and secondary school students with disabilities, including religious-school children as required by the Education Law must be established to ensure the equitable participation of parentally placed private school students with disabilities and an accurate count of such students. The child find activities must be similar to activities undertaken for students with disabilities in public schools and must be completed in a time period comparable to that for other students attending public schools in the school district. The school district shall consult with representatives of private schools and representatives of parents of parentally placed private school students with disabilities on the child find process.

3. **New York Education Law, 89 Ed. L. § 3602-c(2)(a) provides:**

   Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent or person in parental relation of any such student. . . . In the case of education for students with disabilities, such a request shall be filed with the trustees or board of education of the school district of location on or before the first of June preceding the school year for which the request is made, or by July first, two thousand seven for the two thousand seven--two thousand eight school year only, provided that where a student is first identified as a student with a disability after the first day of June preceding the school year for which the request is made, or thirty days after the chapter of the laws of two thousand seven which amended this paragraph, takes effect where applicable, and prior to the first day of April of such current school year, such request shall be submitted within thirty days after such student is first identified. For students first identified after March first of the current school year, any such request for education for students with disabilities in the current school year that is submitted on or after April first of such current school year, shall be deemed a timely request for such services in the following school year.
IV. CHILD FIND OBLIGATIONS UNDER
SECTION 504 OF THE REHABILITATION ACT OF 1973

A. COMPARE CHILD FIND OBLIGATIONS UNDER §504 TO IDEA

1. Section 504 includes a child find provision that varies somewhat from the IDEA child find obligations.

2. Pursuant to §504, school districts must identify students with disabilities who are not receiving a public education and notify their parents. Therefore, the §504 child find obligation applies to students who are parentally placed in private schools, students residing in hospitals, and children who are homeless who are residing within the school district’s boundaries.

   (a) The district in which the private school is located is not responsible for evaluating students pursuant to §504.

   (b) “The regulation does not specify the manner in which a district must meet its location and notification responsibility. There are many means available including notices to private schools, state and local agencies, and notices placed in newspapers.” Letter to Veir, 20 IDELR 864, 20 LRP 2622 (OCR 1993).

   (c) While IDEA requires the school district in which the private school is located to conduct evaluations, there is no such requirement under §504.

3. Pursuant to §504, the school district of residence must evaluate students who are believed to need special education and related services. See West Seneca (NY) Sch. Dist., 53 IDELR 237, 109 LRP 76695 (OCR 2009).

B. LOCATION AND NOTIFICATION

34 C.F.R. § 104.32 provides:

A recipient that operates a public elementary or secondary education program or activity shall annually:
(a) Undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education; and
(b) Take appropriate steps to notify handicapped persons and their parents or guardians of the recipient's duty under this subpart.

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22 See Questions and Answers on Special Education and Homelessness, 110 LRP 212 (OSERS 2008) (Section 504’s requirement that public elementary and secondary schools identify annually and locate every qualified individual with a disability resident in the school district’s jurisdiction who is not receiving a public education applies to students “regardless of whether the student has an official place of residence or is homeless”); see also 34 C.F.R. §§ 104.32(a)-(b).
C. EVALUATION AND PLACEMENT

34 C.F.R. § 104.35 provides:

(a) Preplacement evaluation. A recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.

(b) Evaluation procedures. A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services . . .

V. POTENTIAL CONSEQUENCES FOR VIOLATIONS OF CHILD FIND OBLIGATIONS

Failure to satisfy child find obligations may expose a school district to subsequent FAPE violations and may entitle a student to compensatory education or tuition reimbursement. In order for a school district to satisfy its FAPE obligations, it must first satisfy its child find responsibilities.

VI. STUDENT DISCIPLINE & CIRCUMSTANCES UNDER WHICH STUDENT PRESUMED TO HAVE A DISABILITY

Commissioner’s Regulations § 201.5 Students presumed to have a disability for discipline purposes.

(a) General provision. The parent of a student who has violated any rule or code of conduct of the school district and was not identified as a student with a disability at the time of such behavior may assert any of the protections set forth in this Part, if the school district is deemed to have had knowledge as determined in accordance with subdivision (b) of this section, that the student was a student with a disability before the behavior that precipitated the disciplinary action occurred. Where the school district is deemed to have had knowledge that the student was a student with a disability before such behavior occurred, such student is a “student presumed to have a disability for discipline purposes.”

(b) Basis of knowledge. Except as otherwise provided in subdivision (c) of this section, a school district shall be deemed to have knowledge that such student had a disability if prior to the time the behavior occurred:
(1) the parent of such student has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency or to a teacher of the student that the student is in need of special education, provided that such expression of concern may be oral if the parent does not know how to write or has a disability that prevents a written statement; or

(2) the parent of the student has requested an evaluation of the student pursuant to section 200.4 or 200.16 of this Title; or

(3) a teacher of the student, or other personnel of the school district, has expressed specific concerns about a pattern of behavior demonstrated by the student, directly to the director of special education of the school district or to other supervisory personnel of the school district.

(c) Exception. A student is not a student presumed to have a disability for discipline purposes if, as a result of receiving the information specified in subdivision (b) of this section:

(1) the parent of the student has not allowed an evaluation of the student pursuant to section 200.4 of this Title; or

(2) the parent of the student has refused services under this Part; or

(3) it was determined that the student is not a student with a disability pursuant to section 200.4 or 200.16 of this Title.

(d) Responsibility for determining whether a student is a student presumed to have a disability. If it is claimed by the parent of the student or by school district personnel that the school district had a basis for knowledge, in accordance with paragraph (b) of this section, that the student was a student with a disability prior to the time the behavior subject to disciplinary action occurred, it shall be the responsibility of the superintendent of schools, building principal or other school official imposing the suspension or removal to determine whether the student is a student presumed to have a disability.

(e) Conditions that apply if there is no basis for knowledge. If the superintendent of schools, building principal or other school official imposing the disciplinary removal determines that there is no basis for knowledge that the student is a student with a disability prior to taking disciplinary measures against the student, the student may be subjected to the same disciplinary measures as any other nondisabled student who engaged in comparable behaviors. However, if a request for an individual evaluation is made while such nondisabled student is subjected to a disciplinary removal, an expedited evaluation shall be conducted in accordance with 201.6 of this Part.
201.6 CSE responsibilities for expedited evaluations.

(a) If a request for an individual evaluation is made during the period that a nondisabled student, who is not a student presumed to have a disability for discipline purposes, is suspended pursuant to Education Law section 3214 or is subjected to a removal as defined in section 201.2(l) of this Part if imposed on a student with a disability, the evaluation must be conducted in an expedited manner in accordance with this section.

(b) An expedited evaluation shall be completed no later than 15 school days after receipt of parent consent for evaluation, and shall be conducted in accordance with the procedural requirements of sections 200.4 and 200.5 of this Title. The CSE shall make a determination of eligibility of such student in a meeting held no later than five school days after completion of the expedited evaluation.

(c) Until the expedited evaluation is completed, the nondisabled student shall remain in the educational placement determined by the school district, which can include suspension.

(d) If, as a result of an expedited evaluation, the student is determined to be a student with a disability, the school district shall provide special education to the student pursuant to Part 200 of this Title and the provisions of this Part relating to students with disabilities shall apply.

VII. CASE LAW, ADMINISTRATIVE REVIEW DECISIONS, OCR\(^{23}\) OPINIONS, AND OSERS\(^{24}\) LETTERS

A. CHILD FIND RESPONSIBILITIES FOR DISTRICT OF RESIDENCE AND DISTRICT OF LOCATION

1. In *J.S. v. Scarsdale UFSD*, 826 F. Supp. 2d 635, 58 IDELR 16 (S.D.N.Y. 2011), the court recognized dual obligations on the part of the district of location and the district of residence where a student was withdrawn from the local school district and parentally placed in an out-of-state residential placement. The court concluded that “the IDEA’s child find provisions did not divest the District [of residence] of its responsibility to classify J.G. and provide her with services after she was unilaterally withdrawn from the District in January 2008.” *Id.* The court further explained that “The few cases discussing this or similar situations suggest that a district-of-residence's obligations do not simply end

\(^{23}\) The U.S. Department of Education’s Office for Civil Rights’ (OCR) mission is “to ensure equal access to education and to promote educational excellence throughout the nation through various enforcement of civil rights.” [http://www2.ed.gov/about/offices/list/ocr/aboutocr.html](http://www2.ed.gov/about/offices/list/ocr/aboutocr.html). Specifically, OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 that prohibit discrimination on the basis of disability in programs or activities receiving financial assistance form the U.S. Department of Education. OCR is responsible for resolving complaints of discriminations.

\(^{24}\) The U.S. Department of Education’s Office of Special Education and Rehabilitation Services (OSERS) develops, implements and monitors policy and legislation that impact individuals with disabilities and their families. *See* [http://www2.ed.gov/about/offices/list/osers/policy.html](http://www2.ed.gov/about/offices/list/osers/policy.html).
because a child has been privately placed elsewhere, as the District argues -- rather, the IDEA’s obligations may be shared.” *Id.* The court noted that

The U.S. Department of Education apparently takes the same view: Under the IDEA, parents may seek equitable services from the district of location, and a FAPE from the district of residence. See Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46540, 46593 (Aug. 14, 2006) (noting that “because most States generally allocate the responsibility for making FAPE available to the LEA in which the child’s parents reside, and that could be a different LEA from the LEA in which the child’s private school is located, parents could ask two different LEAs to evaluate their child for different purposes at the same time,” and that “nothing in this part ... would prohibit parents’ from doing so) . . . *Id.*

2. In *Application of Student with a Disability*, Appeal Nos. 11-092, 11-094, 111 LRP 71932 (October 25, 2011), affd. 60 IDELR 195, the SRO affirmed the impartial hearing officer’s determination that the school district of residence “retained the child find obligation for the student because the district of location had not identified and evaluated the student, nor had the parent made clear their intent to keep her in the private school in the district of location. . .” *Id.*

B. CHILD FIND RESPONSIBILITIES OF DISTRICT OF RESIDENCE AND DISTRICT OF LOCATION UNDER §504 OF THE REHABILITATION ACT

In *West Seneca (NY) School District Office for Civil Rights (OCR)*, Eastern Division New York, 02-09-1173, 53 IDELR 237, 109 LRP 76695 (October 15, 2009) OCR explained that pursuant to the regulation implementing Section 504, at 34 C.F.R § 104.32, a student’s district of residence is responsible for locating and evaluating any person who, because of a disability, needs or is believed to need related aids and services. Accordingly, where a student with migraine headaches who attended school in District 1 and resided in District 2, OCR concluded that District 1 was not obligated to evaluate the student pursuant to Section 504.

C. CHILD FIND DUTY FOR OUT-OF-STATE DISTRICT OF LOCATION

In *J.S. v. Scarsdale UFSD*, 826 F. Supp. 2d 635, 58 IDELR 16 (S.D.N.Y. 2011), where the student was parentally placed in an out-of-state residential school, the court noted that “local school districts must engage in child find activities with respect to children placed in private schools located within the district in order to ensure ‘[t]he equitable participation’ of such children in the services the district provides, and to get an ‘accurate count of those children’ for determining the correct amount of funds to be expended. § 1412(a)(10)(A)(ii)(II).” *Id.*

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25 OCR has jurisdictional authority to investigate complaints under §504.
D. TRIGGERS FOR CHILD FIND

1. Poor performance in absence of need for special education services does not trigger child find duty

In *New Paltz Cent. Sch. Dist. V. St Pierre*, 307 F. Supp. 2d 394, 40 IDELR 211 (N.D.N.Y. 2004), the court found that the school district should have referred the student to the Committee on Special Education (CSE) after the parent informed the school district staff that the student was experiencing difficulties including uncontrollable behavior at home, academic performance that was substantially declining and drug use. The school psychologist had also noticed that the student’s academic performance was “substandard” and his school attendance was poor. The school district delayed a referral to the CSE and evaluations of the student. The court noted that the child find duty “is triggered when the [state …] has reason to suspect that special education services may be needed to address that disability.” *Id.* at fn. 13, quoting *Dep’t of Educ., State of Haw. V. Cari Rae S.*, 158 F. Supp. 2d 1990, 1194 (D. Haw. 2001).

2. Parental Request for Evaluation

(a) In *J.S. v. Scarsdale UFSD*, 826 F. Supp. 2d 635, 58 IDELR 16 (S.D.N.Y. 2011), while the court did not find a child find obligation, the court was troubled by the parents’ allegation that in response to their request that the school district test the student, the school district psychologist told the parents that “based on [student’s ] grade average and the fact that she would be a junior the next year, testing was not necessary. [citation to transcript omitted]. A parent’s request triggers a [school district’s] obligation to do an initial evaluation. 20 U.S.C. § 1414(a)(1)(B). But the evidence on what happened at this conversation is unclear in terms of what was asked of [the psychologist] and even who participated in the conversation and when.”

(b) In *Application of Student with a Disability*, Appeal Nos. 11-092, 11-094, 111 LRP 71932 (October 25, 2011), *affd.* 60 IDELR 195, SRO found that the school district violated its child find obligations:

I note that notwithstanding that the district may have had appropriate procedures in place for identifying students suspected of having a disability, the evidence shows in this case that the parents affirmatively requested that the district evaluate the student and determine whether she was eligible for special education under the IDEA, and the district still failed to follow procedures and either (1) evaluate the student and convene the CSE or (2) inform the parents that it was denying their request to evaluate the student for eligibility under the IDEA and provide prior written notice to the parents explaining why the district refused to conduct an initial evaluation and the information that was used as the basis for the decision (34 CFR § 300.503[a], [b]; 8 NYCRR 200.5[a]; *Letter to Zirkel*, 56 IDELR 140 [OSEP 2011]).
E. EMOTIONAL DISTURBANCE CLASSIFICATION

1. Adverse Impact on Educational Performance

(a) In *J.S. v. Scarsdale UFSD*, 826 F. Supp. 2d 635, 58 IDELR 16 (S.D.N.Y. 2011), prior to the student’s January 2009 removal from the public school and placement in an out-of-state residential program, the student exhibited: (a) an academic decline; (b) evolving homework problems; (c) attendance issues; (d) difficulty getting out of bed; (e) and increased negativity (according the director of the alternative school located in the public school). In addition, the student acknowledged in October 2006 that she consumed “a large amount of Tylenol, in her words . . . ‘because I wanted to kill myself’”. The court found that “A suicide attempt and repeated truancy might qualify as ‘inappropriate types of behavior or feelings under normal circumstances.’” [citations omitted] But, besides the fact that J.G. did not, so far as the District reasonably should have known, suffer from her emotional difficulties ‘to a marked degree’ adversely affecting her educational performance, J.G. also did not suffer from these problems over a ‘long period of time.’” Accordingly, the school district (district of residence) did not violate its child find prior to the parents’ removal of the student from the school district.

(b) In *Application of Student with a Disability*, Appeal No. 10-106, 56 IDELR 148, 111 LRP 12772 (January 24, 2011), the SRO focused on the 11th grade student’s academic success, including straight As in a therapeutic residential placement, and found that her depression, anxiety, anorexia, and suicide attempts did not adversely affect her educational performance. The SRO reversed the IHO’s finding that the student was eligible for services under IDEA as a student with an emotional disturbance.

The greater weight of the testimonial and documentary evidence contained in the hearing record demonstrates that the student's medical/psychiatric conditions, although extremely serious, did not adversely affect her educational performance to the extent that the student required special education and related services in order to learn, or that the student was unable to attend school and access the general curriculum without modification of the content, methodology, or delivery of instruction (*C.B. v. Dep't of Educ.*, 2009 WL 928093 [2d Cir. Apr. 7, 2009]; *N.C. v. Bedford Cent. Sch. Dist.*, 2008 WL 4874535 [2d Cir. Nov. 12, 2008]; *Maus v. Wappingers Cent. Sch. Dist.*, 688 F. Supp. 2d 282, 297-98 [S.D.N.Y. Feb. 9, 2010]; *E.D. v. Bd. of Educ.*, 679 F. Supp. 2d 299, 308-11 [E.D.N.Y. Jan. 8, 2010]). Furthermore, the evidence contained in the hearing record establishes that under the circumstances present in this appeal, a residential placement was not intended or designed to be responsive to the student's learning needs, but rather, was designed to address medical and social/emotional problems severable from the student's learning process (*see Mary T. v. Sch. Dist. of Philadelphia*, 575 F.3d 235, 246 [3d Cir. 2009] [discussing *Kruelle v. New Castle County Sch. Dist.*, 642 F.2d 687, 694 [3d Cir. 1981]]; *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1120 [2d Cir. 1997] [noting that district's may be responsible to pay for}
residential placement when medical needs are created by or intertwined with an educational problem).

2. Drug Use

In *Mr. and Mrs. N.C. v. Bedford Cent. Sch. Dist.*, 51 IDELR 149, 108 LRP 65077 (2d. Cir. 2008), the Second Circuit affirmed the Southern District of New York determination that a student with behavior problems was not eligible for special education as a student with an emotional disturbance pursuant to IDEA since his behavioral problems stemmed from drug use and there was no evidence that his inappropriate behaviors had an adverse effect on his educational performance. The Second Circuit relied on: (1) the district court’s finding that that the parents had not produced sufficient evidence of an “‘accompanying emotional disturbance beyond bad conduct’. [N.C ex rel. M.C. v. Bedford Cent. School Dist., 473 F. Supp. 2d 532, 545 (S.D.N.Y. 2007)].”; and (2) insufficient evidence that student’s behaviors had an adverse affect on his educational performance, despite a ten point decline in his GPA. Finally, the Second Circuit concluded that record did not support that parents’ position that the GPA decline was attributable to an emotional disturbance as opposed to [student’s] drug use.”

3. “Socially Maladjusted”

In *W.G. v. New York Cty. Dept. of Educ.*, 801 F. Supp. 2d 142, 111 LRP 35770 (S.D.N.Y. 2011), the court found that the record did not support the presence of an emotional disturbance where student’s academic problems were found to be the result of truancy and his school refusal was the product of “a conduct disorder, narcissistic personality tendencies and substance abuse rather than of depression.” The court explained:

Some courts have focused on conduct disorder as opposed to mood disorder diagnoses in drawing the distinction; some use the nomenclature of "juvenile delinquency." However it is parsed, the distinction between emotional disturbance and other underlying social or behavior problems is significant — the IDEA does not require school districts to undertake the responsibility of, for instance, forcing a child physically to attend school when the child is a neither unable to attend nor impeded by an emotional condition to a marked degree in following through on his ability to attend As the Fourth Circuit explained in *Springer v. Fairfax Co. Sch. Bd.*, 134 F.3d 659, 664 (4th Cir. 1998):

Courts and special education authorities have routinely declined ... to equate conduct disorders or social maladjustment with serious emotional disturbance ... . Indeed, the regulatory framework under IDEA pointedly carves out "socially maladjusted" behavior from the definition of serious emotional disturbance. This exclusion makes perfect sense when one considers the population targeted by the statute. Teenagers, for instance, can be a wild and unruly bunch.
Adolescence is, almost by definition, a time of social maladjustment for many people … Any definition that equated simple bad behavior with serious emotional disturbance would exponentially enlarge the burden IDEA places on state and local education authorities. Among other things, such a definition would require the schools to dispense criminal justice rather than special education. (citations omitted.)

4. **Student Discipline**

In *Application of Student with a Disability, Appeal No. 09-117 (December 4, 2009)*, the SRO found that a student with a history of angry outbursts and a long list of disciplinary violations who was suspended for threatening to kill a student did not satisfy the criteria for classification as a student with an emotional disturbance because he did not meet one of the requisite criteria; the SRO noted that even if the student had met one of the necessary criteria, he not require special education services as a result.

**F. BULLYING & CHILD FIND OBLIGATION**

In a recent *Dear Colleague Letter*, the Office of Special Education and Rehabilitative Services (OSERS), Office of Special Education Programs, 113 LRP 33753 (August 20, 2013) wrote:

Due to the characteristics of their disabilities, students with intellectual, communication, processing, or emotional disabilities may not understand the extent to which bullying behaviors are harmful, or may be unable to make the situation known to an adult who can help. In circumstances involving a student who has not previously been identified as a child with a disability under the IDEA, bullying may also trigger a school's child find obligations under the IDEA. 34 C.F.R. §§ 300.111, 300.201. (emphasis added).

**G. LENIENCY WITH RESPECT TO CHILD FIND OBLIGATIONS TO STUDENTS WITH EMOTIONAL DISTURBANCES**

1. In *Huntsville City Bd. of Educ., 22 IDELR 931, 22 LRP 3238 (SEA AL 1995)*, the high school student’s behaviors and academic performance fluctuated, and heightened anxiety which was apparent in the home, was not communicated the school district. Finding that the school district did not violate its child find obligations, the administrative officer wrote:

While it is true that under IDEA a local education agency is required to “identify, locate and evaluate handicapped children” that principle does not require that it ‘guess’ which children suffer from a handicap that renders them incapable of progressing in their education. Nor does that principle eliminate the obligation of parents and others to assist school officials in identifying children in need of special services. *Id.*
2. Similarly, in *Montgomery Cty. Pub. Schools, 110 LRP 28793* (MSDE-MONT-OT-09-42208 January 22, 2010), the administrative law judge found that the school district did not violate its child find obligations, determining that the school district had no reason to suspect that the student had anxiety that caused extensive absences from class.