

To: Professor Troutt
From: Victoria Bell
Date: August 13, 2015
Re: Are Children with PTSD Being Neglected by Their Schools?

QUESTION PRESENTED: What kind of special education accommodations are required by law to be provided for students suffering from Traumas?

BRIEF ANSWER: At a minimum, school districts have to identify emotionally disturbed children and create an individualized education plan to accommodate their needs. Some of those services include social work and psychological services. Unfortunately school districts do not follow the rules laid out in the IDEA and end up expelling students, under classifying students, and ultimately not accommodating those students. Those failures cause emotionally disturbed children to not succeed in school and the work force. Massachusetts created a solution to remedy districts' failures, which requires an overall community effort to accommodate emotionally disturbed children. This allows those children to receive services before they are identified and have a constant reinforcement of those learned skills. The ability to have a clear program that all districts can follow, along with uniform training for all staff members is key to proper accommodations for emotionally disturbed children.

DISCUSSION

I. Under both Federal and State laws, school districts have many different responsibilities when it comes to the classification of and the accommodations for special needs children.

A. Rights under the IDEA

Under the Individuals with Disabilities Education Act (Hereinafter "IDEA"), districts have certain responsibilities when it comes to accommodating special education eligible students. Under the IDEA, a child with a disability has "intellectual disabilities . . . serious emotional disturbance (referred to in this chapter as 'emotional disturbance') . . . other health impairments, or specific learning disabilities; and who, by reason thereof, needs special

education and related services.”¹ The IDEA places a child find obligation upon the school districts.² This obligation requires the districts to “identif[y], locate[], and evaluate[] and [develop] a practical method . . . to determine which children with disabilities are currently receiving needed special education and related services.”³ This obligation applies to “[a]ll children with disabilities residing in the State, including . . . children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services.”⁴

The IDEA requires districts to conduct an initial evaluation “to determine whether a child is a child with a disability within 60 days of receiving parental consent for the evaluation, or . . . within [the State’s] timeframe.”⁵ While conducting the initial evaluation, the district must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining . . . whether the child [has] a disability.”⁶ The district cannot use “any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child.”⁷ The assessments must be conducted in all the areas of the student’s suspected disability.⁸ The initial evaluation requires the “review [of] existing evaluation data . . . including . . . evaluations and information provided by the parents of the child; current classroom-based, local, or State assessments, and

¹ 20 USCS § 1401 (3).

² 20 USCS § 1412 (a) (3).

³ 20 USCS § 1412 (a) (3) (a).

⁴ *Id.*

⁵ 20 USCS § 1412 (C) (i) (I).

⁶ 20 USCS § 1414 (b) (2) (A).

⁷ 20 USCS § 1414 (b) (2) (B).

⁸ 20 USCS § 1414 (b) (3) (B).

classroom based observations and observations by teachers and related service providers.”⁹ After reviewing all the required information, the district must identify what additional data is required in order to better determine “whether the child is a child with a disability”¹⁰, “the present levels of academic achievement and related developmental needs of the child”¹¹, and “whether the child needs special education and related services.”¹²

In order for the child to be eligible, the child’s disability must fall one of the IDEA’s recognized categories. Children suffering from Post-Traumatic Stress Disorder (hereinafter “PTSD”), would likely be classified under emotional disturbance.¹³ In order to be classified under emotional disturbance, the student must suffer from one of the listed conditions, over a long period of time that adversely affects the student’s educational performance.¹⁴ These conditions are:

- (A) [a]n inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) [a]n inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) [a] general pervasive mood of unhappiness or depression.
- (E) [a] tendency to develop physical symptoms or fears associated with personal or school problems.¹⁵

An Individualized Education Plan (hereinafter “IEP”), is “a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes . . . a statement of the child’s present levels of academic achievement and functional performance, including. . . how the child’s disability affects the child’s involvement

⁹ 20 USCS § 1414 (c) (1).

¹⁰ 20 USCS § 1414 (c) (1) (B) (i).

¹¹ *Id.* at (ii).

¹² *Id.* at (iii).

¹³ 34 CFR 300.8 (4) (i) (a)-(e).

¹⁴ *Id.*

¹⁵ *Id.*

and progress in the general education curriculum.”¹⁶ The IEP must have “a statement of measurable annual goals, including academic and functional goals, designed to . . . enable the child to be involved in and make progress in the general education curriculum; and meet each of the child’s other educational needs.”¹⁷ In addition to a statement of goals, the IEP must have “a statement of the special education and related services and supplementary aids and services . . . that will provide for the child to advance appropriately toward attaining the annual goals; to be involved in and make progress in the general education curriculum.”¹⁸ For children with PTSD, the IEP must “consider the use of behavioral interventions and supports and other strategies, to address [the child whose behavior impedes their learning].”¹⁹ The child’s IEP must be in effect at the beginning of each school year.²⁰ The implemented IEP must be accessible by all of the child’s “regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation.”²¹ The required personnel must be knowledgeable of their “specific responsibilities related to implementing the child’s IEP and the specific accommodations, modifications, and supports that must be provided for the child.”²²

Related services are services that are the child requires in order to receive some educational benefit. There are different types of related services, and some common services offered to special education eligible children are:

transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the

¹⁶ 20 USCS § 1414 (d) (1) (A) (i) (I) (aa).

¹⁷ 20 USCS § 1414 (d) (1) (A) (i) (II).

¹⁸ 20 USCS § 1414 (d) (1) (A) (i) (IV).

¹⁹ 20 USCS § 1414 (d) (3) (B) (i).

²⁰ 34 CFR 300.323 (a).

²¹ 34 CFR 300.323 (d) (1).

²² 34 CFR 300.323 (d) (2).

individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.²³

Counseling services are those services that are "provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel."²⁴ Psychological services include:

- (i) Administering psychological and education tests, and other assessment procedures;
- (ii) Interpreting assessment results;
- (iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning;
- (iv) Consulting with other staff members in planning school programs to meet the special educational needs of children as indicated by psychological tests, interviews, direct observation, and behavioral evaluations;
- (v) Planning and managing a program of psychological services, including psychological counseling for children and parents; and
- (vi) Assisting in developing positive behavioral intervention strategies²⁵

A child suffering from PTSD could also receive social work services. These services include:

- (i) Preparing a social or developmental history on a child with a disability;
- (ii) Group and individual counseling with the child and family
- (iii) Working in partnership with parents and others on those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school;
- (iv) Mobilizing school and community resources to enable the child to learn as effectively as possible in his or her educational program; and
- (v) Assisting in developing positive behavioral intervention strategies.²⁶

The federal law requires States to have in place "policies and procedures designed to prevent the inappropriate over identification or disproportionate representation by race and ethnicity of children as children with disabilities, including children with disabilities with a

²³ 20 USCS § 1401 (26) (A).

²⁴ 34 CFR 300.34 (c) (2).

²⁵ 34 CFR 300.34 (c) (10).

²⁶ 34 CFR 300.34 (c) (14).

particular impairment.”²⁷ In addition to preventing inappropriate over-identification, there are discipline procedures that protect special education students. The school is prohibited from removing a special education student from their current academic placement for more than ten school days per school year.²⁸ If the suspension is longer than ten school days, the school must continue to provide special education and related services to that student.²⁹ Discipline procedures are important for children with PTSD, since most schools will just suspend those children, instead of accommodating them. The only time a special education student may be suspended for more than ten consecutive school days, is if the student’s actions were determined to not be caused by their disability.

The IDEA, at a very minimum requires all States that accept the federal funding to find and locate any and all students who are suspected of a disability. Within 60 days, the districts must have an evaluation meeting to determine if the student has a disability that requires an IEP. That evaluation requires districts to conduct assessments in order to properly determine whether or not the child has a disability. PTSD children, when properly identified, are classified under emotional disturbance. The common related services would be social work and psychological services. The schools must hold an IEP meeting after the evaluation is completed, in order to determine all the educational and related services that are required in order for the student to gain an educational benefit. At a minimum, districts have to ensure that one race is not over classified.

B. Rights Under New Jersey Law

In New Jersey, districts are required to provide services to students between the ages of three and twenty-one.³⁰ In order to start the special education classification process, a referral must be made on behalf of the child by either the parents, school personnel or other agencies that

²⁷ 34 CFR 300.173.

²⁸ 34 CFR 300.530 (b) (1).

²⁹ 34 CFR 300.530 (b) (2).

³⁰ N.J. ADMIN. CODE § 6A:14-1.1 (d).

deal with the welfare of children.³¹ Within 20 days after the referral is received, the school must hold an identification meeting to determine if there is enough evidence to warrant an initial evaluation.³² If there is a determination that an evaluation is warranted, the school and the parent must determine what other assessments and data is needed in order to properly evaluate the student.³³

The evaluation process requires the school district to meet and review all the completed assessments, in order to determine what disability, if any the child has.³⁴ The parent must receive all relevant documents from the district, at least ten days before the evaluation meeting.³⁵ The student is eligible for special education services, if “it is determined that the student has one or more of the disabilities . . . the disability adversely affects the student’s educational performance and the student is in need of special education and related services.”³⁶ The difficulty here is that the student must fit under one of the fourteen classifications, and their disability must adversely affect their educational performance. A student suffering from PTSD would fall under emotionally disturbed, which is “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.”³⁷ The following characteristics that must be met are:

- 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 behaviors or feelings under normal circumstances;
- iv. A general pervasive mood of unhappiness or depression; or

³¹ N.J. ADMIN. CODE § 6A:14-3.3 (e).

³² *Id.*

³³ N.J. ADMIN. CODE § 6A:14-3.4 (a) (2).

³⁴ N.J. ADMIN. CODE § 6A:14-3.5 (a).

³⁵ *Id.*

³⁶ N.J. ADMIN. CODE § 6A:14-3.5 (c).

³⁷ N.J. ADMIN. CODE § 6A:14-3.5 (c) (5).

v. A tendency to develop physical symptoms or fears associated with personal or school problems.³⁸

Children with undiagnosed PTSD may fall under other health impaired, which is “‘chronically ill’ and means a disability characterized by having limited strength, vitality or alertness, including a heightened alertness with respect to the educational environment, due to chronic or acute health problems.”³⁹ The common classification for a PTSD student, is social maladjustment, which is “‘a consistent inability to conform to the standards for behavior established by the school . . . behavior is seriously disruptive to the education of the student . . . and is not due to emotional disturbance.”⁴⁰

Once the evaluation is completed, the parent can either accept the school’s findings and start the IEP process, or disagree with the school’s findings and request independent evaluations.⁴¹ If the parent decides to request an independent evaluation, the parent must specify the kinds of assessments they want completed.⁴² The district must provide the independent evaluation at no cost to the parent, unless the district files for due process within 20 days of receiving the request.⁴³ The parent may be required to explain why there is an objection to the original evaluations.⁴⁴ Common assessments a parent with a PTSD child would request are the social and emotional assessments, which would measure self-concept and relationships with others, social maturity, and appropriateness of behavior.⁴⁵ An academic skill and achievement

³⁸ *Id.*

³⁹ N.J. ADMIN. CODE § 6A:14-3.5 (c) (9).

⁴⁰ N.J. ADMIN. CODE § 6A:14-3.5 (c) (11).

⁴¹ N.J. ADMIN. CODE § 6A:14-2.5 (c).

⁴² *Id.*

⁴³ N.J. ADMIN. CODE § 6A:14-2.5 (c) (1) (ii).

⁴⁴ *Id.* at (c) (5).

⁴⁵ Disability Rights Education and Defense Fund Inc, *Common Educational Tests used for Assessments for Special Education*, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND INC, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCoQFjAA&url=https%3A%2F%2Fdredf.org%2Fspecial_education%2FAssesments_chart.pdf&ei=KGdjVaTjN8SCsAXI6ICYAw

assessment measures the child's reading and phonics skills, spelling skills, handwriting skills, writing language skills and mathematics skills.⁴⁶ Basic education assessments measure cognition and intelligence, verbal intelligence, and non-verbal intelligence.⁴⁷

The IEP process begins either after the parent agrees with the district's evaluations or after the independent evaluations are conducted. An IEP meeting must be conducted 30 days after a student is determined to be eligible.⁴⁸ The IEP team must consider the student's strengths and the parent's concerns.⁴⁹ Other considerations the IEP team must take into account are: "academic, developmental and functional needs of the students, evaluation results, and appropriate strategies to address behavioral issues."⁵⁰ The IEP should include the student's present levels of academic achievements and how their disability affects their progress and achievement in the general curriculum.⁵¹ The IEP must have a statement of measurable annual goals that are related to the general curriculum standards.⁵² The goals in the IEP have to be broken down into benchmarks that are related to the student's educational needs.⁵³ A list of special education and related services that will be provided to the student must also be stated in the IEP.⁵⁴

Common related services are "counseling, occupational therapy, physical therapy, school nurse services, recreation, social work services, medical services and speech-language

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⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ N.J. ADMIN. CODE § 6A:14-3.7 (a).

⁴⁹ *Id.* at (c) (1).

⁵⁰ *Id.* at (c) (2), (3), (5).

⁵¹ N.J. ADMIN. CODE § 6A:14-3.7 (e) (1).

⁵² *Id.* at (e) (2).

⁵³ *Id.* at (e) (3).

⁵⁴ *Id.* at (e) (4).

services.”⁵⁵ These services are only provided when a student cannot gain an educational benefit without them.⁵⁶ Counseling services, must be provided by certified school psychologists, social workers or guidance counselors.⁵⁷ Therapy services, “may be integrated into the context of ongoing activities or routines and provided by personnel as set forth in the student’s IEP.”⁵⁸ If at any point the district is not providing the student with related services, the parent can force the district to provide those services by filing for Due Process.⁵⁹

The special education requirements in New Jersey are stricter than the IDEA requirements. After the initial request to determine whether a child is disabled, districts in New Jersey must hold an initial identification meeting within 20 days, instead of the 60 days the IDEA requires. At the evaluation meeting, the district must determine whether or not the child falls under the identified disability categories. Unlike the IDEA, where PTSD children would fall under emotional disturbance, in New Jersey, PTSD children could fall under other health impaired, emotional disturbance or social maladjustment. Parents in New Jersey have the option to request independent evaluations, if they do not agree with the districts findings. New Jersey districts must hold an IEP meeting within 30 days after the child is determined disabled. The IEP must also take into account a PTSD child’s possible behavioral problems. A student suffering from PTSD should at a minimum receive counseling and therapy services.

C. Rights Under 504 of the ADA

A 504 plan does not have to follow the standards that are laid out under the IDEA or New Jersey’s special education laws. The broad definition of handicapped under 504 results in more people being eligible for 504 plans. A handicapped person “(i) has a physical or mental

⁵⁵ N.J. ADMIN. CODE § 6A:14-3.9 (a)

⁵⁶ *Id.*

⁵⁷ *Id.* at (a) (1).

⁵⁸ *Id.* at (a) (11).

⁵⁹ N.J. ADMIN. CODE § 6A:14-2.7 (a).

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.”⁶⁰ A child with PTSD may fall under “any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”⁶¹ A major life activity is “caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”⁶² The record of impairment requires having “a history of, or has been misclassified as having, a mental . . . impairment that substantially limits one or more major life activities.”⁶³ If the record requirement cannot be met, the person must have a:

(A) . . . mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) . . . mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments . . . but is treated by a recipient as having such an impairment.⁶⁴

Being disabled under 504, does not guaranteed a 504 plan.

Similar to an IEP, in order for a 504 plan to be created, there needs to be an evaluation. This evaluation can be initiated by the parent or the school district.⁶⁵The school must consider different types of information, like “documentation of the child’s disability, evaluation results, observations by the student’s parents and teachers, academic record, independent evaluations.”⁶⁶

Generally, a 504 plan would contain “[s]pecific accommodations, supports or services, [n]ames of the school professional that will provide each service, [t]he name of the person

⁶⁰ 34 C.F.R. § 104.3 (j) (1).

⁶¹ 34 C.F.R. § 104.3 (j) (2) (i) (B).

⁶² 34 C.F.R. § 104.3 (j) (2) (ii).

⁶³ 34 C.F.R. § 104.3 (j) (2) (iii).

⁶⁴ 34 C.F.R. § 104.3 (j) (2) (iv).

⁶⁵Kristin Stanberry, *Understanding 504 Plans*, UNDERSTOOD, <https://www.understood.org/en/school-learning/special-services/504-plan/understanding-504-plans>

⁶⁶ *Id.*

responsible for ensuring the 504 plan is implemented.”⁶⁷ A 504 plan’s nonacademic services “may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.”⁶⁸ The nonacademic services provided would be: “personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are non-handicapped students with similar interests and abilities.”⁶⁹

A 504 plan’s broad definition of disability allows students to get services, who could not get services under the IDEA or New Jersey’s special education laws. The classification does require the child who would fall under mental or psychological impairment to provide documented proof of that impairment or documented proof of the misclassification. The problem with the 504 plan, is that the continued misclassification can allow a nondisabled student to receive 504 services. The 504 services are not as beneficial or as specific to the student as an IEP would be. The 504 plan would only provide counseling services and some academic services. These services do not require objectives or to be tailored to the specific student, like an IEP would. The good thing about a 504 is that students are not pushed to be in more restrictive environments or careers. A 504 plan is better than receiving no services, but it is not something that is ideal for a student suffering from PTSD.

⁶⁷ *Id.*

⁶⁸ 34 C.F.R. § 104.37 (a) (2).

⁶⁹ 34 C.F.R. § 104.37 (b).

D. Case Law that Establishes what is required by School Districts under the IDEA

The first special education case the Supreme Court heard was in 1982. In *The Board of Education of Hendrick Hudson Central School District v. Rowley*, the parents of a deaf first grader Amy filed a due process complaint against the school district because the district did not provide an in-class interpreter for her first grade year.⁷⁰ Instead of the interpreter, Amy was provided with an FM hearing aid, as well as teachers who took a sign language interpretation course.⁷¹ These accommodations allowed Amy to successfully complete her kindergarten year.⁷² The parents demanded an interpreter, but Amy was given an interpreter in kindergarten and it was determined that she did not need an interpreter.⁷³ The parents had a hearing in front of the independent examiner, who agreed with the school district, resulting in the parents appealing to the federal court claiming that the district denied Amy a FAPE (hereinafter “FAPE”).⁷⁴ The Supreme Court had to define what kind of education the school districts are required to provide. The Court created “a basic floor of opportunity . . . [which] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.”⁷⁵ The Court determined that schools satisfy FAPE when they “provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.”⁷⁶ Overall, the Court ruled that Amy was being provided a FAPE without the interpreter.⁷⁷ Even though Amy did not win her case, it created an important standard for what a FAPE is. This ruling helped guarantee that children with disabilities have

⁷⁰ Bd. of Educ. v. Rowley, 458 U.S. 176,184 (U.S. 1982)

⁷¹*Id.*

⁷²*Id.*

⁷³*Id.* at 185.

⁷⁴*Id.*

⁷⁵*Id.* at 201.

⁷⁶*Id.* at 203.

⁷⁷*Id.* at 210.

access to public schools that provide a basic floor of opportunity. This floor of opportunity results in receiving an education that results in an educational benefit, instead of just any services.

The next Court case, which occurred only two years after the Rowley case, dealt with defining related services. The Respondents in *Irving Independent School Dist. v. Tatro* were parents of Amber Tatro, who was an eight year old girl that was suffering from spina bifida that required catheterization (“CIC”) every three or four hours.⁷⁸ The procedure could be done within a few minutes by anyone who took less than an hour’s worth of training.⁷⁹ Amber’s IEP provided her with early childhood development classes and special services like physical and occupational therapies, but did not provide for the catheterization procedure.⁸⁰ The parents were unsuccessful in getting CIC services through administrative remedies.⁸¹ The District Court held that the CIC was not a related service since “it did not serve a need arising from the effort to educate.”⁸² The Court of Appeals held that that the “CIC was a related service . . . because without the procedure Amber could not attend classes and benefit from special education.”⁸³ The Supreme Court agreed that the “CIC is a supportive [service] . . . required to assist a handicapped child to benefit from special education.”⁸⁴ The Court also agreed that the “CIC was not a medical [service], which a school is required to provide only for purposes of diagnosis or evaluation.”⁸⁵ The child gets related services if it is “necessary to aid a handicapped child to benefit from special education” and that the services must be provided if “only they can be performed by a nurse or another

⁷⁸ *Irving Independent School Dist. v. Tatro*, 468 U.S. 883, 885 (U.S. 1984)

⁷⁹*Id.*

⁸⁰*Id.* at 886.

⁸¹*Id.*

⁸²*Id.* at 887.

⁸³*Id.*

⁸⁴*Id.* at 890.

⁸⁵*Id.* at 891.

qualified person, not if they must be performed by a physician.”⁸⁶ This case defined the scope of related services and created this medical exception rule. The medical exception rule forces the district to provide all supportive services that are necessary unless the only person to provide the service is a physician.

The students in *Honig v. Doe* were emotionally disturbed and expulsion was attempted by the San Francisco Unified School District because of their violent and disruptive behavior that was related to both of their disabilities.⁸⁷ Doe assaulted a student at a center for disabled children, but his IEP described him as having difficulty with controlling his impulses and anger.⁸⁸ It was recognized in his IEP that a goal would be to improve his ability to relate to his peers and deal with situations that frustrate him without resorting to violence.⁸⁹ Doe was taunted and finally on November 6, 1980 the taunting was too much and he choked a fellow student so violently that it left abrasions on that child’s neck.⁹⁰ That day Doe was suspended and his mom was notified that his suspension was to be extended until the expulsion hearing was held.⁹¹ Doe was provided with home tutoring and 24 days after his initial suspension, he reentered school.⁹² The other Respondent, Jack Smith was identified as emotionally disturbed at the second grade level, which was in 1976.⁹³ Smith could not control his verbal or physical outbursts and he also had a severe disturbance in relationships with adults and fellow peers.⁹⁴ His difficulties were because of the emotional and physical abuse he suffered from as a child.⁹⁵ Smith was transferred

⁸⁶*Id.* at 894.

⁸⁷ *Honig v. Doe*, 484 U.S. 305, 312 (U.S. 1988).

⁸⁸ *Id.*

⁸⁹ *Id.* at 312-13.

⁹⁰ *Id.* at 313.

⁹¹ *Id.*

⁹² *Id.* at 314.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

to a public school, and when he started a full-day program, he immediately began misbehaving.⁹⁶ Smith was suspended after further making lewd comments to his female peers.⁹⁷ Like they did with Doe, Smith's suspension was extended until the expelling hearing was held.⁹⁸ Instead of the hearing, Smith was given home instruction.⁹⁹

Doe and Smith filed their claim in the District Court, which ruled in their favor, due to the fact that the expulsions and indefinite suspensions due to the conduct of their disabilities deprived them of a FAPE.¹⁰⁰ This resulted in the school being prevented from doing any other disciplinary action besides two or five day suspensions against disabled children for conduct that is related to their disability.¹⁰¹ The Court of Appeals for the Ninth Circuit affirmed, but held that suspensions were allowed up to thirty days.¹⁰² The court also held that the stay-put provision had no dangerousness exception, which caused indefinite suspensions or expulsions being invalid.¹⁰³ The Supreme Court recognized the importance of the EHA which was implicated after a finding that one out of eight disabled children were excluded from their classes.¹⁰⁴ Due to that disproportionate exclusionary practice, Congress included serious emotional disturbance under the federal definition of handicap, requiring schools to educate all disabled children, and prevented schools from changing the child's placement after the parent objects to that placement.¹⁰⁵ The Court recognized that the stay put provision "creates a presumption in favor of the child's current educational placement which school officials can overcome only by showing

⁹⁶ *Id.* at 314-15.

⁹⁷ *Id.* at 315.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 315-16.

¹⁰¹ *Id.* at 316.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 324.

¹⁰⁵ *Id.*

that maintaining the child in his or her current placement is substantially likely to result in injury either to himself or herself, or to others.”¹⁰⁶ The Court held that schools cannot indefinitely suspend disabled students or unilaterally change their current placements.

The next Case determined whether the cost of related services allowed a school district to not provide those services. The respondent in *Cedar Rapids Community School District v. Garret F.*, was a student who was paralyzed from the neck down due to a motorcycle accident at the age of four, but his mental capabilities were unaffected.¹⁰⁷ Garret was in a regular class and was succeeding academically.¹⁰⁸ Garret was dependent on a ventilator and required a responsible individual nearby that could attend to his physical needs while he was at school.¹⁰⁹ Garret’s family paid for the services needed for Garret in school for almost five years, but in 1993 the family finally asked the district to pay for these services.¹¹⁰ The ALJ ruled that the district was financially responsible under the IDEA.¹¹¹ The Court of Appeals used the *Tatro* case and interpreted it as a bright-lined rule which laid out that “the services of a physician . . . are subject to the medical services exclusion, but services that can be provided in the school setting by a nurse or qualified layperson are not.”¹¹² The district however argued with the test and stated that “some federal courts have not asked whether the requested health services must be delivered by a physician, but instead have applied a multi-factor test that considers, generally speaking, the nature and extent of the services at issue.”¹¹³ The Court “referenced the likely cost of the services and the competence of school staff as justifications for drawing a line between physician and

¹⁰⁶ *Id.* at 328.

¹⁰⁷ *Cedar Rapids Cmty. Sch. Dist. v. Garret F. by Charlene F.*, 526 U.S. 66, 69. (U.S. 1999).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 70.

¹¹¹ *Id.* at 71.

¹¹² *Id.* at 72.

¹¹³ *Id.*

other services . . . but our endorsement of that line was unmistakable.”¹¹⁴ The district wanted the Court to look at other factors like “[1] whether the care is continuous or intermittent, [2] whether existing school health personnel can provide the service, [3] the cost of the service, and [4] the potential consequences if the service is not properly performed.”¹¹⁵ The district claimed that the factors helped define what was medical.¹¹⁶ The district was worried about the financial burden and wanted a kind of undue burden test.¹¹⁷ The Court ruled that the District must “fund such related services in order to help guarantee that students like Garret are integrated into the public schools.”¹¹⁸ Overall the cost of related services do not exempt a school from providing them to the student. If the services are needed in order for the student to attend school and the existing medical exemption test is not met, the school must provide it.

Rowley established the standard for what type of education the schools must provide students.¹¹⁹ *Rowley* required schools to provide a basic floor of opportunity to students, which are educational services that result in educational benefits.¹²⁰ The *Irvington* case established the medical exception rule, which requires districts to provide all related services necessary for the child to acquire an educational benefit, unless the only person who can provide the service is a physician.¹²¹ The *Doe* case established the rights of emotionally disturbed children and prevented school districts from indefinitely suspending those students or unilaterally changing their educational services.¹²² The *Cedar Rapids* case extended what was established in the *Irvington* case and reiterated that the district must provide all related services that are required for the child

¹¹⁴*Id.* at 74.

¹¹⁵*Id.* at 75. (internal citations omitted)

¹¹⁶*Id.*

¹¹⁷*Id.* at 77.

¹¹⁸*Id.* at 79.

¹¹⁹*Rowley*, 458 U.S at 210.

¹²⁰*Id.*

¹²¹*Irving Independent School Dist.*, 468 U.S at 895.

¹²²*Doe*, 484 U.S. at 314-15.

to attend school and receive an education.¹²³ It rejected the idea of utilizing an undue burden test when determining whether a school had to provide services.¹²⁴ The only exemption is the medical exception.¹²⁵ Overall, students have the right to have a free education which results in educational benefits, with related services that are needed to allow them to gain that benefit. They have the right to not be indefinitely suspended due to actions that result from their disabilities.

II. Research shows

A. New Jersey Case analysis

School districts are hesitant to classify students as emotionally disturbed. Districts are also unwilling to recognize emotional disturbance being related to the learning experience. The child in *B.G. by F.G. v. Cranford Bd. of Education* was adopted at four and started showing signs that he was previously abused.¹²⁶ As B.G. aged, his hostile and provocative acts advanced.¹²⁷ This resulted in B.G. stealing, harassing his sisters and setting fires when he was angry.¹²⁸ B.G.'s learning ability was impeded due to his short attention span and his ability to be easily distracted.¹²⁹ B.G. succumbed to peer pressure, which resulted in him hitting, tripping or kicking fellow students.¹³⁰ After B.G. was struggling in the fifth grade, his teacher suggested that he go see a therapist, which determined that his school problems were related to his underlying emotional problems.¹³¹ His therapist diagnosed B.G. "as an emotionally disturbed child with a primary diagnosis of an intentional deficit disorder and a secondary diagnosis of a developmental

¹²³ Cedar Rapids Cmty. Sch. Dist., 526 U.S. at 79.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *B.G. by F.G. v. Cranford Bd. of Educ.*, 702 F. Supp. 1140, 1142 (D.N.J. 1988).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

disorder tracing back to B.G.'s early childhood.”¹³² His therapist concluded that the best classification for B.G. would be emotionally disturbed, and the least restrictive environment (hereinafter “LRE”) would be a residential placement.¹³³ The residential placement was appropriate since B.G.’s educational problems would continue until his emotional problems were addressed.¹³⁴ Two critical observations were “first, that B.G.'s educational and emotional needs were inseparable in terms of program placement; and second, that the CST's recommendation that B.G. be classified Perceptually Impaired (hereinafter "P.I.") was inappropriate since it ignored B.G.'s emotional disturbance.”¹³⁵ The Child Study Team (hereinafter “CST”) determined that an emotional disturbance classification was inappropriate.¹³⁶ This was because CST did not observe what was documented, and the conclusion was that the reports dealt solely with emotional difficulty at home.¹³⁷ B.G. was classified as P.I. with accommodations that included transferring, being in a self-contained classroom, individualized instruction, being with non-disabled students for non-academic classes, and a school swimming program.¹³⁸ The parents did not consent to the accommodations, since they believed the accommodations were “nothing more than a school board fearful that they were going to have to pay for a kid to go to a special treatment center and they didn’t want to fund it.”¹³⁹

Since the parents refused consent, the school filed a due process complaint. The administrative law judge (hereinafter “ALJ”) determined that “B.G. should be classified as E.D. Since the CST had mistakenly classified B.G. as P.I. and had not focused on his placement in a

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 1143.

¹³⁶ *Id.* at 1144.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 1145.

program appropriate for E.D., the ALJ ordered the CST to consider appropriate placements for B.G., including YBP.”¹⁴⁰ The Court found that “the CST and the Board . . . engaged in a denial of B.G.'s emotional problems. They incorrectly believe[d] that B.G.'s emotional and neurological problems [were] segregable from the learning process . . . [t]he insidious nature of his handicap is the uneven manner in which it manifests itself. . . . B.G. has good days and bad days.”¹⁴¹ The Court recognized that “[t]he mere fact that B.G. obtained passing grades (barely) and was promoted to the next grade level at Jefferson, though perhaps sufficient to satisfy the minimum federal standards . . . is insufficient and inconsistent with New Jersey's requirements that B.G. be afforded a program that assures him the fullest opportunity to develop his intellectual capacities.”¹⁴² The court defined the LRE, which is a “setting that is as similar as possible to the regular setting in which the pupil would be educated if not considered handicapped. Such a setting is selected in light of a pupil's special educational needs. The least restrictive environment for B.G. . . . is a residential placement.”¹⁴³ The Court ordered the school to develop a new IEP which included a residential program.¹⁴⁴

The student in *Shore Regional High School Board of Education v. P.S.* appealed the district court’s decision which reversed the ALJ’s ruling that determined the district failed to provide a Free and Appropriate Public Education (hereinafter “FAPE.”)¹⁴⁵ P.S. was bullied in elementary schools, and the bullying continued into middle school.¹⁴⁶ P.S. was repeatedly harassed and abused by fellow students and the school repeatedly failed to remedy the

¹⁴⁰ *Id.* at 1146.

¹⁴¹ *Id.* at 1156-57.

¹⁴² *Id.* at 1157.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1158.

¹⁴⁵ *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 195 (3d Cir. N.J. 2004).

¹⁴⁶ *Id.*

situation.¹⁴⁷ The constant bullying caused P.S. to become depressed and his school work suffered.¹⁴⁸ In the fifth grade, P.S. was diagnosed with depression and was prescribed medication, but the medication did not improve his condition.¹⁴⁹ The school district evaluated P.S. and classified him under perceptual impairment (hereinafter “P.I.”).¹⁵⁰ The IEP required P.S. to be in a resource room for one subject and to receive extra teacher attention.¹⁵¹ These accommodations proved ineffective, and P.S. attempted suicide in the eighth grade.¹⁵² Following the suicide attempt, P.S. was home schooled for six weeks.¹⁵³ The parents wanted P.S. to attend Red Bank High School, since the bullying was directly related to the Shore District.¹⁵⁴ The Shore district did not agree with the parents, and felt the harassment would be the same.¹⁵⁵ Shore denied the parent’s request and created an IEP that justified their district being the LRE.¹⁵⁶

The ALJ concluded that Shore could not provide a FAPE “because of the legitimate and real fear that the same harassers who had followed P.S. through elementary and middle school would continue [to bully him.]”¹⁵⁷ The District Court however reversed saying that “[t]he inability of the Maple Place administration to successfully discipline its students does not make Shore an inappropriate placement. No school can ever guarantee that a student will not be harassed by other students.”¹⁵⁸ The District Court also believed that “Shore was the least restrictive environment for P.S. because it was his local public high school, where he would have

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 196.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 197.

¹⁵⁸ *Id.*

been educated with other nondisabled children.”¹⁵⁹ The court reversed the lower court, agreeing with the ALJ’s determination that the bullying would continue, making Shore Point inappropriate.

The parents in the administrative law case of *L.T. and L.T. On Behalf Of K.T.*, appealed from Neptune’s denial of special education and related services.¹⁶⁰ K.T. was a 14 year old girl who was in general education classes until the eighth grade.¹⁶¹ In the sixth grade, K.T was sexually assaulted by an eighth grade male student, and in eighth grade she received home instruction.¹⁶² K.T. saw a counselor because of her anxiety, depression, and sleeping problems due to the constant bullying and sexual harassment.¹⁶³ The school ordered assessments, which included educational, psychiatric, social and psychological assessments.¹⁶⁴ These assessments showed that K.T. had PTSD resulting from the sexual assault, harassment and bullying at school, and the assessments recommended K.T.to be moved to a new school.¹⁶⁵ A further psychiatric evaluation conducted by another psychologist showed that K.T. had PTSD and depressive disorder, which would allow K.T. to meet the criteria for classification under emotional disturbance.¹⁶⁶ The doctor noted that “[r]ecovery from emotional trauma takes considerable time and patience. K.T. will require extensive support and structure to foster growth and healing. While much can be accomplished through psychotherapy, the impact of environment is critical to her wellness.”¹⁶⁷ The doctor reported that home instruction is not viable because it does not help

¹⁵⁹ *Id.* at 197-98 (internal citations omitted).

¹⁶⁰ *L.T. and L.T. ex rel K.T. v. Neptune Twp. Bd. of Educ.*, EDS 11709-11, Decision (March 1, 2012), http://njlaw.rutgers.edu/collections/oal/html/initial/eds11709-11_1.html .

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* (quoting exhibit P-21 at 6.).

with depression, and attending her current school would also be inappropriate because it would further the emotional distress.¹⁶⁸

The school's experts believed that K.T. was ineligible for special education and related services under the classification of emotionally disturbed.¹⁶⁹ The school psychologist believed that K.T.'s depression was not pervasive and her emotional issues had no impact on her education.¹⁷⁰ The school's social worker determined that K.T. was normal and could continue in school with school therapy.¹⁷¹ The private psychologist explained that "several conditions occur as a result of either acute or ongoing trauma and that K.T. exhibited physical symptoms, including body aches and insomnia, as well as emotional symptoms of sadness, irritability, apprehension and anxiety."¹⁷² The private psychologist noted that K.T. "had the related [depression] symptoms of sadness, withdrawal, moodiness and anger."¹⁷³ The private psychologist determined that K.T. was eligible under emotional disturbance because "PTSD and depression functionally impacted her educational performance and ability to learn. Those conditions specifically impair one's ability to acquire, store, and recall information."¹⁷⁴

Based on the testimony from the private experts, the ALJ determined that K.T. was eligible under emotionally disturbed and that K.T. did have PTSD and depression.¹⁷⁵ The ALJ concluded that Neptune failed to prove that K.T. was not eligible for special education and related services.¹⁷⁶ That failure resulted in Neptune being required to develop a proper IEP.¹⁷⁷

¹⁶⁸ *L.T. and L.T. ex rel K.T. v. Neptune Twp. Bd. of Educ.*, EDS 11709-11, Decision (March 1, 2012), http://njlaw.rutgers.edu/collections/oal/html/initial/eds11709-11_1.html .

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

The father in *Munir v. Pottsville Area School District* placed his son O.M. in a private residential facility and a private boarding school after multiple suicide attempts and wanted reimbursement from the school, which was denied.¹⁷⁸ The court recognized that in order to satisfy the IDEA, the district must only offer an IEP that “is reasonably calculated to enable the child to receive meaningful educational benefits in light of the student’s intellectual potential.”¹⁷⁹ A parent is allowed to unilaterally place their child in a different school and ask the district for reimbursement.¹⁸⁰ The parent is only entitled to reimbursement if “the school district failed to provide a FAPE and that the alternative private placement was appropriate.”¹⁸¹ O.M. was eventually diagnosed with emotional disturbance and was required to attend an in-patient hospital treatment program for his threats and gestures of suicide.¹⁸² The district still determined that O.M. was ineligible for special education services because of his normal test scores.¹⁸³ O.M. was determined ineligible for emotional disturbance services because he received positive behavioral ratings from his teacher.¹⁸⁴

O.M. was performing well academically for three years and he periodically saw a school psychologist, who suggested an additional evaluation for IDEA services.¹⁸⁵ In 2008, O.M. overdosed on pills and was hospitalized.¹⁸⁶ O.M. was hospitalized two other times due to suicidal threats, gestures, and attempts.¹⁸⁷ The district helped O.M.’s parents send O.M. to a boarding

¹⁷⁷ *Id.*

¹⁷⁸ *Munir v. Pottsville Area Sch. Dist.*, 723 F.3d 423, 426 (3d Cir. Pa. 2013).

¹⁷⁹ *Id.* (quoting *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 244 (3d Cir. 2012) (quoting *P.P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727, 735 (3d Cir. 2009))).

¹⁸⁰ *Munir.*, 723 F.3d at 426 (*see Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993); *Mary T. v. Sch. Dist. of Phila.*, 575 F.3d 235, 242 (3d Cir. 2009)).

¹⁸¹ *Id.*

¹⁸² *Munir.*, 723 F.3d at 426-27.

¹⁸³ *Id.* at 427.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

school where he was sent home after the first day due to thoughts of suicide.¹⁸⁸ O.M. was hospitalized twice that following year and his parents requested an IEP.¹⁸⁹ The district however implemented a 504 plan for O.M., which the parents approved.¹⁹⁰ In 2009 O.M. was in the hospital again due to another suicide threat.¹⁹¹ O.M.'s parents enrolled him in a therapeutic residential treatment center.¹⁹² The treatment center sent the district documents and evaluations which diagnosed O.M. with emotional disturbance, and requested an IEP.¹⁹³ The school offered an IEP which had most of the therapeutic school's recommendations, but the parents refused consent.¹⁹⁴ In September of 2009, O.M.'s parents sent him to a residential school near their home, which had small classes and a more supportive environment.¹⁹⁵

The parents filed due process claiming that the district failed to conduct a timely evaluation and failed to provide specialized educational services.¹⁹⁶ The hearing officer determined that between 2005 and 2008, the district did not have to evaluate O.M. because even though he seemed to be emotionally disturbed, it was not affecting his ability to learn.¹⁹⁷ For the period after the suicide attempts, the hearing officer determined that the delay did not deprive O.M. of an educational benefit.¹⁹⁸ The hearing officer determined that the parents did not deserve costs for the private placement because "the primary purpose of that placement was the provision of mental health treatment rather than provision of special education . . . the services O.M. received while at Wediko were based on a treatment plan designed by a clinical psychologist and

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 428.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 429.

¹⁹⁸ *Id.*

were not focused primarily on education.”¹⁹⁹ The parents were also denied costs for the less restrictive private placement because “O.M.’s parents opined that O.M. could benefit from smaller class sizes and counseling services such as those provided by the private schools . . . under the IDEA, O.M. is entitled to an appropriate program, not an ideal program.”²⁰⁰ The district court upheld the decision and the parents appealed for tuition reimbursement.²⁰¹

In order for parents to receive reimbursement, they must show that “the School District failed to provide O.M. with a FAPE and that the alternative private placement was appropriate.”²⁰² In order for the private placement to be appropriate, it must “itself be proper under the IDEA—that is, it must “provide[] significant learning and confer[] meaningful benefit.”²⁰³ School districts have to pay for the placement, when it “is necessary to provide special education and related services.”²⁰⁴ Districts do not have to pay if “the placement of students who need twenty-four-hour supervision for medical, social, or emotional reasons, and receive only an incidental educational benefit from that placement . . . courts must consider whether the service is necessary to ensure that the child receives some educational benefit, and they must assess the strength of the link between that service and the child’s educational needs”²⁰⁵ The placement had educational components, but the services were more medical than educational.²⁰⁶ The Court determined that because O.M. was primarily placed in the residential program because of emotional reasons, it was not the school’s responsibility.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at 429-30.

²⁰² *Id.* at 430.

²⁰³ *Id.* at 430 (quoting *Lauren W. ex rel. Jean W. v. DeFlaminis*, 480 F.3d 259, 276 (3d Cir. 2007)).

²⁰⁴ *Munir.*, 723 F.3d at 431 (quoting 34 C.F.R. § 300.104.).

²⁰⁵ *Munir.*, 723 F.3d at 432.

²⁰⁶ *Id.* at 433.

School districts are hesitant to properly classify students, and if they do, districts refuse to pay for the services, since the services are not primarily for the educational experience. The child in *B.G.* was classified as perceptually impaired because the documented instances were determined to solely resonate at home.²⁰⁷ The court recognized that B.G.'s emotional and neurological problems cannot be separated from the learning process.²⁰⁸ The court also determined that a residential placement, which is the one of the most restrictive environments, as the LRE for purposes of B.G.'s needs.²⁰⁹ The Court in *Shore Regional High School Board of Education* again dealt with a district that classified a student as perceptually impaired with improper services.²¹⁰ The court determined that the current district where the child was harassed and bullied was not appropriate, since the bullying would never be stopped.²¹¹ *L.T. and L.T. On Behalf Of K.T.*, is similar to *Shore Regional High School Board of Education*, since it deals with trauma directly related to the school.²¹² Again the district was hesitant to classifying the child whose psychological assessments showed PTSD that was directly related to the school environment.²¹³ The district tried to push the idea that the student's emotional issues had no impact on her education.²¹⁴ The court determined that the child was eligible under emotionally disturbed.²¹⁵ This case exemplifies the trend of school district's denying students proper classification, even though it is clear the trauma is directly related to the school environment and is effecting the student's educational experience.

²⁰⁷ *B.G.*, 702 F. Supp. at 1144.

²⁰⁸ *Id.* at 1145.

²⁰⁹ *Id.* at 1157.

²¹⁰ *Shore Reg'l High Sch. Bd. of Educ.*, 381 F.3d at 196.

²¹¹ *Id.* at 197-98.

²¹² *L.T. and L.T. ex rel K.T.*, EDS 11709-11.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

The *Munir* case demonstrates that districts are only required to give the minimum accommodations to emotionally disturbed students. The child, O.M. was constantly hospitalized due to suicidal threats and attempts.²¹⁶ The student was progressing well in a residential placement, but the district only wanted to provide most of the services at the school district, refusing to pay for the residential placement.²¹⁷ The court determined that the residential placement was not required to be paid by the district because the services were not focused primarily on education and was designed for psychological purposes.²¹⁸ The *Munir* case forces parents to consider whether the risk of not getting reimbursed is worth unilaterally placing their student in a different school.²¹⁹

B. 504 Case analysis

The parent in *W.B. v Matula*, was seeking damages because the school failed to evaluate, classify and provide services in violation of §504 of the rehabilitation act of 1973.²²⁰ E.J. was eventually classified as neurologically impaired.²²¹ These requests started in 1991 when W.B. met with the school principal to inform the district of her concerns about her son's behavioral problems, which included touching and hitting other children.²²² That same year, an outside doctor diagnosed E.J. with ADHD, and the district determined that E.J. was eligible for §504 services, which the district did not provide.²²³ The Court recognized four factors that the plaintiff must demonstrate in order to prove that the school violated §504 of the rehabilitations act, which states “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to

²¹⁶ *Munir.*, 723 F.3d at 427.

²¹⁷ *Id.* at 428.

²¹⁸ *Id.* at 429.

²¹⁹ *Id.* at 431.

²²⁰ *W.B. v. Matula*, 67 F.3d 484, 488 (3d Cir. N.J. 1995)

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 488-89.

discrimination under any program or activity receiving Federal financial assistance.”²²⁴ In order to establish a violation of § 504, the plaintiff must show that:

(1) E.J. is disabled as defined by the Act; (2) E.J. is "otherwise qualified" to participate in school activities; (3) the school or the Board receives federal financial assistance; and (4) E.J. was excluded from participation in, denied the benefits of, or subject to discrimination at, the school.²²⁵

The plaintiff must also show that the defendant “must know or be reasonably expected to know of E.J.’s disability, but intent does not need to be proven.”²²⁶ The specific claim under §504 was that the defendants limited §504 services to students that are also eligible under the IDEA.²²⁷ The district then refused to make reasonable accommodations for E.J.²²⁸ The court allowed these two claims to be reinstated.²²⁹ Under §504, it is harder to prove that the district did not provide services, and there is a higher standard to show that the district violated §504.

The court in *S.H. v. Lower Merion School District* determined that a district does not violate §504 if they erroneously misclassify students as disabled, even if they are not disabled.²³⁰ S.H., who is African-American was placed in regular classes up until the fifth grade, where after scoring below level on two standardized tests was determined to have a learning disability.²³¹ In November of 2004, S.H.’s IEP gave her services, which included speech and language therapy, and a part-time learning support class.²³² S.H. showed improvements after receiving those services.²³³ The school psychologist determined that S.H. had a specific learning disability when

²²⁴ *Id.* at 492 (quoting 29 USCS § 794 (a)).

²²⁵ *Matula*, 67 F.3d at 492; *see Nathanson v. Medical College of Pennsylvania*, 926 F.2d 1368, 1380 (3d Cir. 1991); 34 C.F.R. § 104.4(a).

²²⁶ *Matula*, 67 F.3d at 492 (quoting *Nathanson*, 926 F.2d at 1381, 1384).

²²⁷ *Matula*, 67 F.3d at 500.

²²⁸ *Id.*

²²⁹ *Id.* at 502.

²³⁰ *S.H. v. Lower Merion Sch. Dist.*, 729 F.3d 248, 250-251 (3d Cir. Pa. 2013)

²³¹ *Id.* at 252.

²³² *Id.* at 253.

²³³ *Id.*

she was in the tenth grade.²³⁴ S.H.'s parents got an independent evaluator which determined that S.H.'s classification as learning disabled has always been erroneous.²³⁵ S.H. in her junior and senior year was finally classified as non-disabled and took all regular classes.²³⁶

The parent claimed that the district violated § 504 because the district discriminated against S.H. by erroneously identifying her as a disabled child.²³⁷ The lower court ruled that the district was not liable due to lack of evidence proving that the district intentionally discriminated against S.H.²³⁸ The court recognized that § 504 protections extend to people who are regarded as having a disability.²³⁹ In order to succeed in a § 504 claim, the parent must show that S.H. "(1) has a disability; (2) was otherwise qualified to participate in a school program; and (3) was denied the benefits of the program or was otherwise subject to discrimination because of her disability."²⁴⁰ The plaintiff must also prove that the district had a deliberate indifference.²⁴¹ In order to satisfy that standard, the plaintiff must show that the district had "(1) knowledge that a federally protected right is substantially likely to be violated . . . and (2) failure to act despite that knowledge."²⁴² The Court ruled that there was not enough evidence to show that the district had knowledge, even though there was conflicting expert testimony, and S.H.'s test scores were above average.²⁴³

²³⁴ *Id.* at 254.

²³⁵ *Id.*

²³⁶ *Id.* at 255.

²³⁷ *Id.*

²³⁸ *Id.* at 256.

²³⁹ *Id.*

²⁴⁰ *Id.* at 256 (quoting *Chambers ex rel. Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 587 F.3d 176, 189 (3d Cir. 2009)).

²⁴¹ *S.H.*, 729 F.3d at 265.

²⁴² *Id.*

²⁴³ *Id.* at 267.

The *W.B.* case demonstrates that even though it may be easier to get a §504 plan, it is harder to prove that the district violated their obligations under the Rehabilitation Act of 1973.²⁴⁴ Under IDEA claims, parents do not have the burden to show any type of intent, but as made clear in *W.B.*, parents have to prove that a district knew or was reasonably expected to know.²⁴⁵ School districts constantly only give §504 services to students who are also eligible under the IDEA, and courts make it near impossible for the parents to get the proper §504 services for their child.²⁴⁶ Another issue with §504 services is that districts do not get punished for erroneously misclassifying students.²⁴⁷ Once again, the court puts an intent requirement on the parent in order to prove that the school intentionally discriminated against the minority child.²⁴⁸ Part of the reason that §504 claims are hard to succeed is because §504 protections extend to people regarded as having a disability.²⁴⁹ Being classified may be easier under §504 than the IDEA, but parents rarely succeed in §504 cases, allowing districts to get away with not providing proper services or misclassifying students. At least with the IDEA, parents have no intent requirement, and it allows them to put more responsibility on the districts.

C. Law Review Analysis

The first law review article discusses the issues of school districts being neglectful when it comes to properly identifying emotional disturbance and accommodating it.²⁵⁰ The article discusses Anthony, who was a child who had an outburst, which resulted in his expulsion from

²⁴⁴ *W.B.*, 67 F.3d at 492.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 500.

²⁴⁷ *S.H.*, 729 F.3d at 250-51.

²⁴⁸ *Id.* at 256.

²⁴⁹ *Id.*

²⁵⁰ Yael, Cannon Et al., *Special Education in Urban Schools: Ideas for a changing landscape: Article: A solution Hiding in Plain Sight: Special Education and Better Outcomes for Students with Social, Emotional, and Behavioral Challenges*, 41 *FORDHAM URB. L.J.* 403, 405 (2013).

school and being admitted to a mental health institution.²⁵¹ Anthony ended up being diagnosed with PTSD, Bipolar Disorder and a learning disability, which was never addressed or even identified by his school.²⁵² The article points out that:

Students with social, emotional and behavioral challenges-- particularly low-income students and students of color--are over-represented in a host of adverse outcomes. For example, social, emotional and behavioral challenges in school are associated with lower academic achievement and reduced participation in positive post-school experiences such as employment, secondary education and independent living.²⁵³

The First part of the article discusses the poor outcomes for students that have these social, emotional and behavioral challenges.²⁵⁴ The most common negative effects of those disabilities are that the children tend to have “low achievement, suspensions and expulsions, school dropout, involvement in the juvenile justice system, and psychiatric hospitalization and residential treatment.”²⁵⁵

Child Find and the evaluation provisions normally cause children with these kinds of disabilities to go through school unrecognized as having a disability.²⁵⁶ This lack of recognition results in the student receiving no evaluations or reevaluations for special education services.²⁵⁷ Instead children are excluded from their classes, schools and receive punitive treatments in order to remove them from the community.²⁵⁸ Most children are only helped when there is a court-ordered evaluation through the delinquency system.²⁵⁹ If the child is fortunate enough for their parent to be proactive and request evaluations, the districts tend to take advantage of the parent’s

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.* at 407.

²⁵⁴ *Id.* at 412.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 437.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 438.

²⁵⁹ *Id.*

lack of knowledge of the law.²⁶⁰ This results in the district either ignoring the request or taking extended periods of time in order to discourage the parents.²⁶¹ Another problem is that evaluations of the child lack the required tools, which results in a misclassification.²⁶² Normally the evaluations only examine “(1) a child's cognitive capacities . . . (2) current academic functioning.”²⁶³ A correct evaluation should include:

a clinical psychological component, rather than solely cognitive and academic achievement testing. Clinical psychological assessments might include those that evaluate for ADHD, such as the Conners' Index Scale; tools that examine behaviors and emotions, such as the Behavior Assessment System for Children (BASC); projective tests to assess personality and underlying thoughts and experiences, such as the Rorschach inkblot test or the Thematic Apperception Test (TAT), which may reveal that a child has suffered a trauma, and/or interviews with the parent and child.²⁶⁴

The failure of schools doing these types of tests, results in the inability to identify and meet the child's needs.²⁶⁵ Another huge problem is that the evaluations tend to recommend services outside of the classroom.²⁶⁶

The schools pick a date and time for an IEP meeting and if the parent cannot attend, they will hold the meeting without them.²⁶⁷ This is contrary to the IDEA, which requires the parent to be in attendance. The IEP meeting pressurs the parent into accepting services that the school offers already, instead of services that are aimed to the child's specific needs.²⁶⁸ The failure of having outside experts speaking at the IEP is detrimental, since outside the school is where

²⁶⁰ *Id.* at 439.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.* at 440.

²⁶⁵ *Id.* at 442.

²⁶⁶ *Id.* at 446.

²⁶⁷ *Id.* at 452.

²⁶⁸ *Id.* at 456.

people will have a better understanding of the child's behavioral disability.²⁶⁹ The article discusses a case of Sarah who had PTSD and other issues because of her experience in a Chinese orphanage, which is something the school would never know if the outside therapist that she sees did not attend the IEP meeting.²⁷⁰

Schools also fail to provide key related services.²⁷¹ Some common services are psychological services, school social work services, extended school year services and transition services.²⁷² Schools “make the mistake of assuming that school-based psychological counseling is the primary, if not the only, related service need of students with social, emotional and behavioral difficulties.”²⁷³ Schools pull out students and have them individually meet with a professional, when the child needs and requires consistency.²⁷⁴ Schools should be giving the children with behavior problems behavior supports, and manifestation determination reviews.²⁷⁵ The districts suspend the child and involve the student resource officers without properly documenting these instances.²⁷⁶ Schools also tell parents “to bring their children back home until they have a note from a psychologist or psychiatrist saying that they are safe to return, transferring children to alternative school settings that provide fewer services and often offer fewer hours of instruction, and sending children to emergency rooms or inpatient mental health facilities.”²⁷⁷

²⁶⁹ *Id.* at 457.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 458.

²⁷² *Id.* at 459-61.

²⁷³ *Id.* at 463.

²⁷⁴ *Id.* at 464-65.

²⁷⁵ *Id.* at 475.

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 477.

The article gives suggestions on how to better implement the key IDEA provisions.²⁷⁸ The first suggestion is to “increase teacher training, awareness of disabilities and related social, emotional, and behavioral challenges, and the need for ongoing personal development.”²⁷⁹ The idea is if teachers are better educated, they will be able to “identify potential red flags that might suggest a child is in need of supports and services, including social, emotional, and behavioral red flags.”²⁸⁰ “Specifically, teachers need to be familiar with the following: how to identify children in need of services; how to timely refer children for an evaluation; the IEP process; the myriad of related services that exist; how to implement positive behavior supports and interventions; and the behavior-related provisions within the IDEA.”²⁸¹ The second recommendation is to ensure clarity and timeliness in the referral process.²⁸² Most teachers have admitted that they feel discouraged from referring students for evaluations.²⁸³ Teachers need to be empowered by school administration to refer children, and they need to have the referral process clearly articulated to them and the parents.²⁸⁴ Parents need an opportunity to sit down with school officials in order to further understand the process and what evaluations are being offered.²⁸⁵ The third suggestion was to secure comprehensive evaluations that include all the relevant parties.²⁸⁶ The fourth is collaboration with parents prior to an IEP meeting, since it is beneficial for parents to have informal conversations to be better prepared for these IEP meetings.²⁸⁷

²⁷⁸ *Id.* at 480.

²⁷⁹ *Id.* at 481.

²⁸⁰ *Id.* at 482.

²⁸¹ *Id.*

²⁸² *Id.* at 483.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 484.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 485.

The fifth and sixth suggestions are to guarantee that the necessary and relevant parties attend the IEP and that interpretation is available in order aid the parents with understanding and giving them a full picture of what their child needs.²⁸⁸ The seventh suggestions is a creative use of related services, which would include “educationally related mental health services, social skills classes, music therapy, therapeutic recreation services, behavior therapy, or sensory integration through occupational therapy.”²⁸⁹ The eighth is empowering parents through training and information in order to allow “(1) parents are fully aware of their rights, (2) parents fully understand the IEP process, including what information is important for schools to consider and how to read evaluations, (3) parents fully understand what services can be offered rather than the preset menu of services that is typically offered, and (4) parents are fully informed about the importance of various professionals with whom the school should be working, such as therapists, social workers, and doctors.”²⁹⁰ The ninth is to improve understanding and implementation of behavior-related provisions, including understanding the complex discipline procedures.²⁹¹ This list is not exhaustive, but would be able to fix some of the main issues that parents face when they try to get help for their children.

The Second article explores what urban schools can do to minimize their liability and minimize injuries to students with disabilities.²⁹² Schools generally have a legal duty to take reasonable steps to prevent students from foreseeable risks or injury and to assist students who become injured on the premises.²⁹³ A student’s disability and the manifestations of that disability

²⁸⁸ *Id.* at 486, 87.

²⁸⁹ *Id.* at 488.

²⁹⁰ *Id.* at 489.

²⁹¹ *Id.* at 490.

²⁹² Dagget, Lynn, *Special Education in Urban Schools: Ideas For A Changing Landscape: Article: Reasonable Supervision In The City: Enhancing The Safety Of Students With Disabilities In Urban (And Other) Schools*, 41 FORDHAM URB. L.J. 499, 503 (2013).

²⁹³ *Id.* at 507.

help identify the foreseeable risks.²⁹⁴ A disability could create student vulnerability to bullying or create inappropriate peer behaviors which most likely creates incidents with peers.²⁹⁵ The article points out that long term bullying ends up causing PTSD or significant mental trauma.²⁹⁶

There are risks of injuries during activities which are not adequately supervised by staff or are during unstructured times of the school day.²⁹⁷ “Risks arising from these types of activities include injuries on the playground, sexual assaults in bathrooms and showers, allowing inappropriate activity during unstructured time, injuries during lunch or other eating times, walking off campus to school activities, passing between classes, injuries at school before the start of the school day, and injuries at or after dismissal at the end of the school day.”²⁹⁸ The risks of injuries of children with disabilities are increased when supervised by substitute teachers, which lack knowledge to maintain student safety.²⁹⁹ The school’s misuse of seclusion and restraint techniques to manage student’s behavior produce student injuries.³⁰⁰ There are “hundreds of alleged cases of abuse and death due to the use of seclusion and restraint.”³⁰¹

A big issue with urban schools is that most students do not feel safe at a rate fifty percent higher than suburban and rural students.³⁰² Part of this is caused by urban schools having a large number of special education students.³⁰³ Urban school staffing issues cause higher safety risks for students with disabilities.³⁰⁴ Part of this is due to teacher shortages, since urban schools have a harder time hiring teachers, causing teachers to be hired without background checks or hiring

²⁹⁴ *Id.* at 510.

²⁹⁵ *Id.* at 511.

²⁹⁶ *Id.* at 512.

²⁹⁷ *Id.* at 517.

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 518.

³⁰⁰ *Id.* at 521.

³⁰¹ *Id.*

³⁰² *Id.* at 524.

³⁰³ *Id.* at 528.

³⁰⁴ *Id.* at 529.

less qualified staff.³⁰⁵ Another cause of this is the fact that urban schools report a higher teacher absence rate, which causes a greater use of substitute teachers who may be unaware of students' disabilities.³⁰⁶ Due to the size of the schools and the lack of proper teachers, there tends to be less staff supervision.³⁰⁷

Another issue is that urban schools place disabled students in separate special education classes at 41.3% of the time, which is more than the 23.4 percent in non-urban schools.³⁰⁸ Placing students in these separate classrooms “creates greater separations between special education and general education school staff, and between general education students and students with disabilities.”³⁰⁹ This causes general education teachers to have less experience in supervising disabled students.³¹⁰ General education students also do not have sensitivity about the disability, which increase the risks of bullying and harassment of students with disabilities, due to the fact they do not interact with those students.³¹¹

In order to not violate the ADA and section 504 of the rehabilitation act, schools must provide equal opportunities to disabled students to participate in school activities and cannot transfer the burden of safety on parents.³¹² Schools must also follow the LRE requirements of the IDEA, which causes schools to take affirmative steps aimed at safety.³¹³ “Schools should also consider the long term; students with disabilities will eventually leave the relative cocoon of the school environment for the larger world and need to have developed skills and strategies for living safely in the world. They are not well served by restrictive placements which may keep

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 530.

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 531.

³¹⁰ *Id.*

³¹¹ *Id.* at 532.

³¹² *Id.* at 534.

³¹³ *Id.* at 535.

them safe, but do not prepare them for adult life.”³¹⁴ “Schools concerned about making placements in conformance with LRE and nondiscrimination requirements that risk some injury have some cause for comfort. In the event of injury in general education, the decision to place a child with a disability in mainstream classes should be reviewed in the context of the IDEA'S LRE requirement and presumably in the larger context of the ban on disability discrimination.”³¹⁵

Another solution in increasing the safety of special education students, is to have disability training and access to disability resources for general education staff.³¹⁶ Currently, general education training provides no or little coursework on disability and an easy solution would be to train teachers.³¹⁷ This training, that is required by the IDEA is “a cost-efficient way to prevent student injuries from occurring, which means failure to train is likely a part of the legal duty of reasonable supervision.”³¹⁸ Teachers also need to be trained on bullying and on how to respond to student health crises, in order to be better prepared in preventing harm resulting from those situations.³¹⁹ School’s security guards need training in order to understand the “behaviors of students with disabilities and professionally evaluating when they do (not) present a security threat.”³²⁰ In addition to training security personnel, “Schools must identify and plan to minimize systemic safety risks for their students with disabilities. Schools must also recognize and plan for safety risks faced by individual students with disabilities.”³²¹

³¹⁴ *Id.*

³¹⁵ *Id.* at 536-37.

³¹⁶ *Id.* at 537.

³¹⁷ *Id.*

³¹⁸ *Id.* at 538.

³¹⁹ *Id.* at 539.

³²⁰ *Id.* at 540.

³²¹ *Id.* at 541.

Besides training staff members, another solution to the safety of disabled students, is to have some systemic safety planning.³²² One proposal is to conduct safety audits, in order to better identify the risks that students with disabilities face.³²³ A safety audit allows the schools to identify the foreseeable risks and allow them to minimize those risks.³²⁴ Some schools have areas that are dangerous for students with disabilities, and those areas need to be locked up in order to better prevent injury like assault.³²⁵ Schools also need to create individual safety plans for disabled students by looking at their IEP contents, and identifying their risks in certain school activities.³²⁶ The districts need to share safety and IEP information beyond what the IDEA requires, which would require all staff to be trained and informed on students' disability needs.³²⁷ Staff supervision needs to be drastically improved in order to better prevent harm.³²⁸ One solution is to have better background checks for staff, which include "criminal database searches for arrests and convictions, but also checks with current and past employers, Internet searches, and review of social media accounts to the extent legally permitted."³²⁹ To address the issue with substitute staff being ill prepared for disabled students, there needs to be supervision of those staff members.³³⁰ Substitute teachers need to have guidance on how to properly supervise disabled children which could include "having teachers and aides leave standing instructions about student supervision issues for their substitutes, as well as providing access to the IEP or an IEP summary to substitutes."³³¹ Districts also need to make "special education placement

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.* at 543.

³²⁶ *Id.* at 547.

³²⁷ *Id.* at 551.

³²⁸ *Id.* at 552.

³²⁹ *Id.* at 552-53.

³³⁰ *Id.* at 553.

³³¹ *Id.*

decisions in conformance with disability's laws requirements for placement in the LRE, schools need to take steps to ensure that inappropriate staff behaviors cannot and do not occur in self-contained classes.”³³² Some solutions to solving problems of abuse in self-contained classrooms, is to have the door opened, remove window coverings, or welcome parents to supervise the classroom.³³³

Overall, urban schools face different problems when it comes to the safety of their students, and some of the changes the article suggested, would allow the school to better follow the IDEA and section 504 of the rehabilitation act, while better protecting their disabled students. The article by Yael helped identify the issues of where school districts are negligent in properly identifying students as emotionally disturbed.³³⁴ Like the cases have pointed out, these children end up not graduating school, and become suspended or expelled.³³⁵ One main failure is that districts do not properly fulfill their child find obligations, causing these emotionally disturbed children to either be delayed in getting proper services, or to never receive these services.³³⁶ Most districts will do an IEP meeting without all the proper information.³³⁷ The districts also fail to give the proper related services, and only give psychological services, even though there are many other services those students need.³³⁸ The Yael article also provides solutions, which include increasing teacher awareness to the emotional disturbance disabilities.³³⁹ Other suggestions were to have better evaluations, inform parents before the IEP meeting, better use of

³³² *Id.* at 555-56.

³³³ *Id.* at 556.

³³⁴ Yael, Cannon Et al., *Special Education in Urban Schools: Ideas for a changing landscape: Article: A solution Hiding in Plain Sight: Special Education and Better Outcomes for Students with Social, Emotional, and Behavioral Challenges*, 41 *FORDHAM URB. L.J.* 403, 405 (2013).

³³⁵ *Id.* at 412.

³³⁶ *Id.* at 437.

³³⁷ *Id.* at 451.

³³⁸ *Id.* at 463.

³³⁹ *Id.* at 481.

related services, empower parents through training, and create better behavior related provisions.³⁴⁰ The Daggert article directly discussed the issues urban schools have when it comes to not properly protecting their students.³⁴¹ Here students with disabilities tend to be more vulnerable to injuries and bullying, and those risks are increased by not having proper supervision, and keeping students completely separated.³⁴² A few solutions offered are to have students more integrated, disability training, systemic safety training.³⁴³

Other Journal Articles on Emotional Disturbance

The article by Frank M. Gresham, explores some intervention solutions methods and procedures for “quantifying whether or not a student shows an adequate response to an evidence-based intervention implemented with integrity.”³⁴⁴ Students who experience severe emotional and behavioral challenges are unserved by education and also mental health systems in the United States.³⁴⁵ There is less than one percent across the nation of students who are served as emotional disturbed.³⁴⁶ Almost 22 percent of students have such severe mental health problems, that they would require treatment and educational supports.³⁴⁷ Unfortunately there is a huge disparity between the number of students who need services and the number of student who qualify under the IDEA.³⁴⁸ As seen with the prior cases, a big issue is that districts tend to believe they do not need to accountable for the mental health needs of students.³⁴⁹ Another issue

³⁴⁰ *Id.* at 490.

³⁴¹ Dagget, Lynn, *Special Education in Urban Schools: Ideas For A Changing Landscape: Article: Reasonable Supervision In The City: Enhancing The Safety Of Students With Disabilities In Urban (And Other) Schools*, 41 FORDHAM URB. L.J. 499, 503 (2013).

³⁴² *Id.* at 532.

³⁴³ *Id.* at 541.

³⁴⁴ Gresham, Frank, *Response to Intervention: An Alternative Means to Identifying Students as Emotionally Disturbed*, EDUCATION AND TREATMENT OF CHILDREN VOL. 28, NO. 4, 328, 328 (2005).

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *Id.* at 329 (internal citations omitted).

³⁴⁸ *Id.*

³⁴⁹ *Id.*

is that the ED definition is so limited that it leaves out socially maladjusted students, and that is based on a belief that students that have conduct issues are not actually disabled, and are simply solely responsible for their behavior.³⁵⁰ Another problem with the ED definition, is that the criteria tends to be very subjective.³⁵¹ A huge issue is that students who are socially maladjusted, cannot be Emotionally Disturbed, unless they are both socially maladjusted and emotionally disturbed.³⁵² A problem with this is that part of the ED criteria actually defines what social maladjustment is.³⁵³ A second issue with the Emotionally Disturbed classification, is the “adversely affects educational performance” criteria because educational performance has been narrowly defined.³⁵⁴ This narrow definition points only to academic performance, and not the social, affective and vocational aspects of students performance, which is what emotional disturbance tends to effect more.³⁵⁵

The article proposes a new approach in making eligibility determination and selecting interventions and is based on the response to intervention concept.³⁵⁶ This is based on the logic if “a student's behavioral excesses and/or deficits continue at unacceptable levels subsequent to an evidence-based intervention implemented with integrity, then the student can and should be eligible for ED services.”³⁵⁷ RTI is “an inadequate change in target behaviors as a function of intervention.”³⁵⁸ There needs to be a change between the baseline and the post-intervention levels of the students’ performance.³⁵⁹ The problem is that the definition of what adequate and

³⁵⁰ *Id.*

³⁵¹ *Id.* at 330.

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.* at 331.

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.*

inadequate response to intervention differs across school districts.³⁶⁰ Some factors that are related to the student's response to intervention are "(a) severity of behavior, (b) chronicity of behavior, (c) generalizability of behavior change, (d) treatment strength, (e) treatment integrity, and (f) treatment effectiveness."³⁶¹

The only way to make sure the RTI approach is effective, is to have "validated intervention protocols and procedures to change the behavior."³⁶² There are three different levels of school-based interventions "universal interventions, selected interventions, and target/intensive interventions."³⁶³ "Universal interventions are delivered to all students under the same conditions and are implemented at a district wide, school wide, or classroom wide levels. It is estimated that approximately 80-90 percent of any given school population will respond adequately to universal interventions."³⁶⁴ "Targeted/intensive interventions represent the most intense level of intervention and target students with the most severe and resistant behaviors. Many students served under the category of ED will require this level of intervention. Estimates suggest that these students constitute about 1-5 percent of a given school population, they account for 40-50 percent of behavioral disruptions in schools, and they drain 50-60 percent of school building and classroom resources."³⁶⁵

Overall children who should qualify for special education and related services under ED are not classified and do not receive the education they deserved under law.³⁶⁶ The solution would be to use a better definition, which is the RTI model.³⁶⁷ The RI model would alsoow

³⁶⁰ *Id.* at 332.

³⁶¹ *Id.*

³⁶² *Id.* at 340.

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ *Id.*

students to be considered for ED services if the student's behavior does not change adequately to intervention services.³⁶⁸ The problem with this approach is that intervention has to be implemented before the classification of ED.³⁶⁹

The next article by Renee Bradley also discussed the identification of children with ED, and the outcomes of students who receive those services.³⁷⁰ Students who suffer from emotional and behavioral disabilities (hereinafter "EBD") have only achieved small gains academically, socially and even in post graduate goals.³⁷¹ The article points out that if behavioral problems are identified early on, they can be treatable, but when they are untreated, they become intractable.³⁷² The article confirms that there is a huge failure in early identification of students with emotional and behavioral problems, and there are a large amount of students who never receive services for their emotional difficulties.³⁷³ When it comes to students who are properly identified as emotionally disturbed, they spend some time in regular education classrooms, but they spend less time in regular education than other special education eligible students.³⁷⁴ "Thirty percent of elementary school students with EBD and 32.9% of middle school students spend time in special education classes compared with 13.7% of elementary and 17.8% of middle school students with other disabilities."³⁷⁵ Surprisingly, about 82% of EBD students are educated in regular school buildings, while 18% are placed in residential buildings, separate public or private facilities, or

³⁶⁸ *Id.* at 341.

³⁶⁹ *Id.*

³⁷⁰ Bradley, Renee et al, *Building on the Data and Adding to the Discussion: The Experience and Outcomes of Students with Emotional Disturbance*, J BEHAV EDUC (2008) 17:4–23, 4,4 (2007).

³⁷¹ *Id.* at 5.

³⁷² *Id.* at 6.

³⁷³ *Id.*

³⁷⁴ *Id.* at 7.

³⁷⁵ *Id.*

home or hospitals.³⁷⁶ There are an increasing number of EBD students being placed in more exclusionary settings.³⁷⁷

Another issue is the qualifications of teachers and supports, since EBD students need academic and behavioral instruction by staff that have the skills and knowledge that allows them to deliver instructions effectively.³⁷⁸ There are not enough properly qualified teachers, and those who are tend to not stay long due to the additional stress.³⁷⁹ Unfortunately teachers who are in charge of educating EBD students report that they receive minimal preparation and they do not feel they are not properly giving services that are indicated on those students IEP's.³⁸⁰ There is also just a general lack of training, "[o]nly one-fourth to one-third of teachers of students with EBD received at least 8 h of in service training on working with students with disabilities. Even fewer teachers received training specifically related to meeting the needs of students with EBD: 17, 21.3 and 6% of elementary, middle and high school teachers, respectively."³⁸¹

After identifying the services that emotionally disturbed students are entitled to, the article identifies the specific supports that those children receive, and the outcomes of EBD students.³⁸² Data showed that students receive accommodations, but they do not receive academic support systems, and when they do receive supports, it tends to be whole class instruction, and they rarely receive outside classroom instruction.³⁸³ "Children who exhibit serious behavior problems early in elementary school and do not receive appropriate intervention are likely to continue on a trajectory toward being chronic offenders who require extensive

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ *Id.*

³⁷⁹ *Id.* at 8.

³⁸⁰ *Id.*

³⁸¹ *Id.* at 8-9.

³⁸² *Id.* at 9.

³⁸³ *Id.*

tertiary-level interventions over time.”³⁸⁴ Students who suffer from reading and behavior issues do not improve when just given reading services, but when they were implemented with behavior interventions, there was a significant improvement.³⁸⁵ In addition to increased academic performance, there was also an increased level of compliance to the teacher’s instructions when there is a joint behavioral and academic services.³⁸⁶ Shockingly, less than half of EBD students actually received mental health or behavioral services, but they receive more family and social work services than other disabled students.³⁸⁷ Instead of receiving specialized curriculum, schools provide EBD students with accommodations, which are extended time on tests and assignments, which does not show to be effective.³⁸⁸ 12.2% of EBD students’ parents reported that their kids received D’s and F’s compared to only 6.5% of parents of other disabled students.³⁸⁹ This discrepancy shows the needs for better training in improving their ability to interact with adults positively.³⁹⁰ Even though the IDEA protects against punishments without taking into account the manifestation of the disability, 36.4%, 42.3%, and 53.5% of EBD students were subjected to the same disciplinary procedures as regular education students, and the suspension and expulsion rate is almost three times more than any other students.³⁹¹

The post-school outcomes of EBD children also were not too promising, even though the IDEA has to prepare children for further education, employment and independent living.³⁹² Due to the failure of schools, EBD children do not have the time or resources the behavioral and

³⁸⁴ *Id.* at 10.

³⁸⁵ *Id.*

³⁸⁶ *Id.*

³⁸⁷ *Id.* at 10-11.

³⁸⁸ *Id.* at 11.

³⁸⁹ *Id.*

³⁹⁰ *Id.* at 12.

³⁹¹ *Id.*

³⁹² *Id.* at 13.

academic skills needed to succeed in adult life.³⁹³ EBD students drop out at more than twice the rate of students in general education.³⁹⁴ 40% of EBD students do not receive any type of high school diploma, and 97% were below the expected grade level in reading and math.³⁹⁵ For those that did receive a high school diploma, only 29% went to postsecondary education and of those who did postsecondary education, 65% pursued specific job training taught at trade schools.³⁹⁶ For those who did not obtain further education, only 50% of those students had jobs within three years of graduating, which is much less than the two thirds of employed, other disabled students.³⁹⁷ Unfortunately, most students constantly quit their jobs to find new jobs, which does not allow them enough time to understand their previous job or advance, which results in most of them being unable to become independent adults.³⁹⁸ Two-thirds of EBD youth have some contact with law-enforcement in their lifetime, which result in about 47.7% of those youth being imprisoned.³⁹⁹ The failure in proper services contributes to these high unemployment and incarceration rates.

The final part of the article identifies and provides some suggestions to help with the continued needs of EBD students. Utilizing response to intervention (hereinafter “RIT”), early intervening services (hereinafter “EIS”) and positive behavior supports (hereinafter “PBS”) would be beneficial the EBD students.⁴⁰⁰ RTI entails in the schools: “(a) determine the specific needs of the student, (b) develop an intervention to match the student’s needs, and (c) monitor

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ *Id.* at 14.

³⁹⁸ *Id.*

³⁹⁹ *Id.* at 14-15.

⁴⁰⁰ *Id.* at 15.

the student's progress."⁴⁰¹ EIS would allow schools to provide intervention services to students who may be at risk for academic or behavioral disabilities, which could lead to school-wide behavior models and universal screening for these academic difficulties.⁴⁰² PBS tends to positively impact academic performance, and those students can stay in public schools that offer those behavioral supports, instead of being shipped off to private out of district placements.⁴⁰³ Unfortunately "(a) a dearth of human resources to plan and implement supports for small groups and individual students; (b) a need for more conceptual and skills-based training of school personnel so that they can plan and implement specific programs and supports; and (c) a lack of administrative support for protected team planning time and the provision of relevant staff" prevent an effective PBS plan from happening.⁴⁰⁴

The big issue is that there is a bias associated with the EBD label, and as a result those students experience far less success in school.⁴⁰⁵ These issues are caused by the lack of training and support of teachers and staff and properly implemented programs.⁴⁰⁶ The Gresham article again points out similar failures that districts have when it comes to accommodating students under emotionally disabled categories.⁴⁰⁷ The article points out that there is a great amount of people who would be classified as emotional disturbed, but yet are not properly classified. This comes to about 22 percent who need services, with one percent who actually receive those services.⁴⁰⁸ Part of the reason for the huge discrepancy is the narrow emotionally disturbed

⁴⁰¹ *Id.* at 15-16.

⁴⁰² *Id.* at 16.

⁴⁰³ *Id.* at 17.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.* at 20.

⁴⁰⁶ *Id.*

⁴⁰⁷ Gresham, Frank, *Response to Intervention: An Alternative Means to Identifying Students as Emotionally Disturbed*, EDUCATION AND TREATMENT OF CHILDREN VOL. 28, NO. 4, 328, 328 (2005).

⁴⁰⁸ *Id.* at 329.

definition, and the criteria being extremely subjective.⁴⁰⁹ The narrow definition causes people who are socially maladjusted to not be accommodated. The fact that it tends to negatively affect education performance is also being narrowly defined, causing those students to not be classified.⁴¹⁰ A proposed solution is to give students services, and then classify them if those early intervention services do not prove successful.⁴¹¹ Here, the only way that early intervention service would be successful is if there are all around and inclusive interventions.⁴¹² These early interventions would allow about 90 percent of emotionally disturbed children to be successful.⁴¹³ The Bradley article explored the types of services and the impacts those services have on emotionally disturbed students.⁴¹⁴ Currently, those students who do receive services are not achieving many gains academically, socially or even in their post-schools careers.⁴¹⁵ Again the failure to early identify those students causes the services to be ineffective.⁴¹⁶ Another huge issue is that students are not properly identified or incorporated into the regular educational classroom.⁴¹⁷ The failure of improperly trained teachers causes those services to be ineffective, since emotionally disturbed children need to have an all-around and constantly incorporated educational experience.⁴¹⁸ The article pointed out the need to have both behavioral and academic supports to help those students improve and gain an educational benefit.⁴¹⁹ The failure to prepare those EBD children for life after school, and having proper accommodations and training would

⁴⁰⁹ *Id.* at 330.

⁴¹⁰ *Id.* at 331.

⁴¹¹ *Id.*

⁴¹² *Id.* at 340.

⁴¹³ *Id.*

⁴¹⁴ Bradley, Renee et al, *Building on the Data and Adding to the Discussion: The Experience and Outcomes of Students with Emotional Disturbance*, J BEHAV EDUC (2008) 17:4–23, 4,4 (2007).

⁴¹⁵ *Id.* at 5.

⁴¹⁶ *Id.* at 6.

⁴¹⁷ *Id.* at 7.

⁴¹⁸ *Id.* at 8.

⁴¹⁹ *Id.* at 10.

improve their success. Overall, the articles identify the issue that improper identification, training and services are causing the failure of EBD children. Proper training, early intervention services and both academic and behavioral services are the keys to success for EBD children.

D. Massachusetts' research and solutions to behavioral challenges

Massachusetts created a Behavioral Health and Public Schools Task Force to help guarantee that students that suffer from traumas are properly identified and accommodated. Massachusetts recognized what the prior journal articles had recognized, and that is that behavioral health challenged student's do poorly in school, and are suspended or expelled in record numbers. EBD students are either targets or aggressors of bullying.⁴²⁰ The task force recognized that students with behavioral challenges are misunderstood and are not provided with the supportive services and welcoming environment that those students need in order to be successful.⁴²¹ The ability to improve educational opportunities for those students are on three levels of care and instruction: promotion, prevention, and intervention. More specifically, these levels: 1) foster the emotional wellbeing of all students through school-wide approaches to support positive behavioral health, 2) provide supports to intervene early to minimize escalation of identified behavioral health symptoms through targeted collaborative supports, and 3) provide and participate in coordinated care for the small numbers of students demonstrating considerable needs."⁴²² The important thing that was recognized is that the activities have to take place throughout the whole school, classrooms, small groups, and individual's families.⁴²³

⁴²⁰ Massachusetts Behavioral Health and Public Schools Tasks Force, *Creating Safe, Healthy, and Supportive Learning Environments to Increase the Success of all Students*, 1,1 (2001).

⁴²¹ *Id.* at 1.

⁴²² *Id.*

⁴²³ *Id.*

The task force created different assessment tools in order to identify the school’s needs, and 17 schools piloted the assessment in 2009 and 22 participated in 2010.⁴²⁴ Schools identified the need for school leaders to generate professional development (hereinafter “PD”) plans to increase staff skills in promoting behavioral health, policies and protocols that support students with behavioral needs, district-wide action plan to define what a supportive school environment and intensive services would be, and finally a way to track the outcomes of the students.⁴²⁵ When it came to needs for PD, schools wanted crisis management training, state and district policy training, sensitivity training, aiding in students developing appropriate relationships with adults and peers and finally how to have productive relationships with school and families.⁴²⁶ Districts identified a need for the ability to identify strengths and gaps in behavioral health services, and after-school programming, community-based services and culturally sensitive resources.⁴²⁷ Here, the districts in Massachusetts identified that behavioral difficulties can only be properly accommodated if the entire district and community work together. There was also identified a need for strategies to develop programs to promote healthy and respectful behaviors, effective communication, effective partnerships.⁴²⁸

The task force wants to have a framework for behavioral health and public school framework implemented by 2017.⁴²⁹ “The Task Force acknowledges that using this Framework on a statewide basis represents a paradigm shift. This shift recognizes that positive whole school environments are necessary to improving the behavioral health of all students.”⁴³⁰ The main goal

⁴²⁴ *Id.* at 3.

⁴²⁵ *Id.*

⁴²⁶ *Id.* at 4.

⁴²⁷ *Id.*

⁴²⁸ *Id.*

⁴²⁹ *Id.* at 5.

⁴³⁰ *Id.*

of the program is to assist schools in creating these supportive problem-solving systems that allows all parts of the community to help students to succeed.⁴³¹

The Massachusetts Department of Elementary and Secondary Education also provided guidelines to implement social and emotional learning curricula.⁴³² The main goals of this Social and Emotional (hereinafter “SEL”) curriculum is to provide self-awareness, self-management, social awareness, relationship skills and responsible decision making.⁴³³ The SEL curriculum provides active forms of learning, which involves role playing and behavioral rehearsal, which allows students to not just learn these different skills, but to be able to practice those skills.⁴³⁴ Here the classroom teachers use scripted role plays in order to focus on specific skills, like responsible decision making.⁴³⁵ The great thing about this, is once the student masters the appropriate skills in the specific situations, the teachers than provide opportunities for that student to apply those skills throughout their school day.⁴³⁶ The SEL curriculum recognizes that skills need to be continuously taught and infused through the student’s school day and life. Here the recommended teaching skill practice is to utilize SAFE “Sequenced: Does the program apply a planned set of activities to develop skills sequentially in a step-by step fashion? Active: Does the program use active forms of learning such as role-plays and behavioral rehearsal with feedback? Focused: Does the program devote sufficient time exclusively to developing social and emotional skills? Explicit: Does the program target specific social and emotional skills?”⁴³⁷

⁴³¹ *Id.* at 13.

⁴³² Massachusetts Department of Elementary and Secondary Education, *Guidelines on Implementing Social and Emotional Learning (SEL) Curricula*, 1,2.

⁴³³ *Id.* at 2,3.

⁴³⁴ *Id.* at 3.

⁴³⁵ *Id.*

⁴³⁶ *Id.*

⁴³⁷ *Id.*

Massachusetts identified the different benefits of having these SEL programs. The biggest benefit, and something that schools lack, is the ability to create this safe-learning environment that allows all student to succeed.⁴³⁸ The skills allow students to calm themselves when they get angry, which allows them to make friends, and be able to resolve conflicts in an appropriate and respectful manner.⁴³⁹ This allows those students suffering from emotional behavioral issues to be able to contribute constructively in their community instead of being unable to independently support themselves, like previous articles have pointed out when programs like this are not in effect. Here effective SEL curriculum has showed “Improved academic achievement: Students involved in SEL programming experienced significantly greater academic achievement than students who do not receive SEL. Improved school attitudes and behaviors: SEL instilled greater motivation to learn, a deeper commitment to school, increased time devoted to schoolwork, better classroom behavior, and improved attendance and graduation rates. Fewer negative behaviors: Among students receiving SEL instruction, disruptive class behavior, noncompliance, aggression, delinquent acts, and disciplinary referrals decreased significantly. Reduced emotional distress: Reports of student depression, anxiety, stress, or social withdrawal significantly decreased among students receiving SEL instruction.”⁴⁴⁰ Here the key to the SEL success is to be started early in order to be effective in intervention, and to address clear and specified learning objectives for both grade and developmental level.⁴⁴¹

An important factor in guaranteeing that the SEL is effective is to make sure that there is School-wide implementation.⁴⁴² There needs to be administration that is able to delegate responsibility to people in order to oversee SEL efforts, and make sure those people move

⁴³⁸ *Id.*

⁴³⁹ *Id.*

⁴⁴⁰ *Id.* at 4.

⁴⁴¹ *Id.* at 5.

⁴⁴² *Id.*

forward and effectively communicate with those efforts.⁴⁴³ Like what was done in the surveys, there needs to be an individual inquiry by each school administration in order to identify the specific needs of each school, including what kind of PD, programs and instruction are needed.⁴⁴⁴ This is based on the belief that programs without proper coordination will end up with the programs becoming ineffective.⁴⁴⁵ There also needs to be a way to measure the progress of the programs in order to be able to improve the programs and identify where the program is succeeding and where it is failing.⁴⁴⁶ It also allows schools to “identify which social emotional learning skills are already present in other curricula, such as health and prevention education, and which may need to be added.”⁴⁴⁷ Having a specific rubric also causing teachers to be more accountable for teaching the SEL program, and gives a check and balance.⁴⁴⁸

An SEL program is not effective without properly trained staff, which has been documented as something that is normally lacking. This can be resolved by PD of administrators, teachers and other school staff.⁴⁴⁹ Here it is important for the administration and teachers to be properly trained on the SEL program, since they are the people that model and reinforce proper skills and behaviors.⁴⁵⁰ Quality teacher training allows teachers to be able to succeed and reinforce positive behavior in all situations.⁴⁵¹ “To the extent possible, districts and schools should create opportunities to create cross-system professional development that includes

⁴⁴³ *Id.* at 5-6.

⁴⁴⁴ *Id.* at 6.

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.* at 7.

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.*

administrators, classroom teachers, behavioral health specialists, support service professionals, and families.”⁴⁵²

The most important realization/requirement for the SEL program is the coordination and collaboration with the community and families of the students.⁴⁵³ The ability to have “a coordinated and shared approach with after-school programs, athletics, and other recreational and social activities in the community as well as health and human service agencies.”⁴⁵⁴ This allows an all-around and continuous implementation of SEL programs.⁴⁵⁵ “By orienting them to the skills and prompts, and helping them understand how best to coach their children, parents and family members can support the values and processes of the school initiative. Programs that attempt to involve families through regular activities and by using more than one approach engage parents in the process.”⁴⁵⁶ This allows the parents to be properly trained to enforce the schools teachings, and feel empowered to speak to the schools and feel that their concerns and suggestions will be heard.⁴⁵⁷ Finally, schools need to have proper policies and protocols that reflect the intent of the SEL program, and it allows the school to ensure that the discipline policies have a balance between accountability and a support of the SEL strategies.⁴⁵⁸

Massachusetts understood the problems that these other articles have pointed out and actually made a law and plans to address the EBD accommodation problem. Massachusetts identified the need to have an all-around incorporate accommodations and training.⁴⁵⁹ The need for a connected and trained community outside the schools is the real key to the success of

⁴⁵² *Id.* at 8.

⁴⁵³ *Id.*

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.* at 9.

⁴⁵⁸ *Id.*

⁴⁵⁹ Massachusetts Behavioral Health and Public Schools Tasks Force, *Creating Safe, Healthy, and Supportive Learning Environments to Increase the Success of all Students*, 1,1 (2001).

emotionally disturbed children.⁴⁶⁰ Massachusetts identified the need to research and point out the flaws of districts and propose solutions to those flaws. Most of the solutions were better training of teachers, and an overall community effort to accommodate emotionally disturbed children, instead of just the school having to take on the sole burden.⁴⁶¹ After the task force did their research in identifying where the districts failed, the department of education created social and emotional learning criteria in order to improve the success of all children.⁴⁶² The SEL curriculum provided tools for self-awareness, self-management, social awareness, relationship skills and responsible decision making.⁴⁶³ This curriculum incorporates all forms of learning, including role playing to understand proper reactions, and have all other members of the district enforce those skills throughout the school day.⁴⁶⁴ The huge benefit to a program like this is that there becomes a safe-learning environment, which enables all students to receive the tools that are needed to succeed.⁴⁶⁵ SEL instilled greater motivation to learn, a deeper commitment to school, increased time devoted to schoolwork, better classroom behavior, and improved attendance and graduation rates.⁴⁶⁶ Again the great thing about Massachusetts is they identified the flaws of districts, and the need of the entire community to be together in helping emotionally disturbed children. The solution to the emotional disturbance issue is to have an SEL program in place, and other states like New Jersey should follow in Massachusetts' footsteps.

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.* at 13.

⁴⁶² Massachusetts Department of Elementary and Secondary Education, *Guidelines on Implementing Social and Emotional Learning (SEL) Curricula*, 1,2.

⁴⁶³ *Id.* at 2,3.

⁴⁶⁴ *Id.* at 3.

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.* at 4.

Conclusion

The IDEA, at a very minimum requires all States that accept the federal funding to find and locate any and all students who are suspected of having a disability. Within 60 days, the districts must have an evaluation meeting to determine if the student has a disability that requires an IEP. That evaluation requires districts to conduct assessments in order to properly determine whether or not the child has a disability. PTSD children, when properly identified are classified under emotional disturbance. The common services to be provided would be social work and psychological services. The schools must hold an IEP meeting after the evaluation is completed, in order to determine all the educational and related services that are required for the student to gain an educational benefit. At a minimum, districts have to ensure that one race is not over classified. Districts also have to make sure they do not suspend students because of their disabilities.

The special education requirements in New Jersey are stricter than the IDEA requirements. After the initial request to determine whether a child is disabled, districts in New Jersey must hold an initial identification meeting within 20 days, instead of the 60 days the IDEA requires. At the evaluation meeting, the district must determine whether or not the child falls under the identified categories. Unlike the IDEA, where PTSD children would fall under emotional disturbance, in New Jersey, PTSD children could fall under other health impaired, emotional disturbance or social maladjustment. The parent in New Jersey has an option to request independent evaluations, if they do not agree with the districts findings. This option is not available under the IDEA. New Jersey districts must hold an IEP meeting within 30 days after the child is determined disabled. The IEP must also take into account a PTSD child's

possible behavioral problems. A student suffering from PTSD should at a minimum receive counseling and therapy services.

A 504 plan's broad definition of disability allows people who could not be classified under the IDEA or New Jersey's special education laws. The classification does require the child who would fall under mental or psychological impairment to provide documented proof of that impairment or documented proof of the misclassification. The problem with 504 is that the continued misclassification can allow the student to receive a 504 plan, even though they may not be disabled. The 504 plan services are not as beneficial or as specific to the student as an IEP plan would be. The 504 plan would only provide counseling services and some academic services. These services do not require objectives or to be tailored to the specific student, like an IEP would. The good thing about a 504 is that students are not pushed to be in more restrictive environments or careers. A 504 plan is better than receiving no services, but is not something that is ideal for a student suffering from PTSD.

Rowley established the standard for what type of education the schools must provide students.⁴⁶⁷ *Rowley* required schools to provide a basic floor of opportunity to students, which are educational services that result in educational benefits.⁴⁶⁸ The *Irvington* case established the medical exception rule, which requires districts to provide all related services necessary for the child to acquire an educational benefit, unless the only person who can provide the service is a physician.⁴⁶⁹ The *Doe* case established the rights of emotionally disturbed children and prevented school districts from indefinitely suspending those students or unilaterally changing their

⁴⁶⁷*Rowley*, 458 U.S at 210.

⁴⁶⁸*Id.*

⁴⁶⁹*Irving Independent School Dist.*, 468 U.S at 895.

educational services.⁴⁷⁰ The *Cedar Rapids* case extended what was established in the *Irvington* case and reiterated that the district must provide all related services that are required for the child to attend school and receive an education.⁴⁷¹ It rejected the idea of utilizing an undue burden test when determining whether a school had to provide services.⁴⁷² The only exemption is the medical exception.⁴⁷³ Overall, students have the right to have a free education which results in educational benefits, with related services that are needed to allow them to gain that benefit and they have the right to not be indefinitely suspended due to actions that result from their disabilities.

School districts are hesitant to properly classify students, and if they do, districts argue that they do not have to pay for necessary services, since the services are not related to the learning experience. The child in *B.G.* was classified as perceptually impaired because the documented instances were determined to solely resonate at home.⁴⁷⁴ The court recognized that B.G.'s emotional and neurological problems cannot be separated from the learning process.⁴⁷⁵ The court also determined that a residential placement, which is the one of the most restrictive environments, as the LRE for purposes of B.G.'s needs.⁴⁷⁶ The Court in *Shore Regional High School Board of Education* again dealt with a district that was classified as perceptually impaired with improper services that ended in the student attempting suicide.⁴⁷⁷ The court determined that the current district where the child was harassed and bullied was not appropriate, since the

⁴⁷⁰ *Doe*, 484 U.S. at 314-15.

⁴⁷¹ *Cedar Rapids Cmty. Sch. Dist.*, 526 U.S. at 79.

⁴⁷² *Id.*

⁴⁷³ *Id.*

⁴⁷⁴ *B.G.*, 702 F. Supp. at 1144.

⁴⁷⁵ *Id.* at 1145.

⁴⁷⁶ *Id.* at 1157.

⁴⁷⁷ *Shore Reg'l High Sch. Bd. of Educ.*, 381 F.3d at 196.

bullying would never be stopped.⁴⁷⁸ *L.T. and L.T. On Behalf Of K.T.*, is similar to *Shore Regional High School Board of Education*, since it deals with trauma directly related to the school.⁴⁷⁹ Again the district was hesitant to classifying the child whose psychological assessments showed PTSD directly related to the school environment as emotionally disturbed.⁴⁸⁰ Again the district tried to push the idea that the student's emotional issues have no impact on her education.⁴⁸¹ The court again determined that the child was eligible under emotionally disturbed.⁴⁸² This case again exemplifies the trend of school district denying students proper classification, even though it is clear the trauma is directly related to the school environment and is affecting the student's educational experience.

The *Munir* case shows that even when districts properly classify PTSD students as emotionally disturbed, they are legally able to give the minimum accommodations to the students. The child O.M. was constantly hospitalized due to suicidal threats and attempts.⁴⁸³ The student was progressing well in a residential placement, but the district only wanted to provide most of the services at the school district, refusing to pay for the residential placement.⁴⁸⁴ The court determined that the residential placement was not required to be paid by the district because the services were not focused primarily on education and was designed for psychological purposes.⁴⁸⁵ The problem with this case is that the court put a limitation on parents who put kids in residential treatment, allowing districts to not have to pay if there are only some

⁴⁷⁸ *Id.* at 197-98.

⁴⁷⁹ *L.T. and L.T. ex rel K.T.*, EDS 11709-11.

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.*

⁴⁸² *Id.*

⁴⁸³ *Munir.*, 723 F.3d at 427.

⁴⁸⁴ *Id.* at 428.

⁴⁸⁵ *Id.* at 429.

educational components to the placement.⁴⁸⁶ Districts have a huge loophole to not provide the proper services to emotionally disturbed children, and forces parents to financially take a risk if they place their child in a school that gives the resources the child desperately needs emotionally.

The *W.B.* case demonstrates that even though it may be easier to get a §504 plan, it is harder to prove that the district violated their obligations under the Rehabilitation Act of 1973.⁴⁸⁷ Under IDEA claims, parents do not have the burden to show any type of intent, but as made clear in *W.B.*, parents have to prove that a district knew or was reasonably expected to know.⁴⁸⁸ School districts constantly mistakenly only give §504 services to students who are also eligible under the IDEA, and courts make it near impossible for the parents to get the proper §504 services for their child.⁴⁸⁹ Another issue with §504 services, is that districts do not get punished for erroneously misclassifying students.⁴⁹⁰ Once again, the court puts an intent requirement on the parent in order to prove that the school intentionally discriminated against the minority child.⁴⁹¹ Part of the reason that §504 claims are hard to succeed is because §504 protections extend to people regarded as having a disability.⁴⁹² Being classified may be easier under §504 than the IDEA, but parents rarely succeed in §504 cases, allowing districts to get away with not providing proper services or misclassifying students. At least with the IDEA, parents have no intent requirement, and it allows them to put more responsibility on the districts.

⁴⁸⁶ *Id.* at 431.

⁴⁸⁷ *W.B.*, 67 F.3d at 492.

⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.* at 500.

⁴⁹⁰ *S.H.*, 729 F.3d at 250-51.

⁴⁹¹ *Id.* at 256.

⁴⁹² *Id.*

The Article by Yael helped identify the issues of where school districts are negligent in properly identifying students as emotionally disturbed.⁴⁹³ Like the cases have pointed out, these children end up not graduating school, and end up either being suspended or expelled.⁴⁹⁴ One main failure is that districts do not properly fulfill their child find obligations, causing these emotionally disturbed children to either be delayed in getting proper services, or to never receive these services.⁴⁹⁵ If the child does get identified, the IEP process proves to be flawed also, since most districts will do an IEP meeting without all the proper information.⁴⁹⁶ The districts also fail to give the proper related services, and only give psychological services, even though there are many other services those students need.⁴⁹⁷ The Yael article also provides solutions, which include increasing teacher awareness to the emotional disturbance disabilities.⁴⁹⁸ Other suggestions were to have better evaluations, inform parents better before the IEP meeting, better use of related services, empower parents through training, and create better behavior related provisions.⁴⁹⁹ The Daggert article directly discussed the issues urban schools have when it comes to not properly protecting their students.⁵⁰⁰ Here students with disabilities tend to be more vulnerable to injuries and bullying, and those risks are increased by not having proper supervision, and keeping students completely separated.⁵⁰¹ A few solutions offered are to have

⁴⁹³ Yael, Cannon Et al., *Special Education in Urban Schools: Ideas for a changing landscape: Article: A solution Hiding in Plain Sight: Special Education and Better Outcomes for Students with Social, Emotional, and Behavioral Challenges*, 41 FORDHAM URB. L.J. 403, 405 (2013).

⁴⁹⁴ *Id.* at 412.

⁴⁹⁵ *Id.* at 437.

⁴⁹⁶ *Id.* at 451.

⁴⁹⁷ *Id.* at 463.

⁴⁹⁸ *Id.* at 481.

⁴⁹⁹ *Id.* at 490.

⁵⁰⁰ Daggert, Lynn, *Special Education in Urban Schools: Ideas For A Changing Landscape: Article: Reasonable Supervision In The City: Enhancing The Safety Of Students With Disabilities In Urban (And Other) Schools*, 41 FORDHAM URB. L.J. 499, 503 (2013).

⁵⁰¹ *Id.* at 532.

students more integrated, disability training, systemic safety training.⁵⁰² The articles both point out similar things, is that the failure of proper training and the schools failing to properly follow the IDEA is causing kids suffering from traumas to not be adequately accommodating, causing them to not succeed in the school setting.

The Gresham article again points out similar failures that districts have when it comes to accommodating students under emotionally disabled.⁵⁰³ The article points out that there is a great amount of people who would be classified as emotionally disturbed, but yet they are not properly classified, which comes to about 22 percent who need services, and one percent who actually receive those services.⁵⁰⁴ Part of the reason for the huge discrepancy is the narrow emotionally disturbed definition, and the criteria being extremely subjective.⁵⁰⁵ The narrow definition causes people who are socially maladjusted to not be accommodated, and the fact that it having to negatively affect education performance also being narrowly defined causes those students to not be classified.⁵⁰⁶ A proposed solution is to give students services, and then classify them if those early intervention services do not prove successful.⁵⁰⁷ Here the only way that early intervention service would be successful, is if there are all around and inclusive interventions.⁵⁰⁸ These early interventions would allow about 90 percent of emotionally disturbed children to be successful.⁵⁰⁹ The Bradley article explored deeper into the types of services and the impacts those services

⁵⁰² *Id.* at 541.

⁵⁰³ Gresham, Frank, *Response to Intervention: An Alternative Means to Identifying Students as Emotionally Disturbed*, EDUCATION AND TREATMENT OF CHILDREN VOL. 28, NO. 4, 328, 328 (2005).

⁵⁰⁴ *Id.* at 329.

⁵⁰⁵ *Id.* at 330.

⁵⁰⁶ *Id.* at 331.

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.* at 340.

⁵⁰⁹ *Id.*

have on emotionally disturbed students.⁵¹⁰ Currently, those students who do receive services are not achieving many gains academically, socially or even in their post-schools careers.⁵¹¹ Again the failure to early identify those students causes the services to be ineffective.⁵¹² Again, a huge issue is that students are not properly identified or incorporated into the regular educational classroom.⁵¹³ The failure in properly trained teachers causes those services to be ineffective, since emotionally disturbed children need to have an all-around and constantly incorporated educational experience.⁵¹⁴ The article pointed out the need on having both behavioral and academic supports to help those students improve and gain an educational benefit.⁵¹⁵ Another issue is the failure to prepare those EBD children for life after school, and having proper accommodations and training would improve their success. Overall, the articles identify the issue that improper identification, training and services are causing the failure of EBD children. Proper training, early intervention services and both academic and behavioral services are the keys to success for EBD children.

Massachusetts understood the problems that these other articles have pointed out and actually made a law and plans to address the EBD accommodation problem. Massachusetts identified the need to have an all-around incorporate accommodations and training.⁵¹⁶ The need for a connected and trained community outside the schools is the real key to the success of emotionally disturbed children.⁵¹⁷ Massachusetts identified the need to research and point out the

⁵¹⁰ Bradley, Renee et al, *Building on the Data and Adding to the Discussion: The Experience and Outcomes of Students with Emotional Disturbance*, J BEHAV EDUC (2008) 17:4–23, 4,4 (2007).

⁵¹¹ *Id.* at 5.

⁵¹² *Id.* at 6.

⁵¹³ *Id.* at 7.

⁵¹⁴ *Id.* at 8.

⁵¹⁵ *Id.* at 10.

⁵¹⁶ Massachusetts Behavioral Health and Public Schools Tasks Force, *Creating Safe, Healthy, and Supportive Learning Environments to Increase the Success of all Students*, 1,1 (2001).

⁵¹⁷ *Id.*

flaws of districts, and proposed solutions to those flaws. Most of the solutions were better training of teachers, and an overall community effort to accommodate emotional disturbed children, instead of just the school having to take on the sole burden.⁵¹⁸ After the task force did their research in identifying where the districts failed, the department of education created social and emotional learning criteria in order to improve the success of all children.⁵¹⁹ The SEL curriculum provided tools for self-awareness, self-management, social awareness, relationship skills and responsible decision making.⁵²⁰ This curriculum incorporates all forms of learning, including role playing to understand proper reactions, and have all other members of the district enforce those skills throughout the school day.⁵²¹ The huge benefit to a program like this is that there becomes a safe-learning environment, which enables all students to receive the tools that are needed to succeed.⁵²² SEL instilled greater motivation to learn, a deeper commitment to school, increased time devoted to schoolwork, better classroom behavior, and improved attendance and graduation rates.⁵²³ The great thing about Massachusetts is they identified the flaws of districts, and the need of the entire community to be together in helping emotionally disturbed children. The solution to the emotional disturbance issue is to have an SEL program in place, and other state like New Jersey should follow in Massachusetts' footsteps.

⁵¹⁸ *Id.* at 13.

⁵¹⁹ Massachusetts Department of Elementary and Secondary Education, *Guidelines on Implementing Social and Emotional Learning (SEL) Curricula*, 1,2.

⁵²⁰ *Id.* at 2,3.

⁵²¹ *Id.* at 3.

⁵²² *Id.*

⁵²³ *Id.* at 4.