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THE SOCIAL MALADJUSTMENT EXCLUSION: LEAVING A CATEGORY OF STUDENTS BEHIND AND THE PROBLEM WITH STATE AND JUDICIAL INTERPRETATION OF CONGRESSIONAL INTENT

Carolyn Mason*

INTRODUCTION

Families, advocates, and school personnel interested in having a student identified as eligible for special education services under the category of (ED)\(^1\) may face particular challenges, especially if that student exhibits disruptive or oppositional behaviors, has a disruptive behavior disorder diagnosis like Conduct Disorder (CD)\(^2\) or Oppositional Defiant Disorder (ODD)\(^3\) under the Diagnostic and Statistical Manual of Mental Disorders (DSM-V).\(^4\) This is due in part to the explicit exclusion in the federal definition of ED\(^5\) regarding

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1 34 C.F.R. § 300.8(c)(4) (2006).

2 AM. PSYCHIATRIC ASS’N, THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS V 469-70 (5th ed. 2013) (Conduct Disorder is diagnosed by application of specific criteria that demonstrate a pattern of behavior in which social norms and/or the rights of others are violated).

3 Id. at 474-75. (Oppositional Defiant Disorder is diagnosed through the application of criteria relating to an angry and irritable mood, argumentative, defiant and vindictive behavior over a period of time.)


5 See 34 C.F.R. § 300.8(c)(4)
students who experience social maladjustment; a term commonly associated with disruptive behavior disorders and their related symptoms including conduct problems, disruptive and/or oppositional behavior, and substance abuse, unless the eligibility review team decides that the student also has ED. In some states, the circuitous nature of the federal definition renders the exclusion moot, while other states and some federal courts follow disruptive, oppositional behaviors to their academic outcomes to exclude students from special education services under the category of ED.

Since its incipien in 1975, controversy surrounding the social maladjustment exclusion has plagued its understanding. I posit that the exclusion never made less sense than it does today. With a growing understanding of human behavior, early intervention, and the effects of punitive disciplinary and academic approaches utilized with disruptive and oppositional students are ineffective for youth, schools, and society. A recent review demonstrated that judicial interpretation of the social maladjustment exclusion often operates as a bar to special education eligibility and services for children with disruptive or oppositional behaviors. This paper delves deeper into the controversy and explores jurisdictional and nationwide patterns in the judicial interpretation of the social maladjustment exclusion. This analysis further demonstrates how the evolving interpretation of social maladjustment is out of touch with the needs of vulnerable youth in our schools and society, and may be based, in large measure, on a small group of non-representative plaintiffs.

The Individuals with Disabilities Education Improvement Act of 2004 (IDEA), which contains the ED definition, is due to be reauthorized. Prior to reauthorization, Congress is obliged to revisit the ED eligibility controversy. Ideally, Congress will consider current research, practice, as well as our country's changing priorities regarding disruptive, oppositional, or otherwise socially maladjusted youth.

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6 34 C.F.R. § 300.8(c)(4)(ii) (2006) (provides that the category ED "does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.").
7 34 C.F.R. § 300.8(c)(4) (2006).
8 Id.
In order to demonstrate the necessity to reauthorize ED eligibility revision, this paper is divided into three parts. First, an overview of IDEA, which contains special education eligibility criteria for 13 categories of disability, including ED is discussed. ED is defined with a focus on the social maladjustment exclusion.

Second, the judicial application of the social maladjustment exclusion is examined, and a trend toward excluding children with disruptive, oppositional behaviors from ED consideration who do not also present a current, persuasive mental health diagnosis unrelated to ODD, CD, or their related symptoms, is noted. Additionally, the implementation framework and application of federal ED criteria in the states as well as Washington, DC, is addressed. Individual states are free to develop and apply their own ED definitions within certain parameters. As of January 2015, four states have implemented clarifying language to the social maladjustment exclusion that differs considerably from both the federal and other states' language. In addition, some states provide clarifying guidelines or technical assistance, rather than eligibility code, to assist local school districts in discerning between social maladjustment and emotional disturbance. I demonstrate how this diversity of application may result in inconsistent ED eligibility of students across the nation.

The final section of this paper examines the implications of the social maladjustment exclusion as applied, and addresses relevant counterarguments to an ED revision that removes the social maladjustment exclusion. Ultimately, I conclude that the exclusion as applied by several jurisdictions is unnecessary at best and unconstitutional at worst. In light of these considerations, I argue that


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Congress should abandon the social maladjustment exclusion to ED eligibility in the next reauthorization of IDEA.

I. FEDERAL ED DEFINITION

First enacted in 1975 as Public Law 94-142, the IDEA provides federal funds to help state educational agencies ("SEAs") and local educational agencies ("LEAs") provide special education and related services to students with disabilities identified by category under the law. The IDEA requires that each SEA develop a plan that assures the federal government that the SEA has policies and procedures to ensure that the state meets federal requirements in identifying special education students and in the provision of a free appropriate public education in the least restrictive environment.

The regulations to IDEA provide federal definitions of thirteen (13) disability categories that may qualify a student for special education and related services under the IDEA, including the ED category, which is perhaps the most controversial. In order for a student to receive special education under the category of ED, the federal regulations under IDEA require that the student exhibit one or more of five specifically identified characteristics that adversely affect that student’s learning performance "over a long time and to a marked degree." These characteristics are as follows:

A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

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14 An Act to amend the Education of the Handicapped Act to Provide Educational Assistance to All Handicapped Children, and For Other Purposes, PL 94-12, 94th Cong. (1975) (enacted).
15 See id. at § 612.
16 Individuals with Disabilities Education Improvement Act, 34 C.F.R. § 300 (2006).
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. ¹⁹

Immediately following these five characteristics, the federal regulation provides a clause in which students with schizophrenia are expressly included under the definition of ED and students with social maladjustment are expressly excluded, "unless it is determined that [they have] an emotional disturbance under paragraph (c)(4)(i) of this section." ²⁰

The definition is based on the work of Eli Bower ²¹ who identified the five characteristics of ED for the state of California in the 1950s. Notably, Bower did not include an exclusion for students experiencing social maladjustment in his definition. In fact, Bower identified ED as social maladjustment at school. ²²

A. Social Maladjustment

Social maladjustment first appeared in federal legislation to fund teacher training in 1957, which included students with social maladjustment as exceptional children. ²³ A 1963 funding bill separated the populations of ED and socially maladjusted children, and instead provided funding to serve "emotionally disturbed or socially maladjusted" ²⁴ students. The 1963 bill passed the Senate, but was referred to the House of Representatives Committee on Interstate and

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¹⁹ Id.
²⁰ Id. at § 300.8 (c)(4)(ii).
²³ Daniel H. Cline, A Legal Analysis of Policy Initiatives to Exclude Handicapped/Disruptive Students from Special Education, 15:3 BEHAV. DISORDERS, (SPECIAL ISSUE) 159 (1990) [hereinafter Cline, A Legal Analysis of Policy Initiatives].
Foreign Commerce rather than the Committee on Education and Labor. In the Committee hearings that followed, it was determined that students experiencing social maladjustment were not necessarily ED.  

Many involved in the hearings agreed with the notion that many socially maladjusted students were ED, but some were not.

In 1975, the social maladjustment exclusion was codified in PL 94-142 (also called the Education for All Handicapped Children’s Act; EHA) over concerns that including the socially maladjusted population would mandate special education services to court-supervised, adjudicated youth.

While the concept of social maladjustment has existed for fifty years in special education legislation, no specific identifying criteria has existed in the law. In 1975, when PL 94-142 was first passed, social maladjustment was described in the Diagnostic and Statistical Manual of Mental Disorders II (DSM-II) as a cultural conflict resulting from problems adjusting or adapting to another cultural standard or norm. DSM-II made no reference to delinquency status, CD, ODD, or any other category commonly associated with social maladjustment issues today; and, social maladjustment diagnosis is currently absent from the DSM-V.

A variety of opinions exist regarding Congress’s intent in creating the social maladjustment exclusion. Aside from Bower’s 1982 position and the DSM-II definition, scholar and researcher Herbert C. Quay, Ph.D. has framed social maladjustment as a form of

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25 See 34 C.F.R. § 300.8(c)(4) (2006).
26 See id.
27 Cline, supra note 23, at 168.
32 Bower, supra note 21.
socialized aggression brought about by the operation of environmental factors.\textsuperscript{34} Others have opined that social maladjustment should be identified through antisocial behavior broadly identified as CD.\textsuperscript{35}

II. APPLICATION

IDEA indicates that a child with social maladjustment is ineligible for services under the ED category “unless it is determined that [he or she] has an emotional disturbance under paragraph (c)(4)(i) of this section.”\textsuperscript{36} The fundamental issue litigated by the courts is whether to interpret social maladjustment—which has been defined as "a persistent pattern of violating societal norms . . . a perpetual struggle with authority, easily frustrated, impulsive, and manipulative"—as a bar to ED or as evidence of ED.\textsuperscript{37} Does the language requiring ED eligibility for the socially maladjusted child mean that socially maladjusted behavior is relevant to ED criteria or irrelevant? The courts have not provided a clear answer. Some courts have held that high levels of disruptive, oppositional behavior are indeed relevant to satisfy ED criteria.\textsuperscript{38} More recently, however, disruptive or oppositional behaviors are seen as either irrelevant to an ED analysis or as bar to ED eligibility, requiring courts to look instead for an independent source of emotional disturbance. I posit that the current social maladjustment analysis is fraught with subjectivity. Moreover, I assert that the application of this analysis to the vast majority of students who demonstrate educational need due to disruptive behavior and conduct problems is inappropriate.

\textsuperscript{34} HERBERT C. QUAY, PH.D., HANDBOOK OF JUVENILE DELINQUENCY 118-38 (1987).
\textsuperscript{36} 34 C.F.R. § 300.8 (c)(4)(i).
\textsuperscript{37} Doe v. Sequoia Union High Sch, 88 EHLR 559: 133, 135 (N.D. Cal. 1987).
\textsuperscript{38} See 34 C.F.R. § 300.8 (c)(4)(i).
A. Judicial Application

In the Tenth Circuit, student A.E. displayed "problems with peer interaction, impulse control, and excessive anxiety while in school," had a diagnosis of CD, but did not demonstrate difficulties of a significant magnitude to qualify under the federal definition of ED, despite a recent residential psychiatric stay. A.E.'s family appealed the decision to the Tenth Circuit. According to the court, the issue was "whether seriously emotionally disturbed children who are diagnosed as having a conduct disorder are properly excluded from the coverage of [IDEA]". The court indicated that social maladjustment, by itself, is "not conclusive evidence" that a child is not ED. In this way, the court considered evidence regarding A.E.'s emotional disturbance apart from her social maladjustment, ultimately accepting the school system expert's opinion that A.E.'s behavior was not serious enough to qualify him as ED eligible. While this decision was a loss for the parents, the court did consider the possibility of ED, despite the presence of social maladjustment.

As previously explained, federal ED eligibility criteria require that a student demonstrate at least one of five characteristics, over a long time and to a marked degree. The next two cases provide a focus on one of the criteria which requires "[i]nappropriate types of behavior or feelings under normal circumstances" and another criteria which requires "[a] general pervasive mood of unhappiness or depression." Two court of appeals decisions from 1998, one heard in

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40 See AM. PSYCHIATRIC ASS’N, supra note 7.
41 See 34 C.F.R. § 300.8 (c)(4)(i).
42 See 34 C.F.R. § 300.507 (2006) (Under the Individuals with Disabilities Act regulations, any party (parent or school district) who does not agree with an IEP team decision has the right to appeal that decision in an administrative hearing, referred to as a due process hearing); 34 C.F.R. 300.514-16 (2006) (Either party may appeal the administrative decision reached in this hearing to a state court of competent jurisdiction or to a United States district court); 34 C.F.R. § 300.514b (Some jurisdictions require a second tier administrative review prior to a federal or state court appeal.) District Court decisions may be appealed to appropriate circuit courts.
43 A.E. ex rel., 39 at 474.
44 Id. at 475.
45 Id.
46 See 34 C.F.R. § 300.8(c)(4) (2006).
47 Id. at 300.8 (c)(4)(i)(C)-(D).
the Fourth Circuit and one in the Second Circuit, apply these criteria with a contrasting focus on the social maladjustment exclusion.

The Fourth Circuit case of *Springer v. Fairfax County School* considered the ED eligibility of a high school student with a diagnosis of depression and a history of cutting class, absenteeism and fighting. The student’s parents enrolled the student in a private school, and were seeking reimbursement under the IDEA. The court indicated that “[t]he regulations contemplate that a student may be socially maladjusted and suffer an independent serious emotional disturbance that would qualify him for special education services under IDEA,” but that evidence of social maladjustment cannot be used as evidence of ED. This reading of the law is problematic, in effect indicating that the characteristics of ED, apart from separate conduct problems identified by the *Sequoia* court (1987), must independently affect school performance to a marked degree and over a long period of time. In *Springer*, a diagnosis of a minor depressive disorder, although independent of social maladjustment, was not deemed to be pervasive. What type of independent disorder is serious enough to qualify a student for ED eligibility? When is depression pervasive?

In *Muller ex rel. Muller v. Committee on Special Education*, the Second Circuit indicated that a high school girl’s diagnosis of clinical depression was unnecessary to indicate a “pervasive mood of unhappiness or depression” as required by federal and state regulation. The student, named Treena, was diagnosed with ODD, post-traumatic stress disorder (“PTSD”), and demonstrated a history of a depressed mood and learning problems. The special education team determined that Treena was not eligible for special education under ED, and the administrative hearing officer asserted that there was an

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48 *Id.* 300.8 (c)(4)(ii).
50 *Id.* at 661.
51 See 20 U.S.C. § 1412(a)(10)(C)(2) (2006) (According to the IDEA, parents may be awarded private school tuition reimbursement if the court finds that a free appropriate public education was not made available to the IDEA eligible student.)
52 *Springer*, 134 F.3d at 665.
53 *A.E. ex rel.*, supra note 39, at 475.
54 See 34 C.F.R. § 300.8(c)(4) (2006).
55 *Springer*, 134 F.3d , at 666.
56 *Muller ex rel. Muller v. Comm. on Special Educ.*, 145 F.3d 95 (2nd Cir. 1998).
57 *Id.* at 104.
insufficient nexus between her conduct problems and her educational performance. 58 Both the District Court and Circuit Court disagreed. According to the Circuit Court, her previous suicide attempt, as well as evidence of mental health treatment for depression, were sufficient to demonstrate a pervasive mood of unhappiness. 59 Additionally, the court expressly included the student's oppositional, disruptive behavior along with her depressive behavior in determining that she also demonstrated "inappropriate behaviors under normal circumstances." 60 The court in Muller found Treena to be ED-eligible under New York's and the federal ED criteria.

These decisions demonstrate the uncertain application of the social maladjustment exclusion and the lack of consistency among circuits. Following Muller, 61 the approach of New York courts has been to consider student misbehavior as a whole, affording little or no weight to social maladjustment as a disqualifier to eligibility. 62 The District Court in New Paltz Central School District v. St. Pierre ex rel. M.S. considered a student's defiance and disobedience in determining ED eligibility. 63 The court distinguished M.S., a high school student with a history of drug abuse and depression, from Springer 64 by highlighting the fact that the student in Springer did not demonstrate pervasive unhappiness and did not have difficulty maintaining relationships, while M.S. clearly did. 65 The court noted that at one point, M.S. was so distraught that he cut his wrists. 66 While M.S. had abused drugs, the court treated this behavior as another symptom of the underlying emotional disturbance, rather than as a disqualifying factor. 67 The court followed the precedent set by Muller, 68 and gave deference to the lower court, which found M.S. was ED eligible. Like the court in Muller, the New Paltz court recognized that M.S. demonstrated the characteristics of ED even as he exhibited rule

58 Id. at 100.
59 See 34 C.F.R. § 300.8(c)(4)(i)(D).
60 Muller, 145 F.3d 95, 105.
61 Id.
63 New Paltz, 307 F. Supp. 2d at 394.
64 See 300.8(c)(4)(ii).
65 New Paltz, 307 F. Supp. 2d at 398.
66 Id. at 399.
67 Id.
68 See Muller, 145 F.3d 95 (2nd Cir. 1998).
breaking behavior.\textsuperscript{69} This application of the ED eligibility requirement and the resulting analysis of behavior stands in contrast to the court’s treatment of the student in \textit{Springer}, whose rule-breaking behavior was discounted, and acted as a bar to eligibility.\textsuperscript{70}

Similarly, in 2009, a New York District Court in \textit{Eschenasy v. New York City Department of Education}\textsuperscript{71} recognized that a student named Ann displayed characteristics of ED, as evidenced by hair pulling, cutting herself, and attempting suicide.\textsuperscript{72} The court indicated these behaviors demonstrated inappropriate behavior under normal circumstances and a pervasive mood of unhappiness and social maladjustment.\textsuperscript{73} Ann also demonstrated behaviors consistent with social maladjustment, including stealing, drug use, and running away.\textsuperscript{74} Rather than viewing these behaviors as bars to eligibility, it held that it was “more likely than not, that all of Ann’s problems, and not just her misconduct . . . [were the reason for] her erratic grades, expulsions and need for tutoring . . . [a]lthough Ann exhibits conduct disorder, she also meets the criteria for emotional disturbance.”\textsuperscript{75} The court indicated that the Ann was similar to the student in \textit{Muller}, in that she was markedly unhappy to the point of being suicidal, and not in control of herself;\textsuperscript{76} and distinguishable from \textit{Springer}, who was in control of himself, according to expert testimony, and therefore did not exhibit an emotional disturbance.\textsuperscript{77} From this analysis, future courts in the Second Circuit seemed poised to examine the nature of a student’s depression and/or anxiety in the greater context of behavior, including behavior associated with social maladjustment. Where the student at the center of \textit{Springer} was arguably less debilitated by his depression,\textsuperscript{78} the students in \textit{Muller} and \textit{Eschenasy} exhibited significant emotional issues that clouded their ability to function.\textsuperscript{79}

\textsuperscript{69} \textit{New Paltz}, 307 F. Supp. 2d at 399.
\textsuperscript{70} See 300.8(c)(4)(ii).
\textsuperscript{71} \textit{Eschenasy}, 604 F. Supp. 2d at 650.
\textsuperscript{72} \textit{Id.} at 643-44.
\textsuperscript{73} See 300.8 (c)(4)(i)(C) and (D).
\textsuperscript{74} \textit{Eschenasy, supra} note 83, at 643.
\textsuperscript{75} \textit{Id.} at 650.
\textsuperscript{76} \textit{Id.} at 648.
\textsuperscript{77} \textit{Id.} at 647-48.
\textsuperscript{78} \textit{Id.} at 647-48.
\textsuperscript{79} See \textit{Eschenasy}, 604 F. Supp. 2d at 647-48; \textit{Muller}, 145 F.3d 95, 104 (2nd Cir. 1998).
Moreover, the student in New Paltz likewise "suffered emotionally" and had trouble getting out of bed for a period.\textsuperscript{80}

In 2011, a New York district court again had the opportunity to visit the social maladjustment controversy,\textsuperscript{81} but this time, the court charted a new course with regard to behaviors associated with social maladjustment. The case of \textit{W.G. and M.G. on behalf of K.G. v. New York City Dept. of Education}\textsuperscript{82} centered around the needs of K.G., whose parents him in a residential private school, were seeking eligibility under ED\textsuperscript{83} and private school tuition reimbursement under IDEA.\textsuperscript{84} According to K.G.'s school psychologist, the student had a history of being depressed, withdrawn, and prior to private school placement, had posed a risk of danger to himself and others.\textsuperscript{85} The student also had a diagnosis of ODD,\textsuperscript{86} and demonstrated disobedient and hostile behavior.\textsuperscript{87} The court indicated that the IDEA required socially maladjusted behaviors be separated from behaviors properly considered under an ED analysis.\textsuperscript{88} In interpreting the federal ED definition, the district court reversed the administrative hearing officer (but upheld the second tier administrative review),\textsuperscript{89} stating that "statutes should be interpreted in a way that gives effect to every clause and word of the statute."\textsuperscript{90} Following this direction, the court removed narcissistic, negativistic, and oppositional behaviors from the ED criteria analysis as well as its resulting school effects, such as truancy, drugs or alcohol use, and academic regression.\textsuperscript{91} K.G.'s history of depression was not considered, since another psychologist who evaluated him in his private placement indicated that he was in remission.\textsuperscript{92} The court's determination that social maladjustment could not warrant ED identification made student K.G. ineligible for

\begin{thebibliography}{99}
\bibitem{80} \textit{New Paltz}, 307 F. Supp. 2d at 399.
\bibitem{81} \textit{W.G. v. N.Y. City Dep't of Educ.}, 801 F. Supp. 2d 142, 169 (S.D.N.Y. 2011).
\bibitem{82} Id.
\bibitem{83} See supra note 2.
\bibitem{84} See supra note 61.
\bibitem{85} Id. at 71.
\bibitem{86} See supra note 8 and accompanying text.
\bibitem{87} See \textit{W.G.}, 801 F. Supp. 2d, at 170–171.
\bibitem{88} See supra note 2.
\bibitem{89} See supra note 52 and accompanying text.
\bibitem{90} \textit{W.G.}, 801 F. Supp. 2d at 169 (citing Negonsott v. Samuels, 507 U.S. 99 (1993)).
\bibitem{91} Id. at 174.
\bibitem{92} Id. at 171.
\end{thebibliography}
special education. This decision, at odds with earlier opinions from the same state, highlights the subjectivity required of judicial officials in analyzing student behavior in the face of federal ambiguity. While a court may consider behavior related to social maladjustment in considering the eligibility of the child, some courts, adopting a more narrow interpretation of ED eligibility may not. This lack of consistency is troubling.

Overall, students with separate, current, convincing diagnoses have fared better in judicial analyses following the Springer decision. The presentation of multiple diagnoses is not uncommon among children: many organizations, including the National Association of School Psychologists, take the position that ED can co-occur with disturbances of conduct or adjustment. A review of case law on this point follows.

In Johnson v. Metro Davidson Cty. Sch. Sys., a student’s diagnosis of ODD provided an obstacle to identification, and was part of the reason she was found ineligible for special education by her ED eligibility team at the school level, on appeal at an administrative hearing. The federal district court in Tennessee reversed, holding that this child with ODD still qualified for services under ED because she also presented a “persuasive” diagnosis of bipolar disorder. It is important to note during the litigation of Johnson and as of December 2016, Tennessee’s definition differs from the federal ED definition.

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93 Id. at 170–175.
95 See supra note 2.
100 Id. at 918.
101 See supra notes 1, 23, 24, & 29 and accompanying text.
According to Tennessee, socially maladjusted behavior includes “oppositional-defiant behaviors.”

Because the district court was able to trace the student’s inappropriate behavior under normal circumstances (impulsive behavior and poor judgment) back to the child’s bipolar disorder, however, the court had no need to examine social maladjustment separately.

In 2011, a divided Eighth Circuit Court of Appeals in *Hansen v. Republic R-III Sch. Dist.* held that a child with oppositional behaviors and a diagnosis of bipolar disorder was eligible for special education under the ED category based on Missouri and federal law. The family had not prevailed at the administrative level, but that decision was reversed in the appeal to the district court. The Eight Circuit affirmed the district court’s eligibility holding, finding that the child had an inability to maintain peer and adult relationships, a long history of school failure and a mental health diagnosis, which were facts distinguishable from the circumstances in *Springer.* Judge Greunder’s concurrence objected to the identification of a student as ED given his apparent willful and conscious misbehavior, which were indicative of social maladjustment (Justice Greunder concurred in the identification under a separate IDEA category).

Prior to *Hansen,* courts had issued opinions similar to Justice Greunder’s reasoning that a child who is perceived to be willful or in control of his behavior is socially maladjusted. However, *Indep. Sch. Dist. v. A.C. ex rel.*
C.C., a 2001 Eighth Circuit opinion held that the distinction between willing and unwilling behavior is not relevant for some children, specifically children diagnosed with co-occurring conduct disorder and neurological impairment. In reaching this conclusion, the court indicated that “abnormal emotional conditions prevent [some children] from choosing normal responses to normal situations.” This further emphasizes the importance of competent diagnosis in ED eligibility, since disruptive behavior, coupled with distant, mild, or otherwise not convincing diagnoses of depression or anxiety, may be insufficient to defeat an argument of ED ineligibility due to social maladjustment.

While national case law is not clear on the application of the social maladjustment exclusion, there is evidence, outlined above, that children with disruptive and oppositional behaviors, but without persuasive diagnoses of a co-occurring mental health disorder, may be barred from special education eligibility by operation of the social maladjustment exclusion. The problem with this analysis, is the favoring of youth with access to competent mental health treatment. Low-income children, in particular, are not likely to have access to mental health providers in the community that can provide competent diagnosis. Part III explores the implications of such analysis on the vast majority of socially maladjusted youth.

113 See Springer, 134 F.3d 659 (child diagnosed with mild depression not eligible under ED) and Muller, 145 F.3d 95 (child not formally diagnosed with depression did not qualify for services at the special education team meeting).
114 See supra note 1.
B. State Interpretation of ED Eligibility

In most federal cases adjudicating the effect of social maladjustment identified here, the state law was identical or nearly identical to the federal regulation.\(^{119}\) Even when the law is substantially the same from jurisdiction to jurisdiction, and indeed, within the same jurisdiction, disturbing inconsistencies in the application of ED eligibility are evident.\(^{120}\) The inconsistency in judicial interpretation is only a piece of the muddled ED eligibility story. Another significant issue causing inconsistency and confusion in the application of ED eligibility arises from ED eligibility definitions in four states that expound on the federal meaning of social maladjustment. The Tennessee ED definition provides that, "[s]ocial maladjustment includes, but is not limited to, substance abuse related behaviors, gang-related behaviors, oppositional defiant behaviors, and/or conduct behavior problems."\(^{121}\) The court in *Johnson v. Metro Davidson Cty. Sch. Sys.*\(^{122}\) overturned a school and an administrative court decision relying on the Tennessee definition to exclude a child with oppositional defiant behavior from special education.\(^{123}\) On appeal at the federal district court the student successfully obtained a favorable verdict because of her co-occurring, diagnosis of bi-polar disorder. Had this student not appealed, she would have been ineligible for special education, due to her oppositional behavior.\(^{124}\) The question to address is, do clauses such as Tennessee’s provide additional eligibility hurdles that the federal definition does not demand?

A recent study confirmed the inconsistencies in ED eligibility criteria in 50 states and the District of Columbia.\(^{125}\) According to the authors, state ED eligibility definitions run the gamut from Wisconsin,


\(^{121}\) See *TENN. COMP. R. & REGS.* 0520-01-09-.02 (2016).

\(^{122}\) See *supra* note 97.

\(^{123}\) See *supra* note 97 at 909.


\(^{125}\) See *CLOTH ET AL.*, *SOCIAL MALADJUSTMENT AND SPECIAL EDUCATION*, *supra* note 41.
whose definition for ED indicates that an IEP team may not "identify or refuse to identify a child with ED solely on the basis of another disability" or the presence of social maladjustment\textsuperscript{126} to Vermont, which provides a definition of social maladjustment similar to \textit{Sequoia},\textsuperscript{127} and includes a list of criteria that should be considered when determining whether social maladjustment is unaccompanied by an emotional disturbance.\textsuperscript{128} A child who qualifies for services in Wisconsin (or in the other four states that have abandoned the social maladjustment exclusion)\textsuperscript{129,130} could be excluded from special education in a state like Vermont, which has adopted a broad interpretation of social maladjustment.

In providing an ambiguous exclusion to federal ED eligibility, did Congress mean to provide states discretion in defining exclusion to federal IDEA identification?\textsuperscript{131} The final portion of this paper

\textsuperscript{126} \textit{Id.} at 22: See also \textsc{Lynn Boreson, Educational Evaluation of Emotional Behavioral Disability (EBD)} (2d. ed. 2014), https://dpi.wi.gov/sites/default/files/imce/sped/pdf/ebdguide.pdf.

\textsuperscript{127} See supra note 37.

\textsuperscript{128} \textsc{Vt. Code R. § 2362.1(c)(2) (2013)},"A student who is socially maladjusted shall not be considered to be emotionally disturbed unless, he or she also meets the definition of emotional disturbance as set forth in subdivision (1). A social maladjustment is a persistent pattern of violating societal norms, such as multiple acts of truancy, or substance or sex abuse, and is marked by struggle with authority, low frustration threshold, impulsivity, or manipulative behaviors. A social maladjustment unaccompanied by an emotional disturbance is often indicated by some or all of the following: (i) Unhappiness or depression that is not pervasive; (ii) Problem behaviors that are goal-directed, self-serving and manipulative; (iii) Actions that are based on perceived self-interest even though others may consider the behavior to be self-defeating; (iv) General social conventions and behavioral standards are understood, but are not accepted; (v) Negative counter-cultural standards or peers are accepted and followed; (vi) Problem behaviors have escalated during pre-adolescence or adolescence; (vii) Inappropriate behaviors are displayed in selected settings or situations (e.g., only at home, in school or in selected classes), while other behavior is appropriately controlled; and/or (viii) Problem behaviors are frequently the result of encouragement by a peer group, are intentional, and the student understands the consequences of such behaviors."

\textsuperscript{129} SEAs without social maladjustment exclusion; \textsc{Cal Code Regs.}, tit. 5 § 3030 (2014); \textit{511 Ind. Admin. Code 7-41-7 (2014)}; \textit{Iowa Admin. Code r.41.50(2) (2013)}; \textsc{Minn. R. 3525.1329 (2013)}; \textsc{Wis. Admin Code (PI), § 11.36 (2016)}.

\textsuperscript{130} \textsc{Cloth et al., Social Maladjustment and Special Education, supra note 41 (stating that Colorado did not have social maladjustment exclusion in state code, but ED eligibility in Colorado has been revised since publication); see \textsc{Colo. Code Regs. 301-8 (2013)}}.

\textsuperscript{131} See supra note 1 (indicating that Colorado "[r]equirements and procedures for determining disability and eligibility shall be consistent with 34 CFR § 300" (p.44)).
examines these questions, the resulting implications, and provides a better solution.

CONCLUSION

The previous analysis demonstrates uncertainty and ambiguity surrounding the social maladjustment exclusion and its inconsistent application in federal courts and under state rules. In supplying undefined term, in science or law, that open to state revision, Congress should have contemplated judicial interpretation of the exclusion. Leaving the courts to determine the parameters of the exclusion is problematic because youth with disruptive behaviors and conduct problems are disproportionally low income. Low-income families are unlikely to have the resources to pursue administrative remedies or file an appeal to federal court. Thus, cases that have risen to the federal courts and set jurisdictional precedent are brought by plaintiffs who are not representative of the class of students commonly implicated by the exclusion. Cases interpreting social maladjustment are predominantly related to tuition reimbursement.

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136 Id.
In tuition reimbursement cases, a parent or guardian generally has access to resources adequate to purchase private school tuition in advance of litigation.

The fact that the vast majority of parents or guardians involved in these controversies request tuition reimbursement as the proposed remedy adds another significant challenge to judicial interpretation of the social maladjustment exclusion. Many children with behavior problems in school are low income, and do not have the "adequate means" to provide the initial outlay that unilateral private placement would require. Is it reasonable to leave the interpretation of social maladjustment to the courts, when the courts are made to rely on non-representative plaintiffs seeking expensive remedies? A smaller number of cases adjudicated by federal courts request ED identification and services in the traditional school placement, but most of these cases have relied on earlier tuition reimbursement precedent.

In both categories of cases, the courts have found for defendant school districts at a rate of more than two to one. At best, it is foreseeable that reliance on a judicial interpretation of the social maladjustment exclusion could prejudice low income students who

137 See 34 C.F.R. § 300.148(c) (2010). "Reimbursement for private school placement. If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs."

138 See Burlington Sch. Comm. v. Dep't of Educ., 47 U.S. 359, 370 (1985) (Justice Rehnquist, delivering the opinion of the Court, identifies tuition reimbursement as a course chosen by confident parents with adequate means.)

139 See supra note 133 at 5.

140 See supra note 138 at 370.

require school based services to be successful, but who have reduced access to mental services and legal advocacy.\textsuperscript{142}

Courts have favored plaintiff-students with specific co-occurring mental health disorders, diagnosed by community mental health professionals\textsuperscript{143} and discounted ED in plaintiffs with less current,\textsuperscript{144} less persuasive,\textsuperscript{145} or undiagnosed disorders.\textsuperscript{146} In 2002, only 14 percent of school-aged youth with emotional behavior disorders and without insurance had access to mental health services, compared with 39 percent of all youth.\textsuperscript{147} This statistic has not been relevant to the judicial interpretation of the social maladjustment exclusion, and illustrates the importance of a legislative remedy to the controversy surrounding social maladjustment. The statistic also represents the critical need for special education services in the schools, since low income students with disruptive behaviors are unlikely to access critical behavior intervention in the community.\textsuperscript{148}

There is evidence from social science research that early intervention in ODD cases at school can help prevent the disorder from evolving into CD and increase the social and academic outcomes for youth.\textsuperscript{149} Intervention provided to disruptive, low-income students at school enhance student involvement and are more effective than community based intervention.\textsuperscript{150} Unfortunately, research indicates that significant disruptive behavior persists in the absence of

\textsuperscript{142}See supra note 118.
\textsuperscript{144}W.G. v. N.Y.C. Dep’t of Educ., 801 F. Supp. 2d 142 (S.D.N.Y. 2011).
\textsuperscript{148}See supra note 133.
\textsuperscript{149}Jo Winther et al., \textit{A Pilot Study of a School-Based Prevention and Early Intervention Program to Reduce Oppositional Defiant Disorder/Conduct Disorder}, \textit{8 Early Intervention Psychiatry} 2, 181-189. (2014).
\textsuperscript{150}Marc S. Atkins et al., \textit{School-Based Mental Health Services for Children Living in High Poverty Urban Communities}, 33 Admin. & Pol’y in Mental Health & Mental Health Serv. Res, 146, 146-159. (2006).
Implementing effective special education interventions to stop the progression of oppositional behaviors in public schools can serve students, families, schools and society. Preventing access to these services, to support the school-to-prison pipeline to expensive juvenile justice programs defeats the purpose of public education generally and the IDEA specifically.\textsuperscript{152}

As previously indicated, the judicial application of the social maladjustment exclusion is not the only significant issue affecting its utility. States authority to develop language to clarify social maladjustment operates as an obstacle to intervention, and potentially as a bar in others. David Cline first indicated that an overly conservative application of the social maladjustment exclusion might cause a state to run afoul of the U.S. Constitution.\textsuperscript{153} The Supremacy Clause of the U.S. Constitution provides that the laws of the United States are supreme, and contrary legislation promulgated by the separate states cannot stand.\textsuperscript{154} While the IDEA is not mandatory, states accepting funds under the statute are bound by its provisions. Cline drew on the analogous King v. Smith\textsuperscript{155} to support his point. In King, the Supreme Court determined that states receiving federal funds under the Aid for Dependent Children Program were not permitted to deny eligibility for children not excluded under the federal law.\textsuperscript{156} To date no legal challenges to state ED eligibility have been heard by the federal courts, but the challenge is feasible.

Of course, counter-arguments for the maintenance of the social maladjustment exclusion exist. Historically, promoters of a conservative social maladjustment exclusion application have advanced the notion that an abandonment of the social maladjustment exclusion would “result in a flood of previously unserved students

\textsuperscript{151} Carolyn Webster-Stratton et al., The Long-Term Effectiveness and Clinical Significance of Three Cost-Effective Training Programs for Families With Conduct-Problem Children. 57 J CONSULTING & CLINICAL PSYCHOL. 4, 550–553 (1989).


\textsuperscript{153} See Cline, A Legal Analysis of Policy Initiatives to Exclude Handicapped/Disruptive Students from Special Education, supra note 33.

\textsuperscript{154} U.S. CONST. art. VI, cl. 2.

\textsuperscript{155} King v. Smith, 392 U.S. 309 (1968).

being identified as ED.” This notion is incorrect according to a 2011 survey of states without a social maladjustment exclusion, which reported ED identification rates below one percent. Although these states had slightly higher rates of ED than states that retained the exclusion, there was not a flood.

While there is evidence that the number of youth whose education is adversely impacted by oppositional behavior to a marked degree and over a long period would not likely overwhelm school systems, is it reasonable to expect schools to “dispense criminal justice instead of education”? This judicial rationale misses the point. No one has suggested that schools convert into institutions of juvenile justice. Instead, school systems are urged to provide evidenced-based intervention to increase the academic and functional skills of children with behavior and emotional difficulties that interfere significantly with educational progress. If children with disruptive behavior were provided access to behavior intervention services in school, then schools might prevent the further deterioration of student behavior. By using the IDEA to build behavior plans for students recommended for long-term disciplinary removal, schools might reduce the need for juvenile justice among disruptive populations of students.

Finally, school officials have expressed concern that providing disciplinary protection to this population of students would prevent school staff from being able to remove disruptive students for serious misconduct. For two reasons this argument is less relevant to this discussion than it once was. First, disciplinary removal is becoming a discouraged practice in education. Federal authorities, including former U.S. Secretary of Education Arne Duncan, have expressed concern about school disciplinary policies that focus on removal and urged school systems to instead rely on positive disciplinary practices that “keep students in class where they can learn.” Attorney General

158 CLOTH ET AL., SOCIAL MALADJUSTMENT AND SPECIAL EDUCATION, supra note 41 at 218.
159 See supra note 18 and accompanying text.
Eric Holder indicated that it may be inappropriate to refer a student to juvenile justice for “routine school disciplinary infractions.” The Department is concerned about disciplinary practices that disproportionately affect minority students. An education policy focused on intervention rather than exclusion would not necessarily benefit any particular race, since low-income is a superior predictor of disruptive behavior than ethnicity, but it could provide better access to behavior intervention and keep more students—of any race—in school.

Moreover, for a disruptive student who meets criteria for a DSM-V diagnosis of ODD or CD, and whose disability substantially interferes with a major life activity like learning, Section 504 of the Rehabilitation Act of 1973 is implicated even though IDEA is not. Section 504 is a Civil Rights statute that is applicable to every student receiving IDEA services under his or her category of disability. Section 504 also covers other students with identified disabilities that substantially interfere with a major life activity, but who do not qualify for IDEA, for any number of reasons. Section 504 contains no exclusionary language regarding social maladjustment, and according to the Office for Civil Rights, it does require disciplinary procedures under certain circumstances to protect students whose behavior was caused by, or had a substantial relationship to, his disability. While 504 eligibility is an option for

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163 Id.
164 Id.
166 See supra note 3 (ODD diagnosis).
167 See supra note 2 (CD diagnosis).
168 34 C.F.R. § 104.3
169 Id.
171 34 C.F.R. § 104.3(j)(1)-(2)
172 Under Section 504 of the Rehabilitation Act, 34 C.F.R. § 104.35(a), student re-evaluation is required when a significant change in placement in contemplated. The Office for Civil Rights of the U.S. Department of Education, which enforces Section 504 of the Rehabilitation Act, has stated that long term exclusions of a 504 eligible child may warrant re-evaluation in order to determine whether that child’s behavior was caused by his or her disability (U.S. DEP’T. OF EDUC., OFFICE OF CIVIL RIGHTS, Springfield Sch. Dist. No. 186, 55 IDELR 206,
students with disorders associated with social maladjustment, the lack of mental health services and access to diagnosis is likely to be a barrier for low-income youth.\textsuperscript{173}

For students with ED under the IDEA\textsuperscript{174} and socially maladjusted behaviors, another issue is present. In 2004, a Fourth Circuit court indicated that a child with attention deficit-hyperactivity disorder and ODD who was already qualified for services under ED was not eligible for the disciplinary safeguards of the IDEA, because the behaviors that caused the disciplinary incident in question were related to his social maladjustment (ODD) and were not the primary feature of his initial eligibility (ADHD). The court entertained no arguments related to Section 504.\textsuperscript{175}

In closing, the social maladjustment exclusion to the federal ED definition has been problematic in implementation and application. From state to state, and among courts of the same state, there is little evidence of consistent application, although there has been a narrowing of ED eligibility around students with access to competent, persuasive mental health diagnosis and treatment. Additionally, these youth are unlikely to appeal a refusal to provide services.\textsuperscript{176} These challenges to ED eligibility exist, despite evidence supporting the efficacy of behavior intervention in the schools, a service that low-income students with mental health needs are unlikely to get anywhere else. Now, more than ever, a statutory exclusion preventing access to special education to a category of students seems impractical and unwise. The arguments opposing the abandonment of the social maladjustment exclusion are unfounded. The time has come for Congress to remedy the growing calamity that the social maladjustment exclusion has become.