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Notes

Delinquent or Disabled? Harmonizing the IDEA Definition of “Emotional Disturbance” with the Educational Needs of Incarcerated Youth

MOIRA O'NEILL*

INTRODUCTION

On December 3, 2004 President George W. Bush signed the Individuals with Disabilities Education Improvement Act into law.¹ The Act amended and reauthorized the Individuals with Disabilities Education Act (IDEA) for the third time.² Congress intended this legislation to ensure our public education system meets the special education needs of disabled youth.³ The IDEA extends to incarcerated juveniles.⁴ This fact is significant, given that incarcerated juveniles

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3. The stated purposes of the legislation include:
(1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; (B) to ensure that the rights of children with disabilities and parents of such children are protected; and (C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities.

4. Incarcerated disabled youth (persons under the age of twenty-two) have the right to a free and appropriate public education adjusted to meet their special needs under IDEA. Id. § 1400; see NATIONAL COUNCIL ON DISABILITY, ADDRESSING THE NEEDS OF YOUTH WITH DISABILITIES IN THE

[1189]
demonstrate a higher prevalence of special educational needs than does the public school population. Nonetheless, receipt of a free and appropriate education as mandated under the IDEA is contingent on qualification as "disabled" within the meaning of the IDEA and the regulations promulgated by the Department of Education.

This Note examines the definition of "emotional disturbance," one of the qualifying disabilities under the IDEA. Although research estimates vary, they suggest high numbers of incarcerated juveniles suffer from emotional disturbance. Many special education scholars and professionals have criticized the IDEA definition of "emotional disturbance" as imprecise and inconsistent with mental health constructs of emotional and mental disorders. For the past three decades, the Department of Education regulations have defined "emotional disturbance" to exclude youth diagnosed as "socially maladjusted," even though this exclusionary language does not necessarily correspond well with mental health constructs.

Presently, the Department of Education is in the process of issuing new regulations following the most recent reauthorization of the IDEA. During one of the Department of Education's public input meetings, advocates representing school districts, parents, disability organizations and education agencies requested that the Department of Education eliminate the current definition's reference to "socially maladjusted" youth. Specifically, the Director of Government Affairs for the National...
Mental Health Association pointed out that the current regulations fail to define the term socially maladjusted, and research does not provide a consistent definition of social maladjustment. Nothing indicates that the Department of Education intends to remove the exclusionary language from its definition of emotional disturbance.

The IDEA’s mandate is to provide special education services to disabled youth. The current definition of “emotional disturbance” undermines the IDEA mandate. The language excluding youth identified as “socially maladjusted” eliminates basic educational opportunities for a major segment of the disabled population. Yet, mental health and special education research do not justify the exclusion. The result of not including “socially maladjusted” youth from the category of “emotional disturbance” especially affects incarcerated youth because of the higher prevalence of special needs within this population. It is also in conflict with the primary goals of the state’s intervention with these youths: education, rehabilitation and reduction of recidivism. The special education needs of incarcerated youths with a disability seriously impairing their ability to work, live and function within our society must be addressed for these youths to effectively reintegrate into society upon their release. The goals of the IDEA and rehabilitation within juvenile justice should be in harmony. However, the “socially maladjusted” exclusionary language in the definition of “emotional disturbance” frustrates the rehabilitative goals of juvenile justice.

Part I of this Note discusses the development and history of education and rehabilitation within the American juvenile justice system. Part II discusses the role of the IDEA in meeting special education needs and the development and impact of the “socially maladjusted” exclusionary language. Part III demonstrates that the current regulation excluding socially maladjusted youth is inconsistent with the underlying goal of the IDEA, and the rehabilitative and educational goals of the juvenile justice system. This Note concludes that the regulation defining emotional disturbance should be more consistent with mental health constructions of emotional and behavior disorders, yet be limited to the impact on the child’s education.

2005, at 3.
16. See infra notes 149–50 and accompanying text.
17. See RUTHERFORD ET AL., supra note 6, at 4 (noting that the “interdisciplinary nature of the juvenile correctional system” makes having the right disability label imperative for more than receipt of special education services, which facilitates connecting persons with the appropriate services in the community).
18. Id. at 11.
I. THE AMERICAN JUVENILE JUSTICE SYSTEM: BACKGROUND AND MODERN DEVELOPMENTS

American juvenile justice incorporates juvenile courts as well as the detention and correctional facilities that house delinquent youth. The Illinois state legislature created the first American juvenile court in 1899 to safeguard children from either an incompetent or negligent caretaker or from self-destructive behavior. The Progressive reformers who created this separate court for juveniles believed that to best achieve this goal, this court should provide a forum and set of procedures that would be sensitive to the needs of youth, and benefit those brought before the bench. These Progressive reformers also believed that delinquent juveniles can and should be rehabilitated. They were generally critical of the adult criminal system, and strongly objected to the idea that youth should be mixed in with adult "hardened criminals." The reformers were convinced that society had a duty to children to do more than pass judgment of guilt or innocence. They believed that the state should inquire into the child's needs and determine what interventions would serve a child's best interests. Doing so, they proposed, would help prevent "a downward career."

Thus, these reformers separated the juvenile court from the adult criminal legal system. This separate juvenile court adopted a different set of procedures, and operated under the doctrine of parens patriae, literally translating to "parent of the country" or "state as parent." This doctrine, found in the Pennsylvania Supreme Court decision Ex parte Crouse, served as a legal basis for the creation of a separate juvenile court. Three critical principles emerged from this case: (1) incarceration would be in a "house of refuge" for rehabilitation, not punishment; (2) formal due process protections were not applicable because the adjudicated youth was not being punished; and (3) the state was legally bound to protect children when parents were unable or unwilling to protect them. While the second principle would later be rejected, the
first and third continue to influence the juvenile justice system today.

Consequently, the application of the parens patriae doctrine in juvenile jurisprudence allowed the state to establish requirements for children that did not apply to adults.31 The application of parens patriae also afforded the juvenile court great discretion in its creation and application of procedural rights specific to juveniles. In an effort to rehabilitate and provide for the best interests of the child, the state established informal proceedings that emphasized case-by-case individualized decisions.32 Also, juveniles were subjected to civil, not criminal, proceedings on the theory that juveniles, unlike their adult counterparts, were entitled to care, not liberty.33 Ultimately, the state was not restricted in the same way it would have been were it seeking to deprive an adult of her liberty.34

The state’s freedom to deprive juveniles of due process under the doctrine of parens patriae would later be curtailed by the United States Supreme Court.35 Still, the juvenile court grew in popularity during the beginning of the twentieth century and many states began to develop separate juvenile courts,36 with every state having enacted legislation creating juvenile courts by 1950.37

A. Early Emphasis on Rehabilitation

Historically, juvenile offenders were institutionalized in “houses of refuge,” intended to serve as parent surrogates or “society’s super parents” to delinquent youth.38 In contrast to prisons, which intended to “chafe and wear upon the moral nature and chill the best aspirations of the adult convict,” the youth reformatories in the nineteenth century were meant to rehabilitate by removing the youth from poverty, a poor family life, and any other corrupting influences.39 Nineteenth century rehabilitation was equated with reform, education and training.40 Early reformatories limited education to elementary education, and devoted

32. NATIONAL COUNCIL ON DISABILITY, supra note 4, at 35.
34. Id.
35. See infra Part I.B.1.
37. NATIONAL COUNCIL ON DISABILITY, supra note 4, at 34.
39. Id. at 133 (quoting ENOCH WINES, THE STATE OF PRISONS AND OF CHILD SAVING INSTITUTIONS IN THE CIVILIZED WORLD 80-81 (1880)).
40. Id. at 131; see also JOHN WATKINS, JR., THE JUVENILE JUSTICE CENTURY 29-30 (1998) (explaining that while “educational uplift” was a central component of the juvenile correctional system, nineteenth century juvenile justice education had an “industrial” focus).
greater time to industrial and agricultural training. Contemporary critics of these early reformatories believed these facilities failed to effectively prepare youths for reintegration into society. Still, many of these reformatories continued the above-described practices unabated.

A different notion of rehabilitation would emerge in the mid-twentieth century, placing greater emphasis on meeting emotional as well as educational needs. The detention of juvenile delinquents during and immediately after the Great Depression came under frequent investigation. The resulting reports indicated incarceration in institutions was failing in its goal of providing "meaningful rehabilitation." These reports criticized detention homes for not providing "concerned, warm relationships" between the youths and adult workers, and for lacking adequate recreation, meaningful education programs, and social work services. These criticisms, coupled with subsequent reform efforts, furnished a more contemporary notion of rehabilitation, that it is best effectuated through therapy and education. Modern legislative schemes requiring educational and mental health services for incarcerated youth with disabilities reflect this notion of rehabilitation.

B. MODERN REFORMS AND THE DEVELOPING TENSION BETWEEN REHABILITATION AND PUNITIVE POLICIES

1. Modifying the Implementation of Parens Patriae with Due Process Reforms

By the 1960s, critics of the juvenile justice system complained that the juvenile court's use of an informal, non-criminal context to rehabilitate youth was ineffective. These critics argued that the separate court system was "doing great harm to those appearing before it." Beginning in the mid-1960s, the Supreme Court, consistent with this criticism, limited the discretion once afforded juvenile courts under parens patriae in a series of decisions.

41. Roberts, supra note 38, at 134.
42. Id. at 134-35; see also Watkins, supra note 40, at 29-30 (noting that despite the emphasis on industrial training, apprenticing out youth for rehabilitation was infrequent and instead juvenile labor was exploited within the institutions, and educational opportunities were meager at best).
44. Roberts, supra note 38, at 135-41.
45. Id.
46. Id. at 138.
47. Id. at 140.
49. Bartollas, supra note 36, at 303.
50. Id.
51. Id.
The first of these decisions was *Kent v. United States*, in which the Court held that the state’s power under parens patriae was not unlimited. In *Kent*, the juvenile court judge waived jurisdiction over the juvenile, Kent, and directed that Kent be held for trial under the regular procedures of the United States District Court. In making his ruling, the judge did not hold a hearing or confer with Kent’s parents or counsel. Instead, the judge entered this order without findings or ruling on (or even referencing) motions filed by Kent. The Court held that the juvenile court’s order waiving jurisdiction was invalid because the juvenile court had exercised greater latitude than permissible under the basic requirements of due process and fairness. The juvenile court was bound by the statutory requirement of a full investigation, which entitled Kent to a hearing, access to social records and probation reports, and to a statement of reasons supporting the juvenile court’s decision to waive jurisdiction sufficient to enable meaningful appellate review of that decision.

The Court further criticized the juvenile justice system’s implementation of the parens patriae doctrine in *In re Gault*, where it held that juveniles had a right to due process of law in proceedings that could result in confinement. The Court had to decide whether the Juvenile Code of Arizona, giving the juvenile court great discretion,

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52. *Kent v. United States*, 383 U.S. 541, 554–55 (1966). Morris Kent was apprehended for housebreaking, robbery and rape and taken into custody. *Id.* at 543. He was sixteen at the time, and therefore subject to the “exclusive jurisdiction” of the juvenile court. *Id.* Once his counsel and mother were informed that the juvenile court might waive jurisdiction and remit Kent to trial by the district court, they made arrangements for Kent to be examined by two psychiatrists and a psychologist. *Id.* at 545. They then filed a motion for a hearing on the issue of waiver, offering to prove that if Kent were adequately treated at a hospital he would be a “suitable subject for rehabilitation.” *Id.* Kent’s counsel also moved to gain access to Kent’s file, which would be considered by the judge in determining whether or not to waive jurisdiction. *Id.* at 546.

53. *Id.*

54. *Id.*

55. *Id.* at 552–54.

56. *Id.* at 556–63.

57. 387 U.S. 1, 30–31 (1967). Gault was arrested for making lewd phone calls, and was held in a juvenile detention home without any notice being provided to his family. *Id.* at 4–5. Very little in the way of formal proceedings took place. See *id.* at 5. Gault’s family was not served with notice of the petition filed to the court and the petition did not refer to any factual basis for requesting a hearing. *Id.* Further, the hearing itself occurred without anyone being sworn in, without any recording or transcription, and without the complainant. *Id.* Gault was released after being held for four days at the detention home and, upon his release, his mother received an informal note from the arresting officer indicating her son’s future appearance date. *Id.* at 6. At this later hearing, the complainant was again not present and the testimony offered in the previous hearing was disputed. *Id.* at 7. Ultimately, Gault was committed as a juvenile delinquent to a state industrial school for six years (until he turned twenty-one) “unless sooner discharged by due process of law.” *Id.* at 7–8. Because he was unable to appeal his case under Arizona law, Gault filed a petition for a writ of habeas corpus, which the superior court dismissed. *Id.* at 8–10. The Arizona Supreme Court later affirmed this dismissal. *Id.* at 10.
violated the Due Process Clause of the Fourteenth Amendment. The Court regarded due process of law to be "the primary and indispensable foundation of individual freedom," and held that juvenile court adjudication of delinquency "must measure up to the essentials of due process and fair treatment." In holding that the state was not permitted to deny juveniles due process rights, the Court sought to limit the discretion traditionally afforded juvenile courts under parens patriae.

Thus, the Court gave juveniles due process protections previously afforded only to adults by limiting the juvenile court's discretion and rejecting how the parens patriae philosophy was being implemented. However, contemporary scholars suggest that the inadvertent consequence of In re Gault and its progeny was the legitimization of a greater emphasis on punishment in juvenile courts.

2. The Infusion of More Punitive Measures into Juvenile Justice

The 1970s saw more reforms to the juvenile justice system. Legislative efforts directed at diverting juvenile offenders from correctional facilities and decriminalizing status offenses resulted in the Juvenile Justice and Delinquency Prevention Act of 1974. During the following two decades, federal reforms to the juvenile justice system focused instead on violent youth crime and repeat offenders. Beginning in the late 1970s and growing momentum in the 1980s, a movement to "recriminalize American juvenile justice" surfaced. Under the new federal policies intending to increase crime control, five trends emerged: (1) preventive detention; (2) transfer of violent juveniles to the adult court; (3) mandatory and determinate sentencing for violent juveniles; (4) increased confinement of juveniles; and (5) enforcement of the death penalty for juveniles who commit brutal and senseless murders. In the 1990s, legislative reforms focused on juveniles who participated in street gangs.

58. Id. at 10.
59. Id. at 20.
60. Id. at 30–31.
63. See Barry Feld, Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash," 87 Minn. L. Rev. 1447, 1494 (2003) ("Providing a modicum of procedural justice legitimated greater punitiveness in juvenile courts because once states granted even a semblance of procedural justice, however inadequate, they more readily departed from a purely 'rehabilitative' model of juvenile justice.").
64. Bartollas, supra note 36, at 303.
65. Id. at 303–04.
66. Id. at 304.
67. Id.; Rosenheim, supra note 19, at 342; see also Feld, supra note 63, at 1506.
68. Bartollas, supra note 36, at 304.
69. Id.; see also Aaron Kupchik et al., Punishment, Proportionality, and Jurisdictional Transfer of
The reforms of the 1980s and 1990s, emphasizing transfer to the adult criminal court and mandatory sentencing, reflected an ongoing tension between retribution and rehabilitation within the juvenile justice system. This tension culminated in what some scholars refer to as a presumption in modern juvenile justice law that emphasizes culpability—a presumption that "offend[s] the common law doctrine of incapacity."  

One scholar argues the recent focus on punishment, rather than rehabilitation, provides little justification for a separate juvenile court system. However, at present it does not appear that any state is "ready to dismantle their juvenile justice systems"; instead, most states have passed measures to reform their systems. Some of those reforms have been "get tough" measures that make it easier for judges and prosecutors to transfer youth to adult courts in certain instances. Yet, states have also implemented rehabilitative reforms to meet the needs of delinquent youth.  

3. **Rehabilitation Remains a Primary Goal within Juvenile Justice**

Even with the recent "get tough" measures, rehabilitation remains an important goal of the juvenile justice system. Reforms facilitating the transfer of violent juveniles to the adult criminal court affect fewer than one percent of all youth referred to the juvenile justice system. Thus, most youth remain within the juvenile court's jurisdiction where the traditional emphasis on rehabilitation continues to influence their sentences.  

Also, the Court recently held in *Roper v. Simmons* that the application of the death penalty to individuals who were under eighteen when the crime was committed is cruel and unusual punishment...
forbidden by the Eighth Amendment. The Court's reasoning reaffirmed the rationale underlying the role of rehabilitation within juvenile justice. The Court explained that juveniles, as compared to adults: (1) display a lack of maturity and an underdeveloped sense of responsibility; (2) display more vulnerability or susceptibility to negative influences and outside pressures, including peer pressure; and (3) display a less-formed character. The early penal reformers used identical reasoning when creating a separate juvenile justice system to rehabilitate youth offenders. Thus, despite the modern changes to the juvenile justice system, rehabilitation remains a principal goal that continues to justify the maintenance of a separate system to adjudicate and treat the vast majority of youth offenders.

II. THE ROLE OF THE IDEA IN MEETING THE SPECIAL EDUCATIONAL NEEDS OF INCARCERATED YOUTH

Despite the increased influence of more punitive policies in juvenile justice, rehabilitation remains a key objective in housing youth in juvenile correctional facilities. Many juvenile correctional facilities are officially named "training schools." And, education is still considered to be the "foundation for programming in most juvenile institutions" because it is essential to the rehabilitation of juveniles. Although all juvenile offenders are subject to compulsory education, the quality of the educational services provided to incarcerated juveniles varies and depends on the agency providing the services. The agencies responsible for educating incarcerated youth are local school systems, juvenile justice agencies, private contractors, and state education departments. These agencies, while providing education in juvenile correctional facilities, must follow the same laws as public schools. This includes compliance with the IDEA, which guarantees free and appropriate public education for youth with special needs.

The majority of juveniles who enter correctional facilities have

78. Id. at 569–70.
80. Id. at 85–86.
81. Rosenheim, supra note 19, at 347.
82. Id. at 352.
85. RUTHERFORD ET AL., supra note 83, at 15.
86. Id. at 16.
87. Corwin, supra note 84.
intense educational needs that are often further complicated by mental health needs. The prevalence of special educational needs among incarcerated youth is disproportionately higher than that found in the general population. Statistics vary dramatically, with some studies indicating prevalence of emotional disturbance (defined as including emotional and behavioral disorders) in the juvenile justice system at higher than 60%. If these emotionally disturbed juvenile offenders are identified as having a disability under the IDEA, they can potentially benefit from services immediately. Once identified as disabled, the IDEA requires the development of an individualized family service plan that details the services and supports necessary to meet the youth offender's needs.

Although the prevalence of special educational needs among incarcerated youth is high, they face difficulties in gaining access to adequate special education services. Generally, "few juvenile justice systems employ rigorous screening and assessment for all youth who enter the juvenile justice system" and "the quality, focus, and goals of the screening and assessment can vary greatly, thus reducing the chances that youth with disabilities will be independently identified." Specifically, youth offenders are significantly under-identified as emotionally disturbed. As discussed below, this oversight is "most likely...due to confusion over the [emotional disturbance] definition in the public schools and in corrections."

A. THE IMPACT OF THE "SOCIALLY MALADJUSTED" EXCLUSIONARY LANGUAGE ON INCARCERATED YOUTH

Prior to passage of the Rehabilitation Act of 1973, there were no major federal laws specifically protecting the civil and constitutional rights of children with disabilities. The Rehabilitation Act applied to schools because almost all public school systems received federal funds.

88. Rutherford et al., supra note 83, at 15.
90. Rutherford et al., supra note 6, 11-14; Robinson & Rapport, supra note 89, at 20 (citing a 1995 study reporting that over sixty percent of incarcerated juveniles exhibited an emotional or behavioral disorder).
91. National Council on Disability, supra note 4, at 25.
92. Rutherford et al., supra note 83, at 19; Robinson & Rapport, supra note 89, at 19.
94. Rutherford et al., supra note 6, at 14.
95. National Council on Disability, supra note 4, at 23 ("[The Rehabilitation Act] was the first law stating that the exclusion or segregation of an individual with a disability constituted discrimination.").
It entitled disabled children to a public education comparable to that received by children without disabilities. In 1975, Congress passed the Education for All Handicapped Children Act to meet the unaddressed needs of disabled children who were either receiving inappropriate education, or completely excluded from public schools. Congress renamed this Act the Individuals with Disabilities Education Act in 1990.

The IDEA focused on the educational needs of children with disabilities. It guaranteed these children the rights to attend public schools, receive free services designed to meet their needs, and learn in a regular classroom to the greatest extent possible. The substantive rights provided under the IDEA are often referred to as “FAPE,” which stands for “free, appropriate, public education in the least restrictive environment.” In 1997 Congress amended the IDEA, improving the requirements for the development and review of individualized education programs (IEP) for disabled children. Thus, once a child is eligible for protection under the IDEA, a team (including the parents and public school system representatives) develop an IEP that incorporates what is necessary to meet the child’s unique needs.

The IDEA has since been reauthorized three times, most recently on December 3, 2004, when President Bush signed into law the Individuals with Disabilities Improvement Act of 2004.

The term “children with disabilities” includes incarcerated youth. "Congress has stated that the rights and protections secured by IDEA do not end when children are detained or incarcerated." All juvenile justice programs, including detention centers and correctional facilities, are legally required to provide IEPs to children who need them. To qualify for the protection offered under this statute, an incarcerated

96. Id. at 24.
100. NATIONAL COUNCIL ON DISABILITY, supra note 4, at 24.
101. Id. at 25.
102. Id.
104. Robinson & Rapport, supra note 89, at 19.
105. NATIONAL COUNCIL ON DISABILITY, supra note 4, at 33.
106. Id.
juvenile must meet the definition of a child with a disability. The IDEA defines a disabled child as a child with mental retardation, hearing impairments, speech or language impairments, visual impairments, serious emotional disturbance (referred to as emotional disturbance), orthopedic impairments, autism, traumatic brain injury, or other health impairments or specific learning disabilities, who is in need of special education and related services. Current federal regulations define emotional disturbance as:

(i) [A] condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

(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.
(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.

(ii) The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance.

The term "socially maladjusted" is not defined in the federal regulations. The above definition has significant implications for incarcerated juveniles. As noted earlier, studies estimate that over 60% of incarcerated youth exhibit an emotional or behavioral disorder. However, the number of incarcerated youths identified as emotionally disturbed for special education services is lower than the number estimated to be emotionally disturbed. These numbers vary dramatically from state to state. The percentage of incarcerated juveniles identified as "emotionally disturbed" under the IDEA definition, as reported by state correctional facilities, ranges from zero percent to forty-eight percent. Because the IDEA's definition of

107. Id.
111. RUTHERFORD ET AL., supra note 6, at 11, 14.
112. Id.
113. A 1994 study collecting state reporting rates for incarcerated juveniles with emotional disturbance as defined by special education regulations reflects varying rates of zero percent in two states to a high rate of forty-eight percent, with a national prevalence rate reported at ten percent. Robinson & Rapport, supra note 89, at 20; see also RUTHERFORD ET AL., supra note 6, at 14 (citing
"emotional disturbance" is ambiguous, states are able to use different definitions of the term for identification and assessment for special needs purposes resulting in extreme discrepancies in reporting rates.

B. THE PURPOSE OF EXCLUDING "SOCIALLY MALADJUSTED" YOUTH FROM THE DEFINITION OF EMOTIONALLY DISTURBED

The exclusion of "socially maladjusted" children from the definition of emotional disturbance preceded the IDEA. Regulations promulgated under earlier related legislation excluded "socially maladjusted" from the definition of "serious emotional disturbance," with little comment or discussion about the purpose of the exclusion. The regulations promulgated under the Education for All Handicapped Children Act of 1975 defined "handicapped child" to include emotionally disturbed children. These regulations defined emotional disturbance to exclude "socially maladjusted" from the meaning of emotionally disturbed. This exclusionary language remained in the regulations in near-identical form throughout the various reauthorizations of the 1975 Act, and then continued in the regulations promulgated under the IDEA. In 1982, the Department of Education proposed a rule that would delete the exclusionary language, yet subsequent regulations continued to include it.

One explanation offered for the "socially maladjusted" exclusionary language is that it reflects a policy choice. As the Fourth Circuit commented:

[This exclusion makes perfect sense when one considers the population targeted by [the IDEA]. Teenagers, for instance, can be a wild and unruly bunch. Adolescence is, almost by definition, a time of social maladjustment for many people. Thus a "bad conduct"

numerous studies detailing reported rates of emotional disturbance at varying rates of 16%, 20%, 47% and 50%, and attributing the overall under-identification of incarcerated youth with emotional disturbance to confusion over the emotional disturbance definition in special education).


117. Id.


120. 34 C.F.R. § 300.5(b)(8)(ii) (revised as of July 1, 1983).
definition of serious emotional disturbance might include almost as many people in special education as it excluded. Among other things, such a definition would require the schools to dispense criminal justice rather than special education.121

Equating social maladjustment with "bad conduct" reflects a policy decision to remain "tough" on "bad kids." For example, students not labeled as disabled can be more readily suspended or expelled.122

It is not clear however, that Congress intended this distinction between social maladjustment and emotional disturbance.123 Also, recent legislative history indicates Congress is concerned about the variation in the definitions of emotional disturbance among states and whether these "definitions and evaluation processes conform to scientific, peer-reviewed research."124 One group of scholars has observed that the Department of Education's failure to eliminate the exclusionary language is due to concerns about the potential increase in the number of students who would be identified as emotionally disabled, and then afforded the safeguards against expulsion and suspension from school that accompany such a label.125

121. Springer v. Fairfax County Sch. Bd., 134 F.3d 659, 664 (4th Cir. 1998). This proposition relies on special education authority rather than legislative history. Id. However, this perspective, though not explicitly present in any of the proposed Department of Education rules, is consistent with a response to comments found in rules promulgated by the Department of Defense. That response rejected a comment recommending the term socially maladjusted be deleted from the definition of emotional disturbance, as used within the regulation. Education of Handicapped Children in the DoD Dependent Schools, 46 Fed. Reg. 62257 (Dec. 23, 1981). "Although the term does not lend itself to precise definition, it is useful because it usually encompasses juvenile delinquency, chronic disruptive behavior, and other socially inappropriate conduct that is not indicative of emotional disturbance." Id.


123. Steven Forness & Jane Knitzer, 21 SCH. PSYCHOL. REV. 12, 13 (1992). Also, while the terms "socially maladjusted" or "social maladjustment" are present in the hearing reports prior to enactment of the Education for All Handicapped Children Act in 1975, it is included among the listed disabilities either qualifying for special education services or in need of special education services under state programs. Education for All Handicapped Children: Hearings on S. 6 Before the Subcomm. on the Handicapped of the S. Comm. on Labor and Public Welfare, 93rd Cong. 122-27, 143-44, 254 (1974). The term is also included as a qualifying label for related services in earlier legislative history associated with other statutes. See, e.g., Mental Health: Hearings on S. 1576 Before the Subcomm. of the S. Comm. on Interstate and Foreign Commerce, 88th Cong. 175-78 (1963) (discussing the inclusion of social maladjustment, and defining it as synonymous with term emotional disturbance, as a handicapping condition for the purposes of providing grants to train special education teachers); Vocational Education Amendments of 1969: Hearings on H.R. 13630 Before the Gen. Subcomm. on Education of H. Comm. on Education and Labor, 91st Cong. 49 (1969) (including socially maladjusted youth as members of groups to be served by the Vocational Rehabilitation Amendments of 1968).


125. RUTHERFORD ET AL., supra note 6, at 13. Specifically the Department of Education has not adopted the National Mental Health and Special Education Coalition's alternative and more detailed definition of emotional disturbance eliminating the exclusionary language, although overwhelmingly accepted by professionals because of the above stated concerns. Id.
Does the IDEA’s definition of emotional disturbance conform to scientific, peer-reviewed research? Unfortunately, “[t]here has been little consensus among practitioners and researchers as to how to define emotional and behavioral disabilities in children.” Prior to the IDEA and the regulations promulgated under it, neither the educational nor mental health fields utilized a precise definition for either emotional disturbance or social maladjustment. Outside of the special education realm, emotional or behavioral disorders can be labeled in a variety of ways such as behaviorally disordered, emotionally handicapped, socially maladjusted, psychotic, or anti-social, depending on which agency is evaluating the subject. What is consistent is that an individual with any of these labels will “express emotional disturbances in aberrant or maladaptive behaviors that seriously impair [his or her] ability to be educated.” Also significant is that many of the characteristics associated with delinquent youth strongly correlate with emotional disturbance.

III. Why the “Socially Maladjusted” Exclusionary Language Should Be Deleted

A. The Problem with the Exclusionary Language

At present, juveniles determined to be “emotionally disturbed” are most often diagnosed with mood disorders, and juveniles diagnosed with social maladjustment are most often diagnosed with oppositional defiant disorder and conduct disorder. With regard to academic

126. Anderson, supra note 93, at 485; see Craig Winston LeCroy et al., Systems Considerations in Treating Juvenile Offenders with Mental Disorders, in TREATING ADULT AND JUVENILE OFFENDERS WITH SPECIAL NEEDS 403, 406 (Ashford et al. eds., 2001) (juvenile offenders with mental disorders are adversely impacted by the nonsystematic criteria used to identify disorders). A significant problem affecting the use of mental health definitions is that “the terms emotional, behavioral and mental disorders are used interchangeably.” Id.


128. RUTHERFORD ET AL., supra note 6, at 11.

129. Id.

130. Id. at 14. “These characteristics include: substance abuse; problems in school; low verbal intelligence; family reliance on welfare or poor management of income; broken, crowded or chaotic homes; erratic and inadequate parental supervision; and parental or sibling indifference or hostility toward the youth.” Id.

131. Mood disorders are defined by the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) as “disorders that have a disturbance in mood as the predominant feature,” and include depressive disorders, bipolar disorders, mood disorders caused by a general medical condition, and substance-induced mood disorders. AMERICAN PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 345 (4th ed. 2000).

132. The DSM-IV-TR defines the diagnostic criteria for a oppositional defiant disorder as follows:

The essential feature of Oppositional Defiant Disorder is a recurrent pattern of negativistic, defiant, disobedient, and hostile behavior toward authority figures that persists for at least 6 months . . . and is characterized by the free occurrence of at least four of the following behaviors: losing temper, . . . arguing with adults, . . . actively defying or refusing to comply
performance, children diagnosed as emotionally disturbed that use “maladaptive achievement strategies . . . often have difficulties in school that lead to both internalizing and externalizing behaviors.” Juveniles diagnosed as socially maladjusted are often diagnosed as “evidencing poor academic performance, low school motivation, and negative perceptions of school.” Poor quality of school organization, poor overall functioning of the school, and lack of availability of appropriate peer social support contribute to child maladjustment to school and the subsequent potential to exhibit externalizing problem behaviors.

Thus, a diagnosis of either emotional disturbance or social maladjustment could mean that the child is in need of special education services.

But the lack of a consistent definition allows for disparate identification criteria and processes for the purposes of special education. Special education scholars criticize the IDEA’s definition of emotional disturbance for failing to include any of the specific diagnostic categories used in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) published by the American Psychiatric Association. Also, the IDEA’s definition of serious emotional disturbance differs significantly from the definition of serious emotional disturbance used by children’s mental health care systems. For example,

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with the requests or rules of adults . . . deliberately doing things that will annoy other people, . . . blaming others for his or her own mistakes or misbehavior, . . . being touchy or easily annoyed by others, . . . being angry and resentful, . . . or being spiteful and vindictive. To qualify . . . the behaviors must occur more frequently than is typically observed in individuals of comparable age and developmental level and must lead to significant impairment in social, academic or occupational functioning.

Id. at 100; see Koyanagi, supra note 122, at 7.

133. The DSM-IV-TR defines the diagnostic criteria for a conduct disorder as follows:

The essential feature of a Conduct Disorder is a repetitive and persistent pattern of behavior in which the basic rights of others or major age-appropriate societal norms or rules are violated. These behaviors fall into four groups: aggressive conduct that causes or threatens physical harm to other people or animals, . . . nonaggressive conduct that causes property loss or damage, . . . deceitfulness or theft, . . . and serious violations of rules . . . . Three (or more) characteristic behaviors must have been present during past 12 months, with at least one behavior present in the past 6 months. The disturbance in behavior causes clinically significant impairment in social, academic, or occupational functioning.

American Psychiatric Ass’n, supra note 131, at 93–94. Among special education practitioners, however, there is no consensus as “conduct disorder” is in itself an incongruous term. Jeffrey A. Miller et al., Using Multimodal Functional Behavioral Assessment to Inform Treatment Selection for Children with Either Emotional Disturbance or Social Maladjustment, 41 Psychol. in the Sch. 867, 869 (2004); see also LeCroy et al., supra note 126, at 408 (“The heterogeneity of diagnostic labels such as ‘conduct disorder’ requires that determinations be made on a case-by-case basis.”).

134. Miller et al., supra note 133, at 872.
135. Id. at 874.
136. Id.
137. Id.
138. Anderson, supra note 93, at 486–88. For example, in contrast to the definition of “emotional disturbance,” the DSM-IV-TR provides specific criteria to define mood disorders (e.g., major depressive episode) and conduct disorders. American Psychiatric Ass’n, supra note 131, at 356.
the Center for Mental Health Services defines serious emotional disturbance as a "diagnosable mental, behavioral or emotional disorder of sufficient duration to meet diagnostic criteria specified within the DSM-IV, that result[s] in functional impairment which substantially interferes with or limits the child’s role or functioning in family, school, or community activities." 139 In addition to using less specific criteria than that provided in the DSM-IV, the IDEA definition excludes "socially maladjusted" youth without defining the term. 140 Because the IDEA's definition of emotional disturbance is vague and does not define social maladjustment, states have ample room to modify the interpretation of these terms. Consequently, "there are wide variations in the criteria used to identify children and youth for special education services." 141

As a result, a youth may be identified or not identified as emotionally disturbed depending on how the language is used. 142 The disparity in identification reporting rates of youth with emotional disturbance from state to state evidences this. 143 But it is inconsistent with the purposes of the IDEA to identify (or not identify) a child for special education services based on poorly defined language susceptible to multiple interpretations 144 rather than on the clear need for services. Inconsistent application of the term "emotional disturbance" from state to state 145 seems to create an arbitrary system of implementation. Also, many special education professionals criticize the current definition as illogical and without foundation in research in the area of special education. 146 Congress intended this legislation to guarantee services for, among others, emotionally disturbed youth. Use of a vague definition that has no foundation in special education research and practice does not promote Congress' goal. Rather, the use of this definition promotes inconsistent application of the law and exclusion of individuals who should be identified emotionally disturbed. 147

Some educators and policy makers argue that excluding socially maladjusted youth from special education services is proper, and consistent with the goals of the IDEA because these excluded youth

139. Anderson, supra note 93, at 486.
140. Id. at 487.
141. Id.; see Rutherford et al., supra note 6, at 14.
142. Anderson, supra note 93, at 488.
143. Id. at 487–88.
144. Id.
145. Rutherford et al., supra note 6, at 4.
146. Koyanagi, supra note 122, at 5–6; Weithorn, supra note 127, at 1357. If one compares the criteria defining "emotional disturbance" listed in (i)(A) through (i)(C) of the regulation with the definitions of "conduct disorder," and "oppositional defiant disorder," it is readily apparent that the regulation includes characteristics associated with both of those diagnoses. See also supra notes 108, 132, 133 and accompanying text.
147. Cf. Koyanagi, supra note 122, at 14 (noting that decades of misidentification and under-identification have been self-defeating).
choose to engage in inappropriate behavior, rather than being driven by some underlying psychological problem. This argument effectively labels some youth as delinquent rather than disabled, and educators with this view often exclude youths with behavior disorders from school.

This argument fails to address the weaknesses in the definition, the vague and illogical criteria used to define emotional disturbance and the undefined term “socially maladjusted.” Also, educators and policymakers with this view have not provided an adequate research based justification for the distinction between emotional disturbance and social maladjustment in the IDEA definition. Youth with emotional and behavioral disorders exhibit high levels of social and academic difficulties that persist over time, so a distinction without a basis in research and practice seems to conflict with the goals of the IDEA.

The current exclusion of “socially maladjusted” within “emotionally disturbed” is also out of harmony with the rehabilitative goals of the juvenile justice system. Youth with emotional and behavioral disorders are more likely than other disability groups to get arrested and end up in “restrictive placements.” Many of the characteristics associated with delinquent youth strongly correlate with emotional disturbance. Still, schools often use the exclusionary language to avoid labeling students as emotionally disturbed, preventing intervention and appropriate services while the youth is still in school. This fact increases the likelihood that emotionally disturbed youth will enter the juvenile justice system without being properly identified. Rehabilitation requires youth with these disorders receive the right treatment, including an appropriate educational plan, in order to give them the needed skills to reintegrate into the community upon release. However, a youth may not qualify for special education if she is deemed as socially maladjusted, regardless of whether she needs the services. Yet denying incarcerated youth access to needed special education services undermines the goal of rehabilitation.

148. Anderson, supra note 93, at 488.
149. Id. at 488-89. In particular, “when an organization’s purpose is public safety versus education, deviant behavior may be associated with criminality instead of disability.” Id. at 489; accord Koyanagi, supra note 122, at 2.
150. Anderson, supra note 93, at 484.
151. Id.; cf. Weithorn, supra note 127, at 1358.
152. See supra note 132.
153. See Weithorn, supra note 127, at 1337; Koyanagi, supra note 122, at 2.
154. Miller et al., supra note 133, at 869.
The goal of the IDEA is to make certain that disabled children receive a free and appropriate special education "designed to meet their unique needs and prepare them for further education, employment, and independent living." The goal of rehabilitation is to reintegrate youth back into society. To meet both of these goals, a definition of emotional disturbance would need to ensure that all youth within this category were properly identified. As stated above, the characteristics of emotional disturbance strongly correlate with behavior associated with delinquency, and emotionally disabled youth are more likely than other disabled groups to get arrested. A definition of emotional disturbance that attempts to distinguish between "delinquent" and "disabled" conduct seems not only too difficult to apply, it seems out of line with the goals of the IDEA and rehabilitation. Special education services are critical to enabling emotionally disturbed youth to leave the juvenile justice system equipped with skills allowing them to live independent and productive lives. Neither the goals of the IDEA nor rehabilitation will be effectively met by the under-identification of emotionally disturbed youth.

B. A Better Definition of "Emotional Disturbance" Would be Consistent with the Definitions Used by Agencies Providing Mental Health Services

The definition of a child with disabilities serves as a gatekeeper to the protections provided by the IDEA. Because of the vague language used to define emotional disturbance, the exclusion of an undefined category of socially maladjusted youth, and the extreme variances across states in the identification of incarcerated youth with emotional disturbance under the IDEA, it is reasonable to conclude that the label "emotional disturbance" is inconsistently applied. This inconsistent application in turn results in the under-identification of youth with emotional disturbance.

Also, advocates for improving the IDEA argue that state educational agencies' overall non-compliance with the IDEA is encouraged by the lack of federal funding. Arguably, the same

156. Prior to IDEA's most recent reauthorization, the National Council on Disability findings, based on compiling several major studies, were that the IDEA "in practice is falling far short of what legislators first envisioned." See NATIONAL COUNCIL ON DISABILITY, supra note 4, at 26. This is due to widespread noncompliance and failure to implement services mandated under the IDEA. Id. at 26-27. While there is debate as to what causes this, one important issue that continues to be controversial is funding. Id. at 28. "Funding issues may be affecting decisions to serve, place, or refer children with disabilities, and current funding mechanisms may be creating incentives that undermine or hinder the goals of ensuring that children with disabilities receive a high-quality education." Id. At its inception, it was intended that federal funding would comprise about forty percent of the costs associated with educating children with special needs, but current federal funding is at about ten percent. Id. at 29; see House Education and the Workforce Committee, Building on Historic Funding Increases for Special Education, http://edworkforce.house.gov/issues/108th/education/idea/135ofunding.htm (Nov. 17, 2004)
monetary concerns that encourage overall non-compliance could influence a state education agency’s decision to identify a youth offender as socially maladjusted rather than emotionally disturbed.\footnote{57} The definition of emotional disturbance should be specific enough to prevent such a result.

Even if the inconsistent application of this current definition and the under-identification of disabled youth are not driven by budgetary concerns, the current definition nonetheless runs counter to the goals of the IDEA and rehabilitation. It is vague and allows for inconsistency in application. Thus, youths may be excluded from special education services regardless of whether they have a legitimate need for those services. This outcome contravenes the greater purpose of the IDEA to provide needs services to disabled youth. It also thwarts the rehabilitative purposes that justify maintaining separate juvenile correctional facilities, as well as educational and treatment services for incarcerated youth.

A definition of emotional disturbance that both closely mirrors the constructs of emotional and behavioral disorders used by mental health care providers, but focuses on the impact of the disorder on the youth’s education, would more effectively meet the goals of the IDEA and rehabilitation.\footnote{58} The National Mental Health and Special Education Coalition has developed such a definition and it is widely endorsed by special education professionals:

(i) The term emotional or behavioral disorder means a disability characterized by behavioral or emotional responses in school so different from appropriate age, cultural or ethnic norms that they adversely affect educational performance. Educational performance includes academic, social, vocational and personal skills. Such a disability:

\begin{itemize}
  \item reviewing of federal funding issues at the time of reauthorization of IDEA. Some argue, however, that lack of federal funding is not the central issue. \textit{National Council on Disability, supra} note 4, at 29. They argue instead that what contributes to noncompliance is a lack of commitment to children with disabilities on the part of state education agencies and school district boards. \textit{Id.} From this perspective, because the IDEA is “first and foremost civil rights legislation...it must be enforced irrespective of funding.” \textit{Id.} Notably, the IDEA is a “blend of civil rights law and state grant programs, a duality that has had important implications for how the law has been perceived, implemented, and enforced.” \textit{Id.}

\item This conclusion is premised on the idea that labeling an incarcerated juvenile as disabled would increase the educational agency’s expenses because it would require the agency to provide the youth offender’s special education services in addition to any other services the youth may be receiving.

\item See \textit{Rutherford et al., supra} note 6, at 4 (commenting on the interdisciplinary nature of juvenile corrections). Rutherford observed that “[s]pecial education and mental health terms and categories are not always clearly defined and show overlap, a fact which may act as a barrier to service delivery because the presence of a recognized disability is the ‘ticket’ to receive services.” \textit{Id.} It follows that a special education definition of emotional disturbance more consistent with a mental health definition would be better suited to the “interdisciplinary nature” of juvenile corrections. \textit{See id.}
\end{itemize}
(A) is more than a temporary expected response to stressful events in the environment;
(B) is consistently exhibited in two different settings, at least one of which is school-related; and
(C) is unresponsive to direct intervention in general education or the child's condition is such that general education interventions would be insufficient.

(ii) Emotional and behavioral disorders can co-exist with other disabilities.

(iii) This category may include children or youth with schizophrenic disorders, affective disorders, anxiety disorders or other sustained disturbances of conduct or adjustment when they adversely affect educational performance in accordance with section (i).

This alternative to the current definition deletes the reference to "social maladjustment." Deleting the exclusionary language should reduce the discrepancies between the estimated prevalence rates of emotional disturbance reported by research and the identification rates reported by agencies providing special education services to incarcerated youth. This definition also includes more clear and comprehensive criteria, as it incorporates various diagnoses traditionally associated with emotional disturbance. Finally, it focuses on the impact of various emotional and behavioral disorders on educational performance and increases the likelihood that children with emotional disturbance who are in need of special education services will be properly identified. Thus, the National Mental Health and Special Education Coalition definition is in better harmony with the goal of the IDEA, to meet the special educational needs of disabled youth, and in turn better facilitates the goals of rehabilitating and educating incarcerated youth.

CONCLUSION

The primary justification for maintaining separate juvenile correctional facilities is still to rehabilitate and educate youth offenders. Granted, the juvenile justice system's incorporation of more punitive policies in recent decades reflects the tension between rehabilitation and the desire for more punitive policies. However, state legislators have not chosen to dismantle the juvenile justice system and federal and state laws still require that incarcerated youth be educated and treated. Among those laws is the IDEA, a significant piece of federal legislation protecting the educational rights of youth with special needs, a class that includes incarcerated juveniles. Emotional disturbance, a condition that

159. Koyanagi, supra note 122, at 6.
160. For a detailed comparison between the current federal definition and this alternative definition, see id. at 7–8.
161. See Rutherford et al., supra note 6, at 12–13; Koyanagi, supra note 122, at 6–7.
is estimated to affect more than half of the population of incarcerated youth, qualifies as a disability under the IDEA.

However, the "socially maladjusted" exclusionary language within the definition of "emotionally disturbed" prevents many youth offenders with special needs from having those needs met. Instead, the current regulation excluding socially maladjusted youth allows agencies providing educational services to incarcerated youth to inconsistently identify youth offenders as emotionally disturbed or socially maladjusted. The current regulation potentially excludes emotionally disturbed youth offenders in need of special education services from receiving those services. This result is out of harmony with the IDEA's mandate. It also undermines the juvenile justice system's efforts to rehabilitate incarcerated youth.

Thus, the federal regulation defining emotional disturbance should eliminate the socially maladjusted exclusionary language. The regulation should define emotional disturbance with criteria that focus on whether a child has an emotional or behavioral disorder that interferes with her academic performance. Such a definition would be in better harmony with the IDEA's mandate and the juvenile justice system's goal of rehabilitation.