Left Behind, Left Out or Kicked Out: Strategies for Protecting Children's Rights in School

by Matt Cohen, J.D., Matt Cohen and Associates, special education, disability rights and human services law

The IEP must address a student's developmental and functional needs, based on present level of performance and measurable goals and objectives.

Children with emotional, social and behavioral conditions experience unique challenges within public schools. Their disabilities impact their behavior and academic functioning and make them more likely to be subject to school discipline even if their behavior is a result of their disabilities. Many children with these emotional, social and behavioral issues are entitled to special services and protections within public schools through two laws, the Individuals with Disabilities Education Act (IDEA), the law governing special education, and Section 504 of the Rehabilitation Act of 1973. IDEA is a funding statute that requires all states to comply with the federal special education regulations. Section 504 is a civil rights statute requiring all recipients of federal funds to provide non-discriminatory services, including reasonable accommodations.

Both IDEA and Section 504 have a requirement called "Child Find," which requires schools to identify all children aged 3 to 21 who are suspected of having a disability, including a mental illness. Because mental illness is sometimes less visible than some other disabilities, the Child Find rules are very important in mandating that schools assess children having behavioral, emotional or social problems. As part of the Child Find requirement, a parent or member of the school staff may also refer a child for evaluation for special education or Section 504 services.

When a child is referred for evaluation, the school must first obtain written parent consent before conducting the evaluation. In addition, the school must inform parents if the school does not believe that an evaluation is appropriate and must tell parents the reason the evaluation is being refused and that parents have the right to challenge the refusal. When a school and parent agree that an evaluation should be conducted, it must include a variety of different evaluation procedures and must be non-discriminatory. The IDEA now requires that schools evaluate a child in a manner and form which:

- Yields accurate results
- Identifies what the child knows and can do
- Assesses the child's developmental, functional and academic progress

These requirements are particularly important for children living with mental illness since it makes clear that they may be entitled to services and legal protections for these issues, even if the issues are not directly impacting their academic performance, but are affecting other areas of their development and functioning at school.

Several of the IDEA disability categories may be applicable to children living with mental illness, including the categories of "emotionally disturbed" (ED) and "other health impaired" (OHI). In order to be eligible under the ED category, a child must meet one of the following criteria:
• Inability to learn due to emotional factors
• Inability to build or maintain interpersonal relationships
• Inappropriate types of behavior or feelings under normal circumstances
• General pervasive mood of unhappiness or depression
• Physical symptoms or fears

Furthermore, the condition must be present over a long period of time to a marked degree and must adversely affect the child’s educational performance (including non-academic school performance). ED eligibility is based on the child’s general functioning in school, social relationships, ability to complete work or ability to conform to school rules and classroom expectations. ED includes both aggressive-externalized behaviors and internalized behaviors.

Children with behavior challenges may also be eligible for special education based on having attention deficit/hyperactivity disorder (ADHD), Tourette syndrome, bipolar disorder or other health conditions that cause behavioral symptoms. The OHI criteria requires that the student display limited strength, vitality or alertness, including heightened alertness to environmental stimuli that results in limited alertness in the educational setting and adversely affects educational performance.

All IDEA eligibility categories require that a student meet criteria for a specific disability category that adversely affects educational performance and requires special education intervention, including specialized services in the regular classroom. If the student meets the criteria for eligibility for special education, the student is entitled to a Free Appropriate Public Education (FAPE). A student’s special education program is defined by the content of his or her Individualized Education Program (IEP), which identifies the special education services and supports that he or she needs to stay in school and learn. These services and supports should be provided in the least restrictive environment. FAPE requires necessary services, but not necessarily the best services, so it is important for parents and clinicians to focus on what the student needs and why, rather than on what would be ideal or desirable.

While a student should be based in the regular classroom whenever possible, the student may also be entitled to services in a specialized classroom, a therapeutic day school or even a residential placement. The student is also entitled to receive related services that are necessary for them to benefit from their education, including counseling, social work, parent training, positive behavioral supports, social skills training, use of an aide, positive reinforcement systems, medication administration and any other non-medical services necessary for the child to benefit from education.

Some useful additional strategies for students living with mental illness can include:
• Training programs for staff and students
• Monitoring strategies
• Services to address the academic consequences of emotional and behavioral problems
• A caring/trusted adult or peer buddy to provide support
• Adjusted class schedules and extended time for homework and tests
• Possible homebound tutoring plans as needed
• Planning for homework backup plans

Parents have a right to participate in the IEP process. The IEP must be reviewed at least annually or more often if the parents or school request it. The IEP must address a student’s developmental and functional needs, based on present level of performance and measurable goals and objectives.

The IEP must be based on peer-reviewed research to the extent possible and, for children with social or behavioral issues, should include consideration of positive behavioral interventions and supports as well as supports the staff need (e.g., training on behavior management or access to a behavioral consultant). If a child is having behavioral issues, the school should consider conducting a Functional Behavioral Analysis (FBA), which helps to examine problem behaviors, and developing a Behavior Intervention Plan (BIP), which describes services and supports to help a child improve his or her behavior. If a student with an IEP is being suspended for more than ten days, the school must conduct a FBA and must develop a BIP.

Positive behavioral interventions that can be provided by schools and can be included in a BIP include the following:
• Exceptions to discipline codes
• Counseling
• Positive re-enforcement systems
• Accommodations to meet the individual needs of the student
• Behavioral and social skills training
• Staff support and/or one-on-one aides
• Use of the IEP process to clearly identify student’s behavioral challenges and needs
• Building a hierarchy of positive behavioral supports and interventions into the IEP
• Limiting the use/availability of restrictive/punitive/exclusionary measures
• Writing behavioral goals
• Finding a trusted ally in the school

Continued on page 8
Parents should learn as much as they can about the two laws, so they are sure that they and the school are making the best choice as to which law applies to the student.

Section 504 is a much less detailed law that provides protection from discrimination for children and adults with disabilities. A child is entitled to the protection of Section 504 if he or she has an identified physical or mental disability that substantially limits a major life activity, such as learning, concentrating, thinking or social interaction. Unlike IDEA, a child can qualify for the protections of Section 504 if he or she requires special education or related services. Furthermore, Section 504 has no categories or criteria for a specific type of disability or label. Although many people are unaware of it, Section 504 not only requires the provision of “reasonable accommodations,” but also requires the provision of other services necessary for a student to receive FAPE. While the Section 504 definition of FAPE is somewhat different than that under IDEA, it can also include specialized instruction and/or related services as well as accommodations. Many students who do not meet the criteria for eligibility for IDEA services may still be entitled to the services and protections of Section 504. In fact, if a child is evaluated for special education services and found not eligible, the school should also consider whether they meet the criteria for Section 504.

There are many advantages to both IDEA and Section 504 eligibility. Parents should learn as much as they can about the two laws, so they are sure that they and the school are making the best choice as to which law applies to the student.

Web-based Resources on IDEA and Section 504
- www.mattcohenandassociates.com
- www.disablethelabels.blogspot.com
- www.nami.org/caac
- www.ndrn.org
- www.nichcy.org
- www.copaa.org

More in-depth information about this topic is available in Matt’s book, A Guide to Special Education Advocacy: What Parents, Advocates and Clinicians Need to Know. To order a copy, email Matt Cohen at mdcspedlaw@gmail.com.