



# Advocates for Children of New York

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May 31, 2022

Sent Via Email

Christopher Suriano  
Assistant Commissioner of the Office of Special Education  
Education Building  
89 Washington Avenue, Room 301M  
Albany, New York 12234  
Attn: Public Comment – Emotional Disturbance  
regcomments@nysed.gov

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Re: Proposed Amendments of Sections 200.1 and 200.4 of the Regulations of the Commissioner of Education Relating to the Disability Classification “Emotional Disturbance”

Dear Assistant Commissioner Suriano,

Advocates for Children of New York, Inc. (“AFC”) appreciates the opportunity to provide written comments in response to the New York State Education Department’s (“NYSED’s”) proposed amendments to sections 200.1 and 200.4 of the Regulations of the Commissioner of Education relating to the disability classification “Emotional Disturbance” (“ED”). Our comments focus on racial disproportionality in the identification, placement, and discipline of children with ED classifications and other social-emotional, behavioral, and mental health disabilities in New York City. We believe our comments will provide NYSED relevant information and useful context as it considers new terminology for the ED classification. We also urge NYSED to go beyond nomenclature changes and take further action to eradicate racial inequities and ensure that all New York students with social, emotional, behavioral, and mental health disabilities receive the appropriate supports and services in the least restrictive school setting.

For 50 years, AFC has worked to ensure access to a high-quality education for New York students who face barriers to academic success, focusing on students of color and students from low-income backgrounds. We speak out for students who are



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most likely to struggle or experience discrimination in school because of poverty, race, disability, homelessness, immigration status, involvement in the child welfare or juvenile or criminal legal systems, or language barriers. AFC provides a range of direct services, including free individual case advocacy for families of students who are excluded, or at risk of being excluded, from school through suspension, arrest, summons, or inappropriate referral to the emergency room due to unaddressed or unsupported behavioral and mental health needs. AFC works to help these students get the behavioral, mental health, and academic support they need to succeed in school. AFC also works on institutional reform of education policies and practices through advocacy and impact litigation and advocates for positive, restorative, and trauma-informed alternatives to exclusionary, punitive discipline and police intervention.

AFC strongly supports renaming the “Emotional Disturbance” disability classification under the New York State version of the Individuals with Disabilities Education Act (“IDEA”).<sup>1</sup> The current name for the classification written into the IDEA and New York State special education law is disparaging and stigmatizing and perpetuates racialized biases against students, particularly Black students, who are disproportionately labelled as emotionally disturbed, educated in segregated classrooms, and subject to school discipline and criminalization.<sup>2</sup> In addition to being offensive and stigmatizing, the name is inaccurate and a barrier to inclusion.

We support changing the disability classification “Emotional Disturbance” to “Social/Emotional Impairment” or “Social/Emotional Disability,” which were among the most recommended names by stakeholders who engaged in discussions and surveys with NYSED and the New York City Department of Education (“NYCDOE”). These names better reflect the scope of students’ social, emotional, behavioral, and mental health disabilities and eliminate the derogatory and stigmatizing term “Disturbance.”

We are concerned that the new term recommended by NYSED, “Emotional Disability,” while an improvement over ED, does not reflect the range of characteristics exhibited by students within this classification. For example, one social characteristic of the classification under the New York and federal definition is the inability to build or maintain satisfactory interpersonal relationships with peers and teachers. Furthermore, the classification would retain the “ED” abbreviation, which could result in the continued inappropriate and derogatory reference to these students as ED students or “emotionally disturbed” students.

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<sup>1</sup> 20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(c)(4); 8 NYCRR § 200.1(z)(4).

<sup>2</sup> See Jyoti Nanda, THE CONSTRUCTION AND CRIMINALIZATION OF DISABILITY IN SCHOOL INCARCERATION, 9 Colum. J. Race & L. 265 (2019), DOI:<https://doi.org/10.7916/cjrl.v9i2.3411>.

While renaming the classification is important, there are other substantial steps that NYSED, and NYCDOE, must take to address the educational inequities facing students with social, emotional, behavioral, and mental health disabilities. The remainder of our comments focus on data and AFC's experiences indicating that New York City disproportionately identifies Black students with the ED classification, places them in highly segregated settings, and subjects them to punitive, exclusionary discipline and policing instead of providing them with the appropriate social-emotional, behavioral, mental health, and academic supports and services in the least restrictive setting.

### *Disproportionate Identification of Black Students with Emotional Disturbance Classification*

New York City disproportionately identifies Black students with the disability classification, ED. Black students are two times more likely than their non-Black peers to be identified as ED: in the 2020-2021 school year, though Black students were roughly a quarter of the overall student population, they represented 48.8% of all students classified as ED.<sup>3</sup> In the 2019-2020 school year, New York City reported that 8.8% of all Black students with disabilities attending NYCDOE schools and 5.4% of all students with Individualized Education Program ("IEPs") eligible for free/reduced-price lunch had an ED classification, compared to 3.0% of White students with disabilities and 2.8% of students not eligible for the school lunch program.<sup>4</sup> This disproportionality reflects many years of AFC's own client experiences. For instance, during the current 2021-2022 school year, for the 785 cases for which AFC collected data on our clients' race and disability classification, Black students made up 18% of all clients with disabilities, but 34% of our clients classified as ED.

The disproportionate classification of Black students as ED is cause for alarm. Both national research and our own on-the-ground experiences in New York City reveal that Black students classified as ED are more likely to be removed from the general education population.<sup>5</sup> Moreover, overrepresentation of Black students classified as ED correlates with a disparity in adverse outcomes: placement in low-track educational setting, suspension, drop-out, and juvenile and criminal legal system involvement.<sup>6</sup> Indeed, according to NYCDOE data, in the 2012-2013 school

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<sup>3</sup> Reema Amin, *To reduce stigma, New York moves to change 'emotional disturbance' label to 'emotional disability'*, Chalkbeat (Mar. 14, 2022), <https://ny.chalkbeat.org/2022/3/14/22978080/ny-emotional-disturbance-regents-state-students-with-disabilities>.

<sup>4</sup> N.Y.C. Dep't of Educ., *School-Age Special Education Data Report – SY 2019-20* (Nov. 2, 2020), <https://infohub.nyced.org/reports/government-reports/special-education-reports>.

<sup>5</sup> David Anderson et al., *Culturally Responsive Framework for Reducing Disproportionality in Special Education*, Presentation at the OSPI/WASA Special Education Workshop (Aug. 2010), [http://www.k12.wa.us/specialed/present/Culturally\\_Responsive\\_Framework.pdf](http://www.k12.wa.us/specialed/present/Culturally_Responsive_Framework.pdf).

<sup>6</sup> Daniel Losen & Kevin G. Welner, *Legal Challenges to Inappropriate and Inadequate Special Education for Minority Children*, in *RACIAL INEQUITY IN SPECIAL EDUCATION*, 167, 167-94 (Daniel Losen & Gary Orfield eds. 2002).

year, a majority of youth adjudicated as “juvenile delinquents” and placed in non-secure correctional facilities were classified as ED.<sup>7</sup>

The ambiguity and subjectivity of the New York State definition of ED allows educators and districts much discretion to classify students with ED.<sup>8</sup> Racial, cultural, and ethnic biases may also influence a student’s IEP Team when determining a student’s classification.<sup>9</sup> For example, AFC often sees students the DOE has classified as ED despite having learning disabilities, speech and language impairments, Attention Deficit Hyperactive Disorder, or other significant impairments that impede their ability to learn. In some of these instances, the student’s behavioral challenges stem from their frustration with a lack of appropriate academic interventions, a result attributable at least in part to their ED classification.

### *Deficient and Inappropriate Services, Supports, and Segregated School Placements*

New York City has struggled to educate its students with social-emotional, behavioral, and mental health disabilities, a disproportionate number of whom are Black. Further troubling is New York City data indicating that low-income Black students with emotional and behavioral disabilities are disproportionately referred to some District 75 schools, where they are segregated from their peers, heavily policed, and may not be receiving the therapeutic supports and services they need to learn, in violation of their rights under federal law. Last year, AFC released a report, “Police Response to Students in Emotional Crisis: A Call for Comprehensive Mental Health and Social Emotional Supports in Police-Free Schools,” analyzing New York City Police Department (“NYPD”)

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<sup>7</sup> Statistic reported by NYCDOE personnel at Juvenile Justice Advisory Committee, Education Subcommittee meeting on July 15, 2013.

<sup>8</sup> The New York State definition of ED lends itself to subjectivity and judgment in terms of the characteristics exhibited, the length of time exhibited, and the degree to which they are exhibited:

Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a student’s educational performance:

- (i) an inability to learn that cannot be explained by intellectual, sensory, or health factors;
- (ii) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- (iii) inappropriate types of behavior or feelings under normal circumstances;
- (iv) a generally pervasive mood of unhappiness or depression; or
- (v) a tendency to develop physical symptoms or fears associated with personal or school problems.

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

N.Y. COMP. CODES R. & REGS. tit. 8 § 200.1(zz)(4)(2014).

<sup>9</sup> See Nanda, *supra* note 2; NAT’L EDUC. ASSN, TRUTH IN LABELING: DISPROPORTIONALITY IN SPECIAL EDUCATION (2007), [http://www.nccrest.org/Exemplars/Disporportionality\\_Truth\\_In\\_Labeling.pdf](http://www.nccrest.org/Exemplars/Disporportionality_Truth_In_Labeling.pdf).



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data from the 2016-2017 to 2019-2020 school years, finding that NYPD officers, including precinct officers and school safety agents, responded to a total 12,050 incidents in which a student in emotional distress was removed from class and transported to the hospital for psychological evaluation—what the NYPD terms a “child in crisis” intervention.<sup>10</sup> Mirroring broader trends in policing, a disproportionate number of child in crisis interventions involve Black students, students with disabilities in District 75 schools, and students attending schools located in low-income communities of color. Black students and students in District 75 are not only dramatically over-represented in these incidents; they are also more likely than their peers to be handcuffed when removed from school. For example:

- At least 9.1% of all child in crisis interventions during the 2018-19 and 2019-20 school years occurred in District 75 special education schools, even though District 75 enrolled only 2.3% of City students. More than one out of every five (21.3%) students handcuffed while in crisis was a student with a disability in District 75.
- More than one out of every three (36.7%) students in emotional crisis handcuffed between July 2018 and March 2020 was a Black boy, even though Black boys comprised just 13% of enrollment. Black girls were handcuffed at twice the rate of White girls.
- Citywide, the three schools reporting the highest total number of NYPD child in crisis interventions between 2016 and 2020 were all District 75 schools: J.M. Rapport School for Career Development in the Bronx (127 interventions, 70 of which used handcuffs), I.S./P.S. 25 South Richmond High School on Staten Island (95 interventions, 22 of which used handcuffs), and Queens Transition Center (84 interventions, 19 of which used handcuffs).

The alarming regularity with which some District 75 schools employ a law enforcement response to student mental health crises is deeply concerning, especially given that these particular schools are expressly designed to serve students who have significant disabilities and require more specialized support than can be provided in a community school. By the very premise of their existence, District 75 schools—restrictive placements in which students with very high needs are largely isolated from their peers without disabilities—should be better equipped than nearly all other City schools to provide intensive behavioral and mental health supports to students who need them to be successful in the classroom. Yet the data suggest that the opposite may be true for at least some of the schools: District 75 schools segregate students with disabilities while some of them simultaneously rely on the NYPD, rather than special educators or mental health clinicians, to manage those students’ emotional and behavioral needs. By failing to provide some students in District 75 schools with needed emotional and behavioral supports through the IEP

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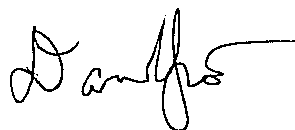
<sup>10</sup> Advocates for Children of New York, *Police Response to Students in Emotional Crisis: A Call for Comprehensive Mental Health and Social Emotional Supports in Police-Free Schools* (June 2021), [https://www.advocatesforchildren.org/sites/default/files/library/police\\_response\\_students\\_in\\_crisis.pdf](https://www.advocatesforchildren.org/sites/default/files/library/police_response_students_in_crisis.pdf).

process, the DOE may well be failing to provide these students with a free appropriate public education (FAPE), in violation of their rights under the IDEA.

This problem – placement in highly segregated and inappropriate classrooms and school buildings – is particularly acute for students with disabilities with emotional and behavioral disabilities returning from court-ordered settings. While some of these students progress academically in their court-ordered settings, their educational prospects upon release, including whether they remain in school, depends largely on the setting in which they are placed when they return to the community. Too often, the NYCDOE inappropriately funnels these students into District 75, even when they were not in District 75 prior to their placement in a court-ordered setting, or when they no longer require such restrictive placements. In our work, we see far too many students with an ED classification cycle in between schools in court-ordered settings and schools in District 75, without appropriate interventions to help them attain their educational goals.<sup>11</sup>

We look forward to working with NYSED and NYCDOE to ensure that New York students with social, emotional, behavioral, and mental health disabilities have access to a high-quality education and appropriate supports and services in the least restrictive school setting. If you have any questions, please contact me at (212) 822-9542 or [dyuster@advocatesforchildren.org](mailto:dyuster@advocatesforchildren.org).

Respectfully submitted,



Dawn L. Yuster, Esq.  
Director, School Justice Project

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<sup>11</sup> See Sarah Butrymowicz & Jackie Mader, *The “Forgotten” Part of Special Education that Could Lead to Better Outcomes for Students*, Hechinger Rep. (Dec. 16, 2017), <https://hechingerreport.org/forgotten-part-special-education-lead-better-outcomes-students/> [<https://perma.cc/85QEY3SD>] (finding that “[e]mployment rates varied considerably by disability” and “[n]early 80 percent of students with learning disabilities had jobs, compared to 45 percent of those with autism and 55 percent of those with an emotional disturbance”).