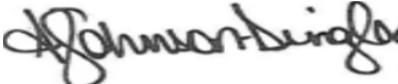




**TO:** The Honorable Members of the Board of Regents

**FROM:** Angelique Johnson-Dingle 

**SUBJECT:** Proposed Amendment of Sections 200.1 and 200.4 of the Regulations of the Commissioner of Education Relating to the Disability Classification "Emotional Disturbance"

**DATE:** June 30, 2022

**AUTHORIZATION(S):** 

**SUMMARY**

**Issue for Decision (Consent)**

Should the Board of Regents amend sections 200.1 and 200.4 of the Regulations of the Commissioner of Education relating to the disability classification "emotional disturbance"?

**Reason for Consideration**

Review of Policy.

**Proposed Handling**

The proposed amendment is submitted to the Full Board for adoption as a permanent rule at the July 2022 Regents meeting. A copy of the proposed rule is included as (Attachment A).

**Procedural History**

The proposed amendment was presented to the P-12 Education Committee for discussion at its March 2022 meeting. A Notice of Proposed Rule Making was published in the State Register on March 30, 2022, for a 60-day public comment period in accordance with the State Administrative Procedure Act (SAPA). Following publication in the State Register, the Department received comments on the proposed amendment. An Assessment of Public Comment is included as (Attachment B). No changes to the proposed amendment are recommended at this time. A Notice of Adoption will be

published in the State Register on July 27, 2022. Supporting materials are available upon request to the Secretary of the Board of Regents.

### **Background Information**

The Department recommends amendment of the special education classification of “emotional disturbance.” The Individuals with Disabilities Education Act 2004 (IDEA) is a federal law that makes available a free appropriate public education to eligible children with disabilities and ensures special education and related services to those children. Federal regulations define “child with a disability” as a child who meets one of thirteen classifications (34 CFR 300.8). One classification is “a serious emotional disturbance (referred to in this part as “emotional disturbance”) ....”. This regulation further defines the 13 classifications used in the definition of a “child with a disability,” including “emotional disturbance.”

Consistent with federal regulations, section 200.1(zz)(4) of the Commissioner’s regulations defines “emotional disturbance” as follows:

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 child’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 general pervasive mood of unhappiness or depression; or
- (v) a tendency to develop physical symptoms or fears associated with personal or school problems.

The term emotional disturbance includes schizophrenia. The term does not apply to socially maladjusted children unless it is determined that they have an emotional disturbance.

Committees on special education (CSE) are required to identify a disability classification on students’ individualized education programs (IEPs). However, special education and related services must be based solely on the student’s individual needs, not the student’s classification.

A survey of the 50 states reveals a range in the terminology used for the classification of emotional disturbance. Seven different terms are used by states as follows:

- The term “emotional disturbance” or “serious emotional disturbance” is used by 27 states, including New York State;
- “Emotional disability” or “serious emotional disability” is used by 13 states;

- A variation of “emotional/behavioral disability or disorder” is used by six states;
- “Emotional impairment” is used by two states;
- “Behavior disorder” is used by one state; and
- “Emotional regulation impairment” is used in one state.

The five territories of the United States use the terms emotional disturbance or serious emotional disturbance and emotional disabilities. Please see (Attachment C) for additional information specific to the terms used in other states and territories.

In January 2020, the Board of Regents discussed replacing the term “emotional disturbance” in section 200.1(zz)(4) of the Commissioner’s regulations. At that time, it was recommended that the Department seek stakeholder input on suggestions for replacement terminology. These efforts were delayed due to the COVID-19 pandemic. Beginning in spring 2021, the Office of Special Education (OSE) engaged stakeholders in a discussion regarding a change to the term “emotional disturbance.” OSE consulted with the following organizations:

- The Commissioner’s Advisory Panel for Special Education Services;
- OSE’s Youth Advisory Panel;
- The Statewide Network for Special Education;
- The Staff/Curriculum Development Network of New York State;
- The Council of Administrators of Special Education;
- The Long Island Association of Special Education Administrators; and
- Advocacy and parent organizations with coordination from the New York City Department of Education (NYCDOE)

The overwhelming consensus was that the term “disturbance” has a negative connotation and should not be used in New York State. In these discussions, the most frequently mentioned replacement terms included emotional disability, emotional dysregulation disability, emotional behavioral dysregulation, social-emotional impairment, and emotional health impairment.

In October 2021, in consultation with the New York City Department of Education, OSE issued a Survey on Changing the Name of the Disability Classification: Emotional Disturbance, seeking suggestions from the public for replacement terminology. The survey was posted online from October 8 through November 12, 2021. OSE received 1,098 responses. When completing the survey, stakeholders were asked to select all of the constituency group(s) they represent. Of the respondents, 25 percent were a parent or family member of a child with a disability, individual with a disability, or a student with a disability who had an IEP. Please see (Attachment D) for additional details on the various constituencies of respondents.

Additionally, approximately 89 percent of respondents indicated that the term emotional disturbance had a negative connotation and supported a change in terminology. From a list of five potential replacement terms, (i.e., emotional disability,

emotional dysregulation disability, emotional/behavioral dysregulation, social-emotional impairment, and emotional health impairment), the top three proposed terms that were ranked first by stakeholders on a survey were emotional/behavioral dysregulation, social-emotional impairment, and emotional disability. Other suggested terms included emotional behavioral impairment, emotional behavioral disability, behavioral impairment, mental health impairment, mental health disability, social-emotional disability, and emotional regulation disability.

In response to stakeholder engagement discussions, the survey results, and the review of replacement terms used by other states and territories, the Department proposes to amend sections 200.1(zz) and 200.4(j) of the Commissioner's regulations to replace the term "emotional disturbance" with "emotional disability."

### **Related Regents Items**

March 2022: [Proposed Amendments of Sections 200.1 and 200.4 of the Regulations of the Commissioner of Education Relating to the Disability Classification "Emotional Disturbance"](https://www.regents.nysed.gov/common/regents/files/322p12d3.pdf)

(<https://www.regents.nysed.gov/common/regents/files/322p12d3.pdf>)

January 2020: [Special Education Disability Classification "Emotional Disturbance"](https://www.regents.nysed.gov/common/regents/files/120p12d1.pdf)

(<https://www.regents.nysed.gov/common/regents/files/120p12d1.pdf>)

### **Recommendation**

It is recommended that the Board of Regents take the following action:

VOTED: That sections 200.1 and 200.4 of the Regulations of the Commissioner of Education be amended, as submitted, effective July 27, 2022.

### **Timetable for Implementation**

If adopted at the July 2022 meeting, the proposed amendment will become effective on July 27, 2022.

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 207, 305, 4402, and 4403 of the Education Law.

1. Paragraphs (1), (4), and (6) of subdivision (zz) of section 200.1 of the Regulations of the Commissioner of Education are amended to read as follows:

(1) *Autism* means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects a student's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. The term does not apply if a student's educational performance is adversely affected primarily because the student has an emotional [disturbance] disability as defined in paragraph (4) of this subdivision. A student who manifests the characteristics of autism after age 3 could be diagnosed as having autism if the criteria in this paragraph are otherwise satisfied.

(4) *Emotional [disturbance] disability* 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] disability.

(6) *Learning disability* means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which manifests itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, as determined in accordance with section 200.4(j) of this Part. The term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The term does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of an intellectual disability, of emotional [disturbance] disability, or of environmental, cultural, or economic disadvantage.

2. Subparagraph (ii) of paragraph (3) of subdivision (j) of section 200.4 of the Regulations of the Commissioner of Education is amended to read as follows:

(ii) The CSE determines that its findings under this paragraph are not primarily the result of a visual, hearing, or motor disability; an intellectual disability; emotional [disturbance] disability; cultural factors; environmental or economic disadvantage; or limited English proficiency.

3. Clause (f) of subparagraph (i) of paragraph (5) of subdivision (j) of section 200.4 of the Regulations of the Commissioner of Education is amended to read as follows:

(f) the determination of the CSE concerning the effects of a visual, hearing, or motor disability; an intellectual disability; emotional [disturbance] disability; cultural factors; environmental or economic disadvantage; or limited English proficiency on the student's achievement level; and

ASSESSMENT OF PUBLIC COMMENT

Following publication of the Notice of Emergency Adoption and Proposed Rule Making in the State Register on March 30, 2022, the State Education Department (Department) received the following comments on the proposed amendment:

1. COMMENT:

The majority of commenters supported the proposed change to replace the term “emotional disturbance” in section 200.1(zz)(4) of the Commissioner’s regulations. Supportive commenters expressed the following sentiments: previous classification “emotional disturbance” was detrimental to students and change is long overdue; term “emotional disability” is a welcome change to options for classifying students; “emotional disturbance” has negative connotations and contributes to eligibility determinations informed by factors unrelated to educational abilities; current classification is disparaging and stigmatizing, perpetuates racialized biases against students—particularly African American students, who are disproportionately labelled as emotionally disturbed, educated in segregated classrooms and subjected to school discipline and criminalization—and is a barrier to inclusion; change has potential to more accurately describe the experiences of vulnerable students (e.g., students in foster care), many of whose emotional and behavioral challenges did not necessarily stem from a “disturbance” but a disability triggered by trauma and challenging life experiences; change will help remove the negative connotation associated with the set of behaviors the term is used to describe; “emotional disturbance” contributes to eligibility determinations informed by factors unrelated to the student’s educational

abilities; change will help remove a long-standing stigma and benefit many students in the future; since "emotional disturbance" is triggering for students and their parents, many districts instead classify students as "other health impaired" (OHI); "disturbed" carries a negative connotation, implying a problem that cannot be overcome and is detrimental to students; people have come to understand "disabled" to mean "differently abled," which means that students still are capable of functioning and learning in spite of emotional trauma; current label contributes to students' negative self-perceptions and can be dehumanizing; while simply changing the term "emotional disturbance" to "emotional disability" will not, on its own recognize or address the challenges and experiences of students, it will situate emotional and behavioral challenges among the other disability classifications in a way that describes students' experiences instead of defining their identities.

#### DEPARTMENT RESPONSE:

The Department appreciates the supportive comments. Since the comments are supportive in nature, no change to the proposed rule is necessary.

#### 2. COMMENT:

Some commenters who supported replacing the disability classification "emotional disturbance" disagreed with the replacement term, "emotional disability," and asked the Department to reconsider its choice.

One commenter stated the following: "Emotional disability" is a significant improvement over the antiquated "emotional disturbance;" however, it may not be sufficient to undo the stigma associated with this disability classification and may lead to further stigmatization of students with social/emotional challenges. The change may not

have a positive effect as classification would retain the “ED” abbreviation and may not register as a significant change resulting in the continued inappropriate and derogatory reference to students with emotional dysregulation issues students as “ED students” or “emotionally disturbed” students. Additionally, it will obviate the need to make alterations to systems (e.g., classification still entered as “ED” in record systems), sidestepping an important action required for individuals to cognitively absorb that there has been a change and may lead to further stigmatization of students with social/emotional challenges. "Disability" is not a precise descriptor for the students identified under this disability category. Although some stakeholders preferred "disability" because it pertains to a protected class, regardless of the name, students with the classification will be considered students with disabilities. Some commenters additionally recommended that the Department solicit the opinion of psychologists or neuropsychologists on this issue.

Another commenter recommended that, based on the results of the Department’s survey, the Department should recommend the classification “emotional health impairment” or “social/emotional impairment.” The commenter further asserted that “Impairment” appropriately focuses on the impact on student learning, rather than labeling the student in general and more closely aligns with how the IDEA and the Department describe other disability classifications (i.e., Other Health Impairment (OHI), Speech and Language Impairment, Visual Impairment, Hearing Impairment, and Orthopedic Impairment). The classification at issue is the emotional equivalent to OHI in that both are umbrella classifications that encompass a range of conditions. The commenter opined that “Emotional health impairment” provides a more accurate

phrasing, is similar to the less stigmatizing OHI disability classification, and more accurately reflects the spectrum of possible underlying issues. The commenter further predicted that “emotional health impairment” or “social/emotional impairment” would help combat stigmatizing labels and cause no harm or burden on schools, school districts, teachers, administrators, or others.

Another commenter stated that “emotional disability,” while an improvement over ED, does not reflect the range of characteristics exhibited by students who have received this classification. The commenter supports changing the disability classification “to “social/emotional impairment” or “social/emotional disability,” which were among the most recommended names by stakeholders in the Department’s survey and discussions with the New York City Department of Education (“NYCDOE”), as these names reflect the scope of emotional, behavioral and mental health disabilities and eliminate the derogatory and stigmatizing term “disturbance.” The commenter opined that “social/emotional impairment” is a preferable alternative since for many students, the nature of their disability depends in part on their interactions with the world around them (the “social” portion); it also reflects a “social” model of disability in lieu of a “medical” model and would help schools realize their role in helping a student with this disability classification. The commenter suggested using “emotionally impaired” or “emotional dysfunction.”

#### DEPARTMENT RESPONSE:

The proposed change to replace the term “emotional disturbance” with “emotional disability” is intended to address issues of respect and dignity for individuals with disabilities and to offset the negative connotation that is associated with the term

“emotional disturbance.” The Department’s recommendation to replace the term “emotional disturbance” with “emotional disability” was made in response to stakeholder engagement discussions, the survey results, and the review of replacement terms used by other states and territories. The overwhelming consensus to the Department’s stakeholder engagement discussions and online survey was that the term “emotional disturbance” had a negative connotation and supported a change in terminology. From a list of five potential replacement terms, (i.e., emotional disability, emotional dysregulation disability, emotional/behavioral dysregulation, social-emotional impairment, and emotional health impairment), the three proposed terms that were most frequently ranked first on the survey by stakeholders, which included psychologists and school psychologists, were “emotional/behavioral dysregulation,” “social-emotional impairment,” and “emotional disability.” Based on a review of the terminology used by other states, “emotional disability is used by 10 of the 26 states that do not use “emotional disturbance/serious emotional disturbance,” making this the second most frequently used term in the country for this disability classification. The Department considered the proposed alternatives but, based upon the above, ultimately selected to “emotional disability.” Therefore, no changes to the proposed rule are necessary.

### 3. COMMENT:

A commenter stated that the ambiguity and subjectivity of the definition of emotional disturbance allows educators and districts too much discretion. The commenter further suggests that racial, cultural, and ethnic biases may influence a student’s individualized education program (IEP) Team when determining a student’s classification.

#### DEPARTMENT RESPONSE:

New York's definition of "emotional disturbance" in section 200.1(zz)(4) of the Commissioner's Regulations is consistent with the definition of the term in federal regulations [34 Code of Federal Regulations (CFR) section 300.8(b)(4)]. In the Analysis of Comments and Changes to the 2006 federal regulations implementing the IDEA (34 CFR Part 300), the U.S. Department of Education, Office of Special Education indicated that "Historically, it has been very difficult for the field to come to a consensus on the definition of emotional disturbance, which has remained unchanged since 1977" and declined to make any changes to the definition of emotional disturbance in response to public comment. The proposed amendment of section 200.4(zz)(4) of the Commissioner's regulations does not make any revisions to the current definition of "emotional disturbance" in the Commissioner's Regulations and, as such, the comment is outside the scope of the proposed amendment. Therefore, no changes to the proposed rule are necessary.

#### 4. COMMENT:

A commenter stated that there are other substantial steps that must be taken to address the educational inequities facing students with social, emotional, behavioral, and mental health disabilities. The commenter expressed their hope that the Department will further assist local educational agencies (LEAs) expand their understanding of student experiences and needs during the IEP development process and provide additional guidance to LEAs about making classification determinations and crafting IEP supports to include consideration of any adverse childhood experiences and trauma. The commenter additionally recommended that the Department consider

collecting, and making available, special education classification data of students with disabilities at the LEA and state level, disaggregated by race, gender, and student group. The commenter further recommended that the Department publicly report on the types of school settings where students with IEPs are served, disaggregated by disability classification and least restrictive environment, and cross-tabulated by race, gender, and English Language Learner status. The commenter urges NYSED to go beyond changes in nomenclature 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.

**DEPARTMENT RESPONSE:**

The comments go beyond the scope of the proposed rulemaking. The Department will consider these recommendations in the development of future guidance and decisions regarding the posting of public data. Thus, no changes to the proposed rule are needed.

**Attachment C**

## Terminology Used by States and Territories for the Term Emotional Disturbance

<b>State</b>	<b>Terminology</b>
Alabama	Emotional Disability
Alaska	Emotional Disturbance
Arkansas	Emotional Disturbance
Arizona	Emotional Disability
California	Emotional Disturbance
Colorado	Serious Emotional Disability
Connecticut	Emotional Disturbance
Delaware	Emotional Disability
Florida	Emotional/Behavioral Disability
Georgia	Emotional and Behavioral Disorder
Hawaii	Emotional Disability
Idaho	Emotional Behavioral Disorder
Illinois	Emotional Disability
Indiana	Emotional Disability
Iowa	Behavior disorder (or emotional disturbance)
Kansas	Emotional Disturbance
Kentucky	Emotional-Behavioral Disability
Louisiana	Emotional Disturbance
Maine	Emotional Disturbance
Maryland	Emotional Disability
Massachusetts	Emotional Impairment
Michigan	Emotional Impairment
Minnesota	Emotional or Behavioral Disorders
Mississippi	Emotional Disability (also referred to as serious emotional disturbance)
Missouri	Emotional Disturbance
Montana	Emotional Disturbance
Nebraska	Emotional Disturbance
Nevada	Emotional Disturbance
New Hampshire	Emotional Disturbance
New Jersey	Emotional Regulation Impairment
New Mexico	Emotional Disturbance
New York	Emotional Disturbance
North Carolina	Emotional Disability or Serious Emotional Disability

<b>State</b>	<b>Terminology</b>
North Dakota	Emotional Disturbance
Ohio	Emotional Disturbance
Oklahoma	Emotional Disturbance
Oregon	Emotional Disturbance
Pennsylvania	Emotional Disturbance
Rhode Island	Emotional Disturbance
South Carolina	Emotional Disability
South Dakota	Emotional Disturbance
Tennessee	Emotional Disturbance
Texas	Emotional Disturbance
Utah	Emotional Disturbance
Vermont	Emotional Disturbance
Virginia	Emotional Disability
Washington	Emotional/Behavioral Disability
West Virginia	Emotional/Behavioral Disorder
Wisconsin	Emotional Behavioral Disability
Wyoming	Emotional Disability

<b>U.S. Territories</b>	<b>Terminology</b>
American Samoa	Emotional Disturbance
Guam	Emotional Disabilities
Puerto Rico	Emotional Disturbance (“Disturbio Emocional”)
Northern Mariana Islands	Serious Emotional Disturbance/Emotional Disturbance
U.S. Virgin Islands	Emotional Disturbance

Updated 12/17/21

**Changing the Term Emotional Disturbance  
Survey Participants (Stakeholders) Summary  
November 2021**

<b>Stakeholder Constituency</b>	<b>Number</b>
Advocate/Advocacy Organization	77
Behavior Specialist	2
Community Organization Member	15
Committee on Preschool Special Education (CPSE)/Committee on Special Education (CSE) Chairperson	6
District or Program Administrator	142
Educational Organization/Provider/Association	48
General Education Teacher	46
Impartial Hearing Officer	2
Individual with a Disability	54
Institution of Higher Education Faculty	29
Institution of Higher Education Administrator	2
Mental Health Specialist	3
Other School or District Staff	289
Paraprofessional	6
Parent Attorney	1
Parent or Family Member of a Child with a Disability	356
Parent	2
Psychologist	10
Related Service Provider	206
School Nurse	2
School Psychologist	43
Social Worker/Counselor	4
Special Education Administrator	138
Special Education Teacher	203
State Agency Employee	29
Student	1
Student with an Individualized Education Program (IEP)	46
<b>Total</b>	<b>1762</b>

When completing the survey, stakeholders were asked to select all of the constituency group(s) they represent. They could select all that apply and/or write in their constituency group. Those highlighted in the chart above were the constituency groups that were listed in the survey. Those not highlighted were write-in constituencies. There were 1,762 stakeholder constituencies associated with 1,091 of the 1,098 survey respondents. Seven respondents didn't check any stakeholder identity. Of the respondents, 25.8 percent were a Parent or Family Member of a Child with a Disability, Individual with a Disability, or a Student with an Individualized Education Program (IEP).