

## MEMORANDUM

TO: Superintendents and Special Education Administrators  
FROM: Jacqui Kelleher, Vermont Agency of Education, Special Education Director  
SUBJECT: Regulation Changes for July 2022 - Adverse Effect  
DATE: January 3, 2022

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### Background

Neither federal nor state law defines the term “adversely affect educational performance.” Courts have interpreted the phrase to mean that education is adversely affected if, without certain services, the child’s condition would prevent them from performing academic and nonacademic tasks and/or from being educated with non-disabled peers. [Yankton School District v. Schramm, 93 F.3d 1369 (8th Cir. 1996).]

In the early 1990’s, the Vermont Legislature amended the rules regarding special education determination to require that, for a student to be eligible for special education and related services, a student with a disability must also demonstrate an adverse effect to the degree that the student fell in the lowest 15th percentile of their grade level peers on three individual measures of at least one basic skill. Vermont became the first, and only, state that adopted such an operational definition of adverse effect. The stated purpose of the rule change then was to establish the consistent application of eligibility standards across the state.

In July of 2022, Vermont will be returning to an eligibility definition of adverse effect in line with most other states, a definition which relies on evidence-based results, student continuous progress measures, as well as other examples of student work, including the effect of functional skill deficits, which demonstrates that the student’s disability has a negative impact on their basic skill, or basic skills, development. Rather than wait until students fall into the lowest 15th percentile of their grade level peers, earlier identification can be made, resulting in the provision of more timely and appropriate supports and services for students in need. With this change, the Vermont Agency of Education predicts that the discussion of when and how students most appropriately get their educational and functional skill needs met becomes the focus rather than meeting an operational standard. To this end, in addition to the basic educational skill areas, the new regulation includes functional performance as a basic skill for Evaluation and Planning Teams (EPT) to consider when documenting adverse effect for a student.

Federal special education law also distinguishes between “educational” performance and “academic” performance and establishes that “educational” performance is a broad concept. For

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example, children must be assessed by schools in all areas of suspected disability. [20 U.S.C. Sec. 1414(b)(3)(B).] Those areas are defined by federal regulations to include: health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. [34 C.F.R. Sec. 300.304(c)(4).] Academic performance is only one of the areas in which children must be assessed. This position is clarified by the Office of Special Education Programs (OSEP) in a March 8, 2007, Letter to Clark, 48 IDELR 77 where "educational performance" as used in the IDEA and its implementing regulations is defined as not limited to academic performance.

In addition to grades and standardized tests scores, schools must consider how a child's emotional, health or other conditions adversely affect their non-academic performance in social, behavioral and other domains as well. Adverse effect on educational performance cannot, therefore, be based solely on discrepancies in age or grade level performance in academic subject areas. Rather, when determining if a student's disability has an adverse effect on educational performance, EPTs must consider all aspects of the child's functioning at school, including academic, social/emotional, cognitive, communication, vocational and independent living skills. For example, an adverse effect can be manifested through behavioral difficulties at school; impaired or inappropriate social relations; impaired work skills, such as being disorganized, tardy; having trouble getting to school on time; and difficulty with following the rules.

### **Changes to Vermont Rule 2362 Adverse Effect: (*effective July 1, 2022*)**

#### **Eligibility for Children Ages Six Years through Twenty- One (34 CFR § 300.306)**

*(The changes to the current regulation are underlined in bold type.)*

- (a) A child shall be eligible for special education if:
- (1) He or she has one or more of the disabilities described in Rule 2362.1; and
  - (2) Except for the disability categories of Deaf-Blindness and Specific Learning Disability, the disability results in an adverse effect on the child's educational performance in one or more of the basic skill areas as described in subsection (f), below; and
  - (3) The student needs special education services to access and benefit from his or her educational program and this support cannot be provided through the educational support system, standard instructional conditions or supplementary aids and services provided in the school.
- (b) The three criteria listed in section (a) above shall also be applied at the time the student receives a re-evaluation to determine eligibility.
- (c) A formal evaluation process, documented in a report as required by Rule 2362.2.65, shall be used to determine whether the above criteria are met.
- (d) Adverse Effect.

- (1) In this section, “adverse effect” and to “adversely affect” are used interchangeably and mean to have a negative impact on the basic skills areas. This impact does not need to be substantial, significant, or marked. It is more than a minor or transient hindrance, evidenced by findings and observations based on data sources and objective assessments with replicable results. An adverse effect on educational performance does not include a developmentally appropriate characteristic of age/grade peers in the general population.
  - (2) The EPT must identify areas of adverse effect due to disability in the basic skills areas using a range of diagnostic and performance data appropriate to the student where the disability category requires a finding of adverse effect. The EPT and IEP Team will consider academic and nonacademic aspects of the child’s functioning.
  - (3) The documentation of adverse effect on educational performance must also substantiate that the educational deficiencies persist or will persist over time in spite of specific alternative strategies that are provided within the general education setting. The EPT should document evidence that scientific, research-based interventions have been implemented with fidelity. The EPT will consider these efforts and their impact when determining adverse educational performance.
- (e) A child may not be determined to be eligible under these rules if the determinant factor for that eligibility decision is lack of instruction in reading, including the essential components of reading instruction (phonemic awareness, phonics, fluency including oral reading skills, vocabulary development, reading comprehension strategies), or math, or limited English proficiency; and the child does not otherwise meet the eligibility criteria of these rules.
- (f) If a child has a disability that results in an adverse effect on his or her educational performance in one or more of the basic skills, the EPT shall, in the following order:
- (1) Consider the interventions, services, and accommodations the student may need, and
  - (2) Determine and provide justification that the student requires specially designed instruction that cannot be provided within the school's standard instructional conditions or provided through the school's educational support system.
- (g) Basic skill areas—
- (1) Unless otherwise specified in the disability category in these rules, basic skill areas are:
    - (i) Oral expression;
    - (ii) Listening comprehension;

- (iii) Written expression;
- (iv) Basic reading skills;
- (v) Reading comprehension;
- (vi) Mathematics calculation;
- (vii) Mathematics reasoning;
- (viii) Motor skills;
- (ix) **Functional skills**

- (2) For an individual with a sensory impairment, one or more comparable basic skills shall be considered to serve as an appropriate substitute for one or more of the above basic skills, for example, Braille skills for basic reading skills.
- (3) The screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services.
- (4) **“Functional skills” means the acquisition of essential and critical skills needed for children with disabilities to learn specific daily living, personal, social, and employment skills or the skills needed to increase performance and independence at work, in school, in the home, in the community, for leisure time and for post-secondary and other life-long opportunities.**

Vermont continues to require a three-gate eligibility determination process.

- Gate 1: The student has a disability according to the established criteria;
- Gate 2: The student’s condition adversely affects educational performance; and
- Gate 3: The student needs specially designed instruction.

Although the new regulation no longer requires the documentation of three measures of adverse effect for a basic skill area, those measures, such as grades, performance on individual and group assessments, continuous progress monitoring, attendance, observations, clinical judgment from qualified experts, and samples of student work, should continue to be used to substantiate an adverse effect. Indicators of educational performance can include present and past grades, report cards and reports of progress (social emotional and/or academic), achievement test scores and measures of ongoing classroom performance such as curriculum-based assessment (formative and summative assessments), work samples and data relative to responses to interventions. This information will continue to be provided collaboratively between special education and general education staff. The appropriateness of the school district's educational goals, as reflected in the curriculum and in the formal grading reports, should also be considered.

Various types of standards must be applied when making judgments about student progress to determine what constitutes adverse effect on educational performance. . While determining a student's cognitive abilities and level of academic achievement may be useful, the focus should be placed on the student's overall performance in school and his or her response to interventions as illustrated in the data resulting from progress monitoring activities. Some students attain adequate achievement test scores, but do not demonstrate appropriate academic progress; for example, when a severe and chronic pattern of failing to persevere with tasks and complete classroom assignments leads to repeated failure in subject matter courses. In this case, the student's resulting failure in subject matter courses can be considered an adverse effect. However, it must also be noted, that 34 C.F.R. Section 300.101(c) states that a free and appropriate public education (FAPE), must be available to any child with a disability who needs special education and related services, even if the child has not failed or been retained in a course or grade and is advancing from grade to grade.

Two important aspects of adverse effect remain as AOE guidance. Firstly, all basic skill areas of concern identified in the EPT's Evaluation Plan must be addressed in either the adverse effect section or the Need section of the Evaluation Report. In order for the student to continue on the path towards eligibility, at least one of the basic skill areas must have the adverse effect documented in the Evaluation Report. However, all basic skill areas of concern identified in the Evaluation Plan must be documented in the Adverse Effect section of the Evaluation Report until either one basic skill area has a documented adverse effect, or all the basic skill areas of concern have been documented as not proving an adverse effect in the Evaluation Report.

The Vermont Agency of Education will be issuing additional guidance throughout this school year regarding the documentation of adverse effect, changes to the State's Evaluation Planning Team Form 2, and revised adverse effect criteria worksheets that EPTs can use in the documentation of adversely affected educational and functional performance.