

2362 Eligibility for Children Ages Six Years through Twenty One (34 CFR §300.306)

(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;

(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 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 2362.2.5, shall be used to determine whether the above criteria are met.

(d) Adverse Effect.

(1) To conclude that a disability has an adverse effect on the student's educational performance, the EPT shall determine and document that, To "adversely affect" means to have a negative impact that is more than a minor or transient hindrance, evidenced by findings and observations based on multiple 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) Adverse effect on educational performance cannot be based solely on discrepancies in age or grade level performance in academic subject areas. Rather, when determining if the manifestation of the student's disability has an adverse effect on educational performance, the EPT and IEP Team will consider all aspects of the child's functioning at school, including academic, social/emotional, cognitive, communication, vocational and independent living skills.

(3) An adverse effect can be manifested through behavioral difficulties at school; impaired or inappropriate social relations; impaired work skills, such as being disorganized; having trouble getting to school on time; and difficulty with following the rules.

(4) The documentation of adversely affected educational performance must also substantiate that the educational deficiencies persist over time in spite of specific alternative strategies that have been 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.

Commented [SE1]: DLP disagrees with this specific language and suggests the following instead, striking the subsequent paragraphs:
“(d) 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. Determination of adverse effect must consider not only impact on basic skills areas, but should also be aligned to the proficiencies expected of all Vermont students prior to graduation.”

Commented [SE2]: “multiple data sources” – VCSEA suggestion

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~~as a result of his or her disability, the student is~~

~~functioning significantly below grade norms compared to grade peers in one or more of the basic skills defined in Rule 2362(g).~~

~~(2) "Significantly below grade norms" means the 15th percentile or below, or a 1.0 standard deviation or more below the mean, or the equivalent, as reflected by performance on at least three of the six following measures of school performance, generally over a period of time:~~

~~(i) Individually administered nationally normed achievement test;~~

~~(ii) Normed group administered achievement tests, including nationally normed curriculum based measures;~~

~~(iii) Grades;~~

~~(iv) Curriculum based measures which could include benchmark assessments and continuous progress monitoring outcomes;~~

~~(v) Criterion referenced or group administered criterion referenced assessments;~~

~~(vi) Student work, language samples or portfolios.~~

~~(3) With respect to each basic skill considered, the EPT shall specifically identify in its report:~~

~~(i) Each type of measure considered by the Team;~~

~~(ii) The finding of the Team, with respect to each measure considered, as to whether and why the measure met (or did not meet) the 15th percentile, 1.0 standard deviation, or equivalent standard, in order to support a finding of adverse effect;~~

~~(i) The specific testing data/scores, student work, and/or education records relied upon by the Team to support its finding under subparagraph (ii) that a measure did or did not meet the standard; and~~

~~(iv) A statement of each basic skill area in which the disability was determined to have an adverse effect, based upon (i) - (iii).~~

~~(5) The EPT shall document its findings and observations on a form developed by the Agency of Education.~~

(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

Commented [SE4]: DLP suggests the AOE will need to make revisions to the Maine form

Commented [SE5]: VCSEA opposes a required form

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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. The evaluation procedures used to measure a child's functional skills must meet the same standards as all other evaluation procedures [described in IDEA at §300.304(c)(1)]. (71 Fed. Reg. at 46661)

Commented [SE6]: DLP suggests adding “, aligned to state standards”

Commented [SE7]: DLP suggests adding transferrable skills and social emotional skills, as well as functional performance

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Commented [SE8]: DLP suggests adding the following :
“Functional performance” 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.”

Commented [SE9]: VCSEA objects to this first sentence.

The meaning of “functional performance,” refers to “skills or activities that are not considered academic or related to a child’s academic achievement” and “is often used in the context of routine activities of everyday living.” These skills typically include things like but not exclusively:

Commented [SE10]: DLP suggests striking this paragraph and list

- dressing, eating, going to the bathroom;
- social skills such as making friends and communicating with others;
- behavior skills, such as knowing how to behave across a range of settings; and
- mobility skills, such as walking, getting around, going up and down stairs.

***** intervening text of rules omitted in this working draft*****

2362.2.5 Additional Procedures for Identifying Children With Specific Learning Disabilities (34 CFR §§300.307-300.311)

(a) In making the determination that a student has a specific learning disability the LEA shall decide whether to use ~~a discrepancy model or~~ a model based on whether the student responds to scientific, research-based intervention ~~or to use a model based on other alternative research-based procedures for determining whether a child has a specific learning disability.~~

~~(1) When using a discrepancy model, the EPT shall document that the student exhibits a discrepancy of 1.5 standard deviations or greater between ability and expected levels of performance in one or more of the basic skill areas.~~

(1) Eligibility determinations for a student who is determined to have a specific learning disability shall not be required to include an assessment of adverse effect as outlined in 2362(d).

(2) When using a model based on whether the student responds to scientific, research based intervention the EPT shall document use of the following:

(i) High-quality instruction and scientific research-based tiered interventions aligned with individual student need;

(ii) Frequent monitoring of student progress to make results-based academic decisions; and

(iii) Use of student response data to evaluate the effectiveness of interventions.

(b) The determination of whether a student has a specific learning disability shall be made by the student’s parents and a team of qualified professionals, which shall include:

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(1) The child's general education teacher; or

(i) If the child does not have a general education teacher, a classroom teacher qualified to teach a child of his or her age; or

(2) For a child of less than school age, an individual licensed by the Vermont Agency of Education to teach a student of his or her age; and

(3) At least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, special education teacher or remedial reading teacher.

(c) The EPT may determine that a student has a specific learning disability if:

(1) When provided with learning experiences and instruction appropriate for the student's age or State-approved grade-level standards, the student does not achieve adequately in one or more of the following areas:

(i) Oral expression.

(ii) Listening comprehension.

(iii) Written expression.

(iv) Basic reading skill.

(v) Reading fluency skills.

(vi) Reading comprehension.

(vii) Mathematics calculation

(viii) Mathematics problem solving

(2) The student does not make sufficient progress to meet age or State approved grade level standards in one or more of the areas identified in (c)(1) when using ~~either a discrepancy~~

~~model or~~ a model based on whether the student responds to scientific, research based intervention.

(3) The EPT determines that its findings under paragraphs (c)(1) and (2) of this section are not primarily the result of:

(i) A visual, hearing, or motor disability;

(ii) Intellectual Disability;

(iii) Emotional disturbance;

Commented [SE11]: Strike this language per DLP

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(iv) Cultural factors;

(v) Environmental or economic disadvantage; or

(vi) Limited English proficiency.

(d) To ensure that underachievement in a student suspected of having a specific learning disability is not due to lack of appropriate instruction in reading or math, the EPT shall consider, as part of the evaluation, the following:

(1) Data that demonstrate that prior to, or as a part of, the referral process, the student was provided appropriate instruction in general education settings, delivered by qualified personnel; and

(2) Data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the student's parents.

(e) The LEA shall promptly request parental consent to evaluate the student to determine if the student needs special education and related services, and shall adhere to the timeframes described in Rule 2362.2.1 unless extended by mutual written agreement of the student's parents and other members of the EPT if:

(1) Prior to a referral, a student has not made adequate progress after an appropriate period of time when provided scientifically research based instruction/intervention; and

(2) Whenever a student is referred for an evaluation.

(f) At least one member of the child's EPT, other than the child's current teacher, who is trained in observation, shall observe the child, and the learning environment, including the general classroom setting, to document academic performance and behavior in the areas of difficulty.

(1) Students who are enrolled in a program of home study or who receive instruction delivered in a home, hospital, preschool, childcare setting or other out of school setting shall be observed in instructional environments appropriate for children of that age, by trained personnel who are not the teacher. This observation shall be reported in writing to the EPT.

(2) If, after reasonable efforts have been made, it is not possible to conduct a classroom observation due to chronic truancy or other extenuating circumstances, there shall be documentation of efforts made to observe the student in an instructional environment

*** intervening text of rules omitted in this working draft***

2363.7 Content of IEP (34 CFR §300.320)

An IEP that contains information under one component need not repeat the same information under another component. The IEP for each child with a disability shall include:

(a) A statement of the child's present levels of academic achievement and functional performance, including:

- (1) The child's abilities, acquired skills, and strengths;
- (2) How the child's disability affects the child's involvement and ability to make progress in the general curriculum; or
- (3) For preschool children, how the disability affects the child's participation in activities appropriate for the child;
- (4) For children, not later than one year before the child reaches the age 18, a statement that the child has been informed of their rights under these regulations that will transfer to them upon reaching the age of majority (18).

(b) Measurable annual goals related to the child's present levels of academic and functional performance which shall:

- (1) Be written as measurable short-term objectives or benchmarks with projected dates for accomplishment, including a description of the evaluation procedures to be used to measure the child's progress towards meeting the short-term objectives or benchmarks;
- (2) Enable the child to be involved in and progress, to the extent appropriate, in the same curriculum as children without disabilities. For preschool children, goals shall include participation in activities appropriate for children without disabilities;
- (3) Enable the child to meet other educational needs that result from his or her disability;
- (4) Be accompanied by a method of reporting the child's progress to the parents at least as often as other parents in the school receive progress reports. A progress report shall inform parents of:
 - (i) Their child's progress toward the annual goals; and
 - (ii) The extent to which the progress is sufficient to enable the child to achieve the goals by

Commented [SE12]: DLP suggests inserting "including the specific data that will be used to assess goals progress, using pertinent data to inform the development of appropriate goals and objectives" and striking the rest of the sentence

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the end of the year.

(c) Special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of individual accommodations, program modifications, or supports that will be provided for school personnel to enable the child:

- (1) To advance appropriately toward attaining his or her IEP annual goals;
 - (2) To be involved in and progress in the general curriculum, to participate in extra-curricular and other non-academic activities and in physical education services pursuant to the requirements in Rule 2360.2.
 - (3) To be educated and participate with a variety of children who do and do not have disabilities.
- (d) The projected date for the beginning of the services and modifications, the title of the service provider, anticipated frequency, location, and duration of those services and modifications;
- (e) The IEP Team shall determine the child's placement in accordance with Rule 2364.3. The IEP shall also include an explanation of the extent, if any, to which the child will not participate with children without disabilities in a general education class, general curriculum, extracurricular and other non-academic activities;
- (f) Where the student's placement is a residential placement pursuant to Rule 2366.9, the student's IEP shall contain annual goals and short-term objectives or benchmarks designed to reintegrate the student into a local LEA placement, and a description of how they will lead to reintegration.
- (g) A statement of any individual accommodations in the administration of State, district-wide, or local assessments of student achievement that are needed in order for the child to participate in the assessment;
- (1) If the IEP team determines that the child will not participate in a particular State or districtwide assessment of student achievement (or part of an assessment), a statement of:
 - (i) Why that assessment is not appropriate for the child; and
 - (ii) How the child will be assessed.
- (h) A description of any extended school year services (ESY) which the IEP team finds are necessary to provide a FAPE to the student.
- (1) ESY services shall be provided only if a child's IEP team determines that the services are necessary for the provision of FAPE to the child because one or more of the following factors

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is evident:

(i) ESY is essential to permit the student an opportunity to reach reasonably set educational goals;

(ii) There has been a significant amount of regression over the past winter, spring and summer vacations and recoupment did not occur within a reasonable amount of time;

(iii) The severity of the student's disability presents a danger of substantial regression; or

(iv) The student's transition goals require continued programming beyond the school year IEP.

(2) An LEA or IEP team may not limit extended school year services to students with particular disabilities.

(3) An LEA shall not adopt a policy that limits the type, amount, or duration of ESY services for all children.

(i) Transition services

(1) For students, beginning with the first IEP in effect when the child is 16, or younger if determined appropriate by the IEP team, and updated annually thereafter, there shall be:

(i) Age appropriate and measurable postsecondary goals based upon age appropriate assessments related to:

(A) Education/training;

(B) Employment; and

(C) If appropriate, independent living.

(ii) Evidence that the student's interests and preferences were taken into consideration during the formulation of the goals.

(2) Contingent upon prior consent from the parent or adult student, representatives of any agency that is likely to be responsible for providing or paying for transition services to implement the goals, shall be invited to participate in the IEP meeting.

(3) If a participating agency, other than the LEA, fails to provide the transition services described in the IEP, the LEA shall reconvene the IEP team to identify alternative strategies to meet the transition objectives for the student set out in the IEP.

(4) Nothing in these regulations shall relieve any participating agency of the responsibility to

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provide or pay for any transition service that the agency would otherwise provide to students with disabilities who meet the eligibility criteria of that agency.

(5) When a student is going to graduate, a “summary of performance” report shall be written for the student as described at Rule 2362.2.3(g)(i).

(j) Parent Input. The IEP shall contain a section for parents to provide written comments regarding their child’s IEP. Following an IEP meeting to write or amend an IEP, the LEA shall send the IEP to the parent together with a Form 7a. The parent shall complete and return the parent input section of the IEP within 10 days. The purpose of the parent input section is to facilitate feedback from families to ensure they have an opportunity to express any opinions about the IEP or the IEP process.

Commented [SE13]: Compromise AOE/DLP paragraph