

## TA Tuesday: Adverse Effect, March 21st, 2023

### Purpose

Hello Special Education Directors,

Every Tuesday, the AOE will be sending a technical assistance email to LEAs as a reminder and to provide any updates on available resources or professional development for a particular topic related to upcoming special education rule changes. Today's TA topic is the special education rule changes related to adverse effect.

Adverse Effect means to have a negative impact on the Basic Skills areas. The 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.

### Historical Perspective: Adverse Effect

In the early 1990's, Vermont introduced a rule to operationalize the concept of adverse effect. Evaluation and Planning Teams (EPTs) were required to document three measures of educational performance in a basic skills area that fell at or below the 15th percentile or 1.0 standard deviation below the mean of a standardized assessment. For 30 years, Vermont has been the only state to operationalize adverse effect in such a manner.

### Rule 2362: Eligibility for Children Ages Six Years Through Twenty-One

The full rule change related to adverse effect can be found on page seventy-four of the [State of Vermont Special Education Rules](#), effective July 1, 2023. For a comparison of the major differences present in this section of the rule changes, please visit page 16 of the [Rules 2360 Side by Side](#).

### Special Education Rule Changes: Adverse Effect

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 support and services for students in need. With this change, the

### Contact Information:

If you have questions about this document or would like additional information, please contact:  
Cassandra Santo, Special Education Division, [Cassie.Santo@Vermont.gov](mailto:Cassie.Santo@Vermont.gov)

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.

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.

## **Exceptions to the Rule**

The new adverse effect rule will require EPTs to continue to document the existence of an adverse effect for at least one basic skill area for a student/child to meet the adverse effect gate for special education eligibility. The exceptions to this rule are the disability categories of Specific Learning Disabled, Deaf-Blind, and Developmentally Delay, where the current federal rules do not require such documentation.

## **Reevaluation Reminder**

If the student is currently performing well, as a result of existing supports and services from special education, describe how the EPT has determined that the removal of those special education supports, and services, would adversely impact the student's performance. This can include a history of adverse impact when those services were not provided. Students should never be denied services to prove adverse impact.

## **Additional Reminders**

1. Special education is a service, not a placement.
2. IEP goals and objectives should be linked to needs as documented in the Evaluation Report.
3. Evidence presented in the Evaluation Report should be used to assist the IEP Team in programming and, where appropriate, the development of postsecondary transition plans for students.
4. Students found to have a disability, but not an adverse effect nor a need for special education services, must be referred, within a reasonable amount of time, to the building principal and a Section 504 Team meeting convened to discuss the possible need for a Section 504 Plan.

## **Rule 2360: Q&A**

*Q: In situations where teams are completing an evaluation and are considering the documentation of whether the learner has or has not received appropriate instruction through general education, the regulations are clear that you cannot delay an evaluation due to MTSS. Can the team make the*

*determination that the learner would not meet the need criteria without the documentation of a lack of response to evidence based general education interventions provided with fidelity?*

A: Special education is presumptive on the fact that a student has had good first instruction and evidence-based interventions. If you cannot determine if the student received adequate first instruction, you cannot find that student eligible for special education. Please see section 2362 ([34 C.F.R. § 300.306](#)) of the special education rules, effective July 1, 2023. This section identifies the documentation needed to substantiate adverse effect including documentation of adverse effect on educational performance that corroborates that the educational deficiencies persist or will persist over time in spite of specific alternative strategies that are provided within the general education setting. This rule also identifies that EPTs should document evidence that scientific, research-based interventions have been implemented with fidelity.

That being said, if a student is referred for special education and the team begins the evaluation process, an evaluation cannot be delayed based on a student not yet receiving interventions, unless the parent agrees to such a delay. There are situations in which immediate action might be needed and there is no requirement that a student receive interventions prior to referral. A student may be referred before, during, and after supports and an LEA cannot delay an evaluation based on a student having not received interventions. If a child has obvious signs of cognitive or physical issues, they may need to receive immediate support to ensure access. Federal guidance states that: “The regulations...allow a parent to request an initial evaluation at any time to determine if a child is a child with a disability. The use of RTI strategies cannot be used to delay or deny the provision of a full and individual evaluation...to a child suspected of having a disability...If the LEA agrees with a parent who refers their child for evaluation that the child may be a child who is eligible for special education and related services, the LEA must evaluate the child.” Please see [OSEP Memo, 2011](#) for more information.

*Q: What data and information will be important to collect to substantiate adverse effect and decision making related to special education eligibility?*

To determine Adverse Effect is present, 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, consider academic and non-academic aspects of the student’s functioning in making the determination, and document the impact of the Adverse Effect on educational performance to substantiate that the educational deficiencies persist or will persist over time despite specific alternative strategies that are provided within the general education setting.

For determination of Adverse Effect, while State regulations do not indicate a required number of measures, an EPT should use multiple pieces of evidence in order to get a full picture of the student’s educational performance. The areas for assessment are highly individualized decisions and although the new regulation no longer requires the documentation of three measures of Adverse Effect for a Basic Skill area, LEAs are still required to document Adverse Effect in one area. Promising practice demonstrates that additional factors, while not required to be documented should continue to be used to substantiate an Adverse Effect. This approach will impact the EPT’s Assessment Planning.

An EPT should still consider how it will use evidence such as grades, performance on individual and group assessments, continuous progress monitoring, attendance, observations, clinical judgment from qualified experts, and samples of student work throughout the Assessment Process. 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.

The [Adverse Effect Evidence Source Checklist](#) represents a checklist of the types of evidence that may be helpful for school-aged children, many of which will be collected as part of the Assessment Process.

*Q: How will the changes to adverse effect be implemented and how will the actual definition of adverse effect be operationalized and quantified in a consistent and equitable approach?*

A: Determinations regarding adverse effect will rely on evaluation planning team member's expertise and should be based upon the results of assessments or data sources, determined by the team to be necessary to validate the impact of the disability on academic and functional performance. The evidence gathered through the evaluation and reports from staff and parents should demonstrate that the disability has an impact on the student's educational performance that is below what is expected in comparison to the student's cognitive, academic, or functional skills or expected of their typically developing peers, no longer requiring the lowest 15th percentile threshold. The additional question to consider is if an adverse effect is demonstrated, how are the student's needs best met. Does the student require specially designed instruction to address the unique needs of the child that result from the child's disability, and to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the State that apply to all children? Please see the [State Board of Education Rules](#), (34 C.F.R. § 300.39), for Vermont's Special Education Rules related to specially designed instruction.

## Resources

[Adverse Effect Memorandum](#): This memo from the AOE in January 2022, covers the background and the changes to rule 2362 related to adverse effect.

[Three-Gate Eligibility Determination](#): This guidance document from the AOE covers the criteria for all three of the three-gate process for special education eligibility that must be met and documented.

[Eligibility Deliberation Form](#): Adverse effect due to disability in one or more of the basic skill areas is determined by using a range of diagnostic and performance data appropriate to the student. This form is intended to support teams with conversations about adverse effect and determining eligibility.

Happy Tuesday,

Special Education Program Team