

COMPARISON OF FEDERAL AND STATE RULES PERTAINING TO ELIGIBILITY FOR SPECIAL EDUCATION
Disability Law Project of Vermont Legal Aid, Inc.
October 2014

FEDERAL REGULATIONS	VERMONT REGULATIONS
<p>34 CFR §300.1 (a) Statement of Purpose The purposes of [the IDEA] are to . . . to ensure that:</p> <p>All children with disabilities have available to them a [FAPE] that emphasizes special education and related services designed to meet their unique needs and <u>prepare them for further education, employment and independent living.</u></p>	<p>Rule 2360.1 Statement of Purpose These rules are designed to ensure that:</p> <p>Eligible Vermont children have available to them a [FAPE] that emphasizes special education and related services designed to meet their unique needs and <u>prepare them for further education, employment and independent living.</u></p> <p>See also,</p> <p>Vermont Framework of Standards and Learning Opportunities” (2013)</p> <p>Appendix A – Purpose of the Standards To “raise expectations for all learners . . . from prekindergarten through grade 12.” These expectations are described as “Vital Results.”</p> <p>Appendix A – Definition of “All Students” The term means “<u>every</u> student . . . including, “students who have been unsuccessful in school, as well as those who have been successful in school.”</p>
<p>34 CFR § 300.306 (a)(1) Eligibility - - Upon completion of the administration of assessments and other evaluation measures— A group of qualified professionals and the parent determines whether the child is a child with a disability, as defined in §300.8 . . . and who, by reason thereof, needs special education and related services.</p> <p>Note: Under the federal regulations eligibility is a 2 step process. Adverse affect is dealt with in the context of the specific disability under 34 CFR §300.8.</p>	<p>Rule 2362(a) Eligibility-- A child shall be eligible for special education if—</p> <ol style="list-style-type: none"> (1) He/she has one or more disabilities described in Rule 2362.1 (2) The disability results in an adverse effect on the child’s educational performance in one or more basic skill areas . . . and (3) The student needs special education . . . <p>Note: Under Vermont rules eligibility is a 3 step process. A child must not only meet the severity/adverse affect criteria for a particular disability listed under Rule 2362.1, the child must also meet a second adverse affect standard under the provisions of Rule 2362(a)(2) to be eligible for special education. Therefore, children in Vermont have impact on educational performance considered twice.</p>

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<p>See also,</p> <p>34 CFR §300.101(c) which requires States to “ensure that a . . . FAPE is available to any individual child with a disability who needs special education and related services, <u>even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.</u>”</p>	<p>See also,</p> <p>Rule 2360.2.4 which requires the LEA to provide a FAPE to “any child with a disability, eligible for special education, <u>even though the child has not failed or been retained in a course or grade and is advancing from grade to grade</u>”.</p> <p>Note: The citation above is to the 6/1/13 edition of the rules. It is a re-codification of the former Rule 2360.2. (d) found in the 4/23/10 edition of the rules.</p>
<p>Adverse Effect on Educational Performance This term is not defined in the IDEA or its implementing regulations. “Adverse affect on educational performance” is referenced within the definition of a particular disability.</p>	<p>Rule 2362 (d) (1) Adverse Affect on Educational Performance requires determination and documentation by the evaluation and planning team (EPT) that –</p> <p>“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).”</p> <p>Significantly below grade norms is defined as functioning in -</p> <p>“ the 15th percentile or below or 1 standard deviation or more below the mean, or the equivalent, as reflected by performance on at least three of . . . six measures of school performance, generally over a period of time.”</p> <p>Rule 2362 (d) (2).</p>
<p>Basic Skills</p> <p>Federal law has no comparable reference to specific skills that must be adversely affected to be eligible for special education. The most analogous reference is to “educational performance.”</p>	<p>Rule 2362 (g) (1) Basic Skills</p> <p>Unless otherwise specified in the disability category in these rules, basic skills are:</p> <ul style="list-style-type: none"> (i) Oral expression (ii) Listening comprehension (iii) Written expression (iv) Basic reading skill (v) Reading comprehension (vi) Math calculation (vii) Math reasoning (viii) <u>Motor Skills</u> <p>Note 1: Motor skills are clearly non-academic skills. However, they have been historically included and excluded from the list of basic skill areas under the rules. The 8/23/10 edition of the rules excluded motor skills as a basic skill</p>

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<p>See, 34 CFR § 300.309 (a) (1) Determining the existence of a specific learning disability –</p> <p>[The team] may determine a child has a specific learning disability if: The child does not achieve adequately for the child’s age or to meet State-approved grade-level standards in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child’s age or State-approved grade-level standards:</p> <ul style="list-style-type: none"> (i) Oral expression (ii) Listening comprehension 	<p>and the 6/1/13 revised rules have restored motor skills as a basic skill once again. Motor skills have always been listed as an “area of concern in the <u>basic skill areas</u>” under the evaluation procedures provisions of Rule 2362.2.4 (b) (3) (viii) (H).</p> <p>Note 2: Historically, Vermont’s rules used the skill areas considered when determining the existence of a specific learning disability - all academically focused - to define “basic skills” to be considered when determining eligibility for special education for <u>all</u> disability categories. There is one exception. The rules for determining the <u>existence</u> of a specific learning disability includes “reading fluency” as a skill area to be considered when a specific learning disability is suspected. However, “reading fluency” is excluded from the list of “basic skills” to be considered when determining adverse effect on educational performance under Rule 2362 (d) (1) which must be demonstrated at the second step of the eligibility process for <u>all</u> disability categories.</p> <p>Note 3: The “Special Education Evaluation Plan and Report” (Form 2) Section Two (A)-Adverse Effect on Educational Performance includes “reading fluency” as a basic skill area to be considered in determining adverse effect “for students suspected of Specific Learning Disabilities only.” There is no provision in <u>federal or state</u> regulations that support inclusion of reading fluency as a skill area for consideration <u>solely</u> under the specific learning disability category.</p> <p>Note 4: Vermont’s rules do not define the term “basic skills.” The definition section of the rules Rule 2361.1 at (5) simply defines basic skills as “those skills enumerated in Rule 2362 (g).”</p> <p>See, Rule 2362.2.5 (c) (1) Additional procedures for identifying specific learning disability –</p> <p>The EPT shall determine that a student has a specific learning disability if: When provided with learning experiences and instruction appropriate for the student’s age or to meet State-approved grade level standards, the student does not achieve adequately in one or more of the following areas:</p> <ul style="list-style-type: none"> (i) Oral expression (ii) Listening comprehension (iii) Written expression
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<ul style="list-style-type: none"> (iii) Written expression (iv) Basic reading skill (v) Reading fluency skill (vi) Reading comprehension (vii) Math calculation (viii) Math problem solving 	<ul style="list-style-type: none"> (iv) Basic reading skill (v) Reading fluency skill (vi) Reading comprehension (vii) Math calculation (viii) Math problem solving (ix) <u>Motor skills</u> <p>Note: The 6/1/13 revised rules have re-codified former Rule 2362.2.4 (c) (1) found in the 7/23/10 rules. The revised rule inadvertently added “motor skills” to the factors to be considered in determining whether a student has a specific learning disability under the rules. This error was rectified by memo from the Agency of Education.</p>
<p>Educational Performance This term is not defined in the federal regulations. It is referenced under individual disability categories which require a finding that the child’s disability “adversely affects educational performance.”</p> <p>Note: Although the specific term “educational performance” is not defined in the federal law or regulation there is guidance regarding the interpretation of that term. The U.S. Office of Special Education Programs (OSEP) is responsible for issuing guidance regarding interpretation of the regulations. Such guidance was issued with respect to interpretation of the term “educational performance”.</p> <p>See, Letter to Clarke (OSEP 3/8/07)</p> <p>“It remains the Department’s position that the term ‘<u>educational performance</u>’ as used in the IDEA and its implementing regulations <u>is not limited to academic performance.</u>”</p> <p>“Whether a[n] . . . impairment adversely affects a child’s educational performance must be determined on a case-by-case basis, depending on the unique needs of a particular child and <u>not based only on discrepancies in age or grade performance in academic subject areas.</u>”</p>	<p>Educational Performance This term is not defined in the Vermont regulations. Adverse affect on educational performance is limited solely to deficits in basic skills which, in turn, are limited to academic skills.</p> <p>Note: However, like the federal regulations, guidance as to what constitutes educational performance is found in the “Vermont Framework of Standards and Learning Opportunities for All Students” (2013).</p> <p>See, Vermont Framework of Standards and Learning Opportunities” 2013</p> <p>Introduction – Definition of Standards and Evidence “Standards identify the essential knowledge and skills that should be taught and learned in school. Essential knowledge is what students should <u>know</u>. Essential skills are what students should be able to <u>do</u>.”</p>

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<p>Analysis of Comments and Discussion of IDEA Part B Regulations (2006)</p> <p>Response to a request to define “academic achievement.”</p> <p>“Academic achievement’ generally refers to a child’s performance in academic areas The definition could vary depending on a child’s circumstances or situation, and therefore, we do not believe a definition of ‘academic achievement’ should be included in these regulations. 71 Federal Register 46,662 (2006)</p> <p>Response to a request to define “functional performance.”</p> <p>“We do not believe it is necessary to include a definition of ‘functional performance’ in these regulations because the word is generally used to refer to activities and <u>skills that are not considered as academic or related to a child’s academic achievement</u> 71 Federal Register 46,597 (2006).</p> <p>“Functional is often used in the context of routine activities of everyday living.” 71 Federal Register 46,661 (2006)</p> <p>See also,</p> <p>34 CFR § 300.39 (b) (3) which defines special education as specialized instruction designed</p> <ul style="list-style-type: none">(i) To address the unique needs of the child that result from the child’s disability; and(ii) To ensure access to the general curriculum, so that the child can meet the same educational standards within the jurisdiction of the public agency. <p>34 CFR §300.304 (b) which in the context of an evaluation requires the team to “gather relevant <u>functional, developmental</u> and academic information.”</p> <p>34 CFR §300.320 (a) (1) which states that the IEP must contain “a statement of the child’s present levels of academic achievement and functional performance.”</p>	<p>Appendix C- Definition of “Vital Results”</p> <p>These are the “broad expectations of what students should know and be able to do.”</p> <p>Vital results include academic and non academic skill expectations related to</p> <ul style="list-style-type: none">(1) <u>Communication</u> (The prior description of the communication standards have been replaced with the Common Core Standards for English Language Arts.),(2) <u>Reasoning and Problem Solving</u> (questioning, problem solving, mathematic dimensions, abstract and creative thinking),,(3) <u>Personal Development</u> (worth and competence, healthy choices, physically active lifestyle, making decisions, personal economics, relationships, workplace skills), and(4) <u>Civic/Social Responsibility</u> (community service, democratic process, human diversity, cultural expression, effects of prejudice, continuity and change, understanding place). <p>Appendix C – Definition of “Vital Results Standard”</p> <p>“Specific statements of what ALL students should know and be able to do. These establish the degree and quality of performance that students are <u>expected</u> to attain within grades Pre-K-4, 5-8, and 9-12.”</p> <p>See also,</p> <p>Rule 2360.3.1 which defines special education as instruction designed</p> <ul style="list-style-type: none">(a) To address the unique needs of the child that result from the child’s disability; and(b) To ensure access to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the LEA that apply to all children. <p>Rule 2362.2.3 (b) (1) which requires evaluation of a child’s “<u>functional, developmental</u> and academic” performance.</p> <p>Rule 2362.8 (a) which requires “a statement of the child’s present levels of academic achievement and <u>functional</u> performance.”</p>
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