

January 26, 2017

Representative David Sharpe, Chair

Vermont House Education Committee

Re: *Amend Vermont's Special Education Definitions to Stop Excluding Children with "High-Functioning" Autism*

Dear Representatives:

Today in Vermont, children with "high-functioning" autism are slipping through the cracks, prevented from accessing special education services that they need to perform at their best in school and later in life. We write to you to ask you to change this—to clarify the special education definitions set out by statute to ensure that children with autism who have social and emotional impairments get the services they need to fully access public education.

Children with "High-Functioning" Autism Have Special Educational Needs

Autism is a spectrum disorder, characterized by varying degrees of difficulty in social interaction, communication, and repetitive or stereotypical behavior. Even children with so-called "high-functioning" autism, who have normal or even exceptional intellectual abilities, may experience difficulties that impede their ability to function in a mainstream classroom without assistance. These difficulties can include:

an immature inability to manage emotions; unique attention problems requiring regular redirection; an unusual learning style demanding hands-on attention; . . . an inability to notice or understand the non-verbal signals that convey messages in the classroom; . . . persistent interrupting and not responding in a manner inappropriate in the social context in a classroom[;] . . . meltdowns during unexpected in-school transitions or in busy sensory simulating environments[;] and . . . unexplained repetitive, whole-body movements . . . disruptive to others in the classroom.¹

¹ Lisa Lukasik, *Asperger's Syndrome and Eligibility under the IDEA: Eliminating the Emerging "Failure First" Requirement to Prevent a Good Idea from Going Bad*, 19:2 VA. J. SOC. POL'Y & L. 252, 255-56 (2012) (citing TONY ATTWOOD, *THE COMPLETE GUIDE TO ASPERGER'S SYNDROME* 15 (2007)).

In many states, children with “high-functioning” autism and difficulties like these receive special education services. However, Vermont school regulations for determining eligibility for special education only consider performance on academic skills like math and reading—areas where many children with “high-functioning” autism perform near grade level. Accordingly, children with “high-functioning” autism in Vermont are routinely denied special education services.

The Individuals with Disabilities Education Act (IDEA)

The Federal Individuals with Disabilities Education Act (IDEA) provides that students with disabilities have a right to “a free appropriate public education . . . designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C. § 1400(d)(1)(A) (2006). Where a disability, such as autism, *id.* § 1401(3)(A)(i), would adversely affect the child’s educational performance, that child is entitled to receive special educational services under the IDEA. 34 C.F.R. § 300.8(c) (2011). Congress intended the IDEA to reach not only intellectual disabilities, but also disabilities that cause functional or developmental impairments that negatively affect the child’s ability to fully access public education. See 20 U.S.C. § 1414(b)(2) (noting that when evaluating a child for services, “the local educational agency shall . . . gather relevant **functional, developmental,** and academic information” and shall “**not use any single measure** or assessment as the sole criterion for determining whether the child is a child with a disability”).

The regulations implementing the IDEA make clear that special education services should not be denied simply because “the child has not failed or been retained in a course or grade, and is advancing from grade to grade.” 34 CFR 300.101(c). Therefore, the fact that a child with autism is “high-functioning” and performs at grade level in some areas like mathematics or reading does not preclude the child from having the right to and a need for special educational services. Indeed, most states provide special educational services for students, like those with “high-functioning” autism, whose disability primarily impairs social and emotional development. Such special educational services could include separate instruction on communication and emotional skills, modified lesson plans to assist with learning, and accommodations during highly stimulatory activities or other times of difficulty.

Vermont’s Special Education Regulations Preclude Access to Special Education

Vermont adopted statutory definitions in 16 V.S.A. § 2942 as part of its implementation of the IDEA. Although these definitions cover terms including “special education” and “essential early education,” they do not provide guidance on what constitutes “educational performance.” It is unclear from the statutory definitions whether “educational performance” includes those social and emotional skills that are necessary to function effectively in the classroom and in life.

Relying upon the Vermont statute's silence, the Vermont Agency of Education adopted a narrow view of "adverse effect on educational performance." The current version of Vermont's Special Education regulations effectively precludes access to special education services for those students with a disability that affects social and emotional development, like "high-functioning" autism. Specifically, Vermont Special Education Rules state that a disability only has an adverse effect on the student's educational performance if the student is functioning at or below the 15th percentile in a specific "basic skill area." Rule 2362(d). The "basic skill areas" are limited by the same regulation to the following:

- (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

Rule 2362(g). In practice, parents report that Vermont school districts applying this rule routinely deny access to special education for children with autism who have severe social and emotional deficits. These students are not getting the support they need to fully participate in public education.

Amend the Statutory Definitions

This problem can be solved with a stroke of a pen: amending the statutory definition to make clear that children with a disability like autism who have a socio-emotional impairment are entitled to special education, even if those children have been successful academically.

Attached to this letter is a draft amendment to 16 V.S.A. § 2942. It adds a definition of "educational performance" that specifically includes functional areas like socio-emotional development and self-help skills. It also adds a definition of "adverse effect" that means a child's eligibility for special education will be based, as Congress intended, on the impact of that child's disability on that child—instead of requiring that child be failing in an academic area before services are offered.

We hope you will stand with us to ensure that Vermont children with "high-functioning" autism have access to an appropriate public education. We urge you to pass this legislation.

Sincerely,

Vermont Autism Task Force (www.vtautismtaskforce.org)
Julie Erdelyi and Philip Eller, Co-Chair

Proposed Amendment

16 V.S.A. § 2942. Definitions

§ 2942. Definitions

As used in this chapter

(1) “Child with a disability” means any child in Vermont eligible under state regulations to receive special education.

(2) “Special education” means, to the extent required by federal law, specially designed instruction, at no cost to parents or guardian, to meet the unique educational needs of a child with a disability, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions. The term includes “related services” as defined in federal law.

(3) “Essential early education” means the education of children with disabilities prior to legal school age for the early acquisition of fundamental skills.

(4) “Adverse effect” means, for students of legal school age, having a negative impact.

(5) “Educational Performance” means, for students of legal school age, performance in academic and functional areas both within the general curriculum and in areas necessary to access public education and gain functional independence later in life, including but not limited to socio-emotional development, communication, reasoning and problem solving, civic and social responsibility, and self-help skills.

~~(6)~~(4) “Federal law” means the Education of the Handicapped Act, codified at 20 U.S.C. §§ 1400-1485, and its implementing regulations, as amended from time to time.

~~(7)~~(5) “Residential placement” means the placement of an eligible child, as part of an individualized education plan, in a 24-hour residential facility within or outside Vermont which provides educational services consistent with the child's plan.

~~(8)~~(6) “Individualized education plan” means a plan established for an eligible child pursuant to 20 U.S.C. § 1401(19) and the implementing federal and state regulations.

~~(9)~~(7) “Unilateral placement” means a placement of a child eligible for special education by a person or persons having legal custody of the child in an educational

placement other than one recommended by the child's duly constituted individualized education plan team as defined in 20 U.S.C. § 1401(19). (Amended 1965, No. 152, § 2; 1971, No. 207 (Adj. Sess.), § 1; 1987, No. 235 (Adj. Sess.), § 3; 1989, No. 107, § 1; 1995, No. 157 (Adj. Sess.), § 22; 1999, No. 117 (Adj. Sess.), § 4.)