Who is Eligible Under the Individuals with Disabilities Education Improvement Act?

Robert A. Garda, Jr.
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“[T]o determine that a child is handicapped and to place him in a specialized program . . . is one of the most important, if not the most important, decision that will ever be made in that person’s life.”

Senator Robert Stafford, co-sponsor of the Education of All Handicapped Children Act.”**

INTRODUCTION

The Individuals with Disabilities Education Improvement Act [hereinafter “IDEA”] requires that states provide all “children with disabilities” a free appropriate public education. An eligible “child with a disability” is defined as a child

(i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
(ii) who, by reason thereof, needs special education and related services.2

These apparently simple provisions are in fact among the most complex requirements of IDEA.3 Courts, hearing officers and eligibility teams often misapply these intricate eligibility requirements, leading to both over-identification and under-identification of IDEA eligible children.4 The over-identification of students for special education, particularly minority students, was a primary focus in the most recent re-authorization of IDEA in 2004.5

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3 PRESIDENT’S COMM. ON EXCELLENCE IN SPECIAL EDUC., A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES 21 (July 1, 2002) [hereinafter “PRESIDENT’S COMMISSION”], available at http://www.ed.gov/inst/commissionsboards/whspecialeducation/ (finding the eligibility requirements among the most “complex” requirements in IDEA); Martha Minow, Learning to Live with the Dilemma of Difference: Bilingual and Special Education, 48 LAW & CONTEMP. PROBLEMS 157, 179-80 (1985) (“[T]he statute is unclear about which children shall be included within the reach of its guarantees . . . . The substantive dimensions of the program remain ambiguous, however, especially regarding what kind of special needs should entitle the child to special placements or services.”).

4 Robert A. Garda, Untangling Eligibility Requirements Under the Individuals With Disabilities Education Act, 69 MO. L. REV. 441, 450 (2004); PRESIDENT’S COMMISSION, supra note 3, at 8 (current identification methods lead to failing to identify children).

is warranted because misplacement into special education stigmatizes students, denies them a high quality education, limits their future opportunities, and takes valuable resources away from truly disabled students. On the other hand, under-identification of students for special education, usually of emotionally disturbed children, leaves them unserved and often unable to participate effectively in society.

The first step to resolving these eligibility problems is for authorities to properly interpret IDEA’s difficult eligibility requirements. This Article explains how courts and hearing officers apply, and misapply, these standards. It also provides authorities a clear roadmap to IDEA’s eligibility criteria and the proper analysis for eligibility decisions. To understand the eligibility standards they must be broken down into their root elements. First, an eligible child must be diagnosed with one of the enumerated disabilities. Yet not all children with diagnosed disabilities are IDEA eligible. A disability is not qualifying and eligibility does not attach, despite a medical diagnosis, unless the disability “adversely affects a child’s educational performance.” Children diagnosed with an enumerated disability that adversely affects educational performance must also “need[] special education and related services” to be IDEA eligible. In short, a child of qualifying age is eligible under IDEA if the child (1) is diagnosed with an enumerated disability that (2) adversely affects educational performance, and (3) by reason thereof needs special education. Because the “adversely affects” requirement is merely a subpart of finding a qualifying disability, most courts and hearing officers identify only a two-
part test for IDEA eligibility. Yet it is clear that each of the three hurdles must be surpassed for eligibility to attach.

This Article explores the authorities’ conflicting interpretations of each of these separate terms and suggests their proper application. Part I discusses decision-makers’ divided interpretation of “educational performance” and proposes that the term be defined by reference to the state curriculum and areas of student performance tracked by the schools. Part II describes authorities’ conflicted interpretation of “adversely affects” and argues that any effect should suffice for eligibility. Part III explains the split in interpreting the “need” element and suggests that “need” exists when a child is performing below average. Finally, Part IV discusses the varied interpretations of “special education and related services” and propounds that its meaning should be limited to significant adaptations to instruction that are not provided to general education students.

I. “Educational Performance”

IDEA eligibility initially hinges on the existence of a disability that adversely affects the child’s “educational performance,” yet IDEA does not define the term. Decision-makers are split as to whether “educational performance” means exclusively academic performance, such as grades and standardized test scores, or whether it also encompasses non-academic performance, such as behavior, emotional development, and interpersonal relationships.

Authorities employing a narrow, academic-centered definition of “educational performance” deny eligibility to children whose disability affects any area of performance other than academic performance. Decision-makers utilizing a broad definition find that disabilities which adversely affect attendance, socialization or behavior are qualifying even though the disability does not affect the child’s grades. For example, some decision-makers deny eligibility to children that perform well academically but struggle with communication. On the other

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13 See, e.g., Babicz v. Sch. Bd., 135 F.3d 1420, 1422 n.10 (11th Cir. 1998) (“The first prong includes those suffering from a long list of handicaps and ‘other health impairments’ such as asthma, and, the second prong includes those, ‘who, by reason thereof, need special education and related services.’”) (citations omitted); W. Chester Area Sch. Dist. v. Bruce C., 194 F. Supp. 2d 417, 420 (E.D. Pa. 2002) (There is a “two-part test for determining whether a student is entitled to an IEP. First, the student must have a qualifying disability, and, second, the student must ‘need special education.’”).

14 See, e.g., Doe ex rel. Doe v. Belleville Pub. Sch. Dist. No. 118, 672 F. Supp. 342, 344 (S.D. Ill. 1987) (“three tests must be met before [IDEA] can be made to apply in this case: 1) [an enumerated disability must exist], 2) which adversely affects a child’s educational performance, and 3) which requires special education and related services”).

15 J.D. ex rel. J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 66 (2d Cir. 2000); Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1375 (8th Cir. 1996); Mr. and Mrs. I. v. Maine Sch. Administrative District 55, 2006 WL 224318 at *6 (D.Me. 2006); Letter to Lillie/Felton, 23 IDELR 714, 716 (OSEP 1994).

16 Callegary, supra note 7, at 185, 187-88. See also, Easton Area Sch. Dist., 42 IDELR 137 (Pa. SEA 2003) (holding in dicta that “we do not agree with the District's various witnesses that the Student's academic ability and passing grades necessarily negate his eligibility under [IDEA]); Kenston Local Sch. Dist., 41 IDELR 47 (Oh SEA 2003) (child with a disability that adversely affected her attention, organization and completion of assignments, but not her grades, was eligible because “[g]rades alone are not determinative with whether the child is impacted, or impaired, by her disability. Rather IDEA encourages a more complete examination of all of the educational achievement of the student.”)

17 See, e.g., Bd. of Educ., 29 IDELR 122, 128 (N.Y. SEA 1998) (child with autism that resulted in “articulation difficulties” and “difficulty initiating and maintaining conversations with his peers” did not meet
hand, authorities employing an expansive definition find that a disability impacting communication skills affects “educational performance” irrespective of the effect on academic performance.\textsuperscript{18}

There is also sharp disagreement as to whether a disability that affects behavior and socialization exclusively is qualifying. Many courts and hearing officers exclude behavior and socialization from the definition of “educational performance.”\textsuperscript{19} In Doe ex rel. Doe v. Board of Education of the State of Connecticut, the child was depressed, violent, refused to go to school and was hospitalized, yet the court found the child ineligible because his emotional “difficulties did not adversely affect his educational performance as required by federal and state law. The plaintiff’s academic performance (both his grades and his achievement test results) before, during, and after his hospitalization were satisfactory or above.”\textsuperscript{20} In contrast, in In re Kristopher H., the school denied IDEA eligibility to a child that was distractible and had problems staying on task and in social relationships, relying on the fact that he performed at grade level.\textsuperscript{21} The hearing officer disagreed, and turning to the dictionary, found that educational

\textsuperscript{18}See, e.g., Mary P. v. Ill. State Bd. of Educ., 919 F. Supp. 1173, 1180-81 (N.D. Ill. 1996), amended by 934 F. Supp. 989 (N.D. Ill. 1996) (“a child whom experts determine suffers from a speech impairment so severe as to inhibit his ability or desire to communicate with his teachers and peers [but performs well academically] meets the criteria of ‘speech impairment’ which ‘adversely affects the child’s educational performance’ . . . and, thus, is a ‘child with a disability’”); Weymouth Pub. Sch., 21 IDELR 578, 580 (Mass. SEA 1994) (“Were Daniel W. unable to communicate effectively because of the lisp, his satisfactory academic progress would not bar his entitlement to special education under the analysis above and the outcome of this case would be quite different.”); Quintana ex rel. Padilla v. Dep’t of Educ., 30 IDELR 503, 506 (P.R. Cir. Ct. App. 1998) (teaching exclusively communication skills is “education” because it “would contribute to his development as a human being, which is the ultimate purpose of education”); Letter to Lybarger, 16 EHLR 82, 85 (OSEP 1989) (“it is the position of the Office of Special Education Programs that a child with a speech impairment that does not affect his/her academic achievement can still be identified as an eligible ‘handicapped child’ under EHA-B”).

\textsuperscript{19}See, e.g., Gregory M. ex rel. Ernest M. v. State Bd. of Educ., 891 F. Supp. 695, 702 (D. Conn. 1995) (finding child ineligible because “[g]iven [his] C level grades and his functioning in the mainstream classroom without significant disruption, there was sufficient evidence from which the hearing officer reasonably concluded that Gregory’s education was not significantly impeded or adversely affected by his behavioral difficulties”); R.B. by and through F.B. v. Napa Valley Unified Sch. Dist., 43 IDELR 188 (N.D.Cal. 2005) (child performing above average academically but having behavioral, emotional and social difficulties was denied eligibility because, among other reasons, her disabilities did not adversely affect her educational performance); Bd. of Educ. of the Fayetteville-Manlius Central School District, 43 IDELR 158 (N.Y. SEA 2005) (child with needs in the areas of pragmatic language, social skills and peer interrelationships, speech-language, and motor coordination was not IDEA-eligible because she “did well in class and her marking period grades showed that she was learning the content area material presented in her classes.”); In re Hollister Sch. Dist., 26 IDELR 632, 660 (Cal. SEA 1997) (child’s significant emotional problems, which resulted in underdeveloped social and emotional skills, difficulty in interpersonal relationships and aggressive behaviors at home, did not adversely affect his educational performance because the child “has always been mainstreamed in regular education classes and has consistently received better than passing grades”); Fauquier County Pub. Sch., 20 IDELR 579, 584 (Va. SEA 1993) (hearing officer held that “the concept of ‘education’ may encompass more [than] mere academic instruction, and implies some development of emotional maturity and social skills, [but] the law does not require respondent to treat Child’s emotional disturbance”); Capistrano Unified Sch. Dist., 33 IDELR 51, 55 (Cal. SEA 1999) (looking only at the student’s academic record, the hearing officer concluded that “there is no indication that STUDENT’s academic performance was in anyway adversely affected by his depression.”); Roane County Sch. Sys. v. Ned A., 22 IDELR 574, 586 (E.D. Tenn. 1995) (gifted child with excellent academic performance was found ineligible because “[h]is educational performance, notwithstanding a slight decrease in his IQ level, has not been adversely affected by his socialization problems.”).


\textsuperscript{21}In re Kristopher H., 507 EHLR 183, 187 (Wash. SEA 1985).
performance “includes not only the narrow conception of instruction, to which it was formerly limited, but embraces all forms of human experience.”

Finally, there is a split in authority regarding whether attendance, standing alone, is “educational performance.” Many authorities find that a disability which affects a student’s attendance, but not grades, is not qualifying.\(^{23}\) In *Doe ex rel. Doe v. Belleville Public School District No. 118*, the court concluded that excessive absenteeism does not adversely affect educational performance unless it “has resulted in either lower grades or a decreased level of comprehension or ability to learn.”\(^{24}\) On the other hand, many authorities find that a disability which prevents school attendance adversely affects educational performance even if the child performs well academically.\(^{25}\) They reason that it is “self-evident that the inability to be present in a classroom adversely affects one’s educational performance.”\(^{26}\)

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\(^{22}\) *Id.* at 187. *See also* Baltimore City Pub. Schools, 37 IDELR 210 (Md. SEA 2002) (child’s Asperberger’s Syndrome adversely affected his educational performance despite good grades because the child “has pragmatic language, organizational, attentional, social cognition and other needs that must be addressed in order for him to access to the general curriculum.”); Monrovia Unified Sch. Dist., 38 IDELR 84, 87-88 (Cal. SEA 2002) (holding that a child that performed well academically was still eligible because the student’s behavioral problems led to removals from class and multiple school suspensions). *See also*, PRESIDENT’S COMMISSION, *supra* note 3, at 26 (calling for eligibility “as assessments that reflect learning and behavior in the classroom”).

\(^{23}\) *See*, e.g., Talladega City Bd. Of Educ., 44 IDELR 25 ( Ala. SEA 2005) (child exhibiting disruptive and hyperactive behavior leading to suspensions did not have a disability that adversely affected her “educational performance” because she performed at grade level academically); Bd. of Educ. of the Wappingers Falls Central Sch. Dist., 39 IDELR 116 (N.Y. SEA 2003) (child’s migraine headaches prevented her from attending school leading to impaired academic performance therefore disability adversely affected “educational performance”); Houston County Pub. Sch. Sys., 35 IDELR 25 (Ala. SEA 2001) (child’s Attention Deficit Disorder (“ADD”) did not adversely affect his grades, rather his failure to attend led to decreased grades; however, the child’s failure to attend school was a result of his ADD); West Haven Bd. of Educ., 37 IDELR 56, 64 (Conn. SEA 2001) (child with ADD suspended for drugs and alcohol, and later expelled for stealing, did not fulfill “educational performance” prong because “his academic performance is mostly in the above average range in an academically challenging program”); Old Orchard Beach Sch. Dep’t, 21 IDELR 1084, 1087 (Me. SEA 1994).

\(^{24}\) *Doe ex rel. Doe v. Belleville Pub. Sch. Dist. No. 118, 672 F. Supp. 342, 344 n.3. (S.D. Ill. 1987).* The *Belleville* ruling emanates from unique circumstances. The court agreed with the parents in holding that the child was not IDEA eligible and therefore did not need to exhaust administrative remedies before filing the lawsuit in federal court.

\(^{25}\) *See*, e.g., Weixel v. Bd. of Educ., 287 F.3d 138, 150 (2d Cir. 2002) (A child with Chronic Fatigue Syndrome and fibromyalgia that performed well in school was found eligible because she had a disability that “made it impossible for her to attend school.”); Corchado *ex rel.* Corchado v. Bd. of Educ., 86 F. Supp. 2d 168, 173 (W.D.N.Y. 2000) (child’s seizure disorder adversely affected his educational performance because it caused him to “miss many days of school, both as a result of the seizures themselves and so that he could attend medical appointments”); Elgin Unit Sch. Dist. 46, 40 IDELR 82 (III. SEA 2003) (Emotional disturbance resulting in escalating absences should have lead district to evaluate child for eligibility because the disability affected her “educational performance”); Ludington Area Schools, 39 IDELR 86 (Mich. SEA 2003) (Child’s emotional disturbance adversely affected his educational performance because “[h]is behavioral problems all compromised either his attendance at school, or when he was there, his participation in a regular education classroom.” The hearing officer held that “[a]dverse educational performance has been too narrowly interpreted to mean just ‘academic’ as opposed to ‘social or behavioral’ performance.”); Sierra Sands Unified Sch. Dist., 30 IDELR 306 (Cal. SEA 1998) (depression that prevented child from attending school adversely affected educational performance); Bd. of Educ., 34 IDELR 216 (N.Y. SEA 2000) (child performing well academically but who had disability leading to decreased attendance was IDEA eligible). *See also*, Sharon C. Streett, *The Individuals with Disabilities Education Act*, 19 U. ARK. LITTLE ROCK L. REV. 35, 44 (1996) (“ADD adversely affects daily school performance if the child cannot attend to his work and remain in class or in school.”); Lucy W. Shum, *Educationally Related Mental Health Services for Children with Serious Emotional Disturbance: Addressing Barriers to Access*
Employing a narrow academic-centered definition of “educational performance” results in schools not “serving students who have deficits in their interpersonal, social, and employment skills that adversely affect their in-school activities and relationships but may not affect their acquisition of academic skills.” The narrow meaning of “educational performance” applied by many authorities is one reason that emotionally disturbed children are the most under-identified category of disabled children. These children can often perform well academically but cannot form social relations, control their behavior or attend the regular classroom consistently. On the other hand, a broad or even limitless definition of “educational performance” reads the requirement out of IDEA because the mere existence of a disability fulfills the “adversely affects educational performance” prong. The result is over-identification of children for special education because children with disabilities that affect non-educational performance are found eligible.

Where, then, should the line be drawn? The divide in authority results from the improper attempt to find a federal definition of “educational performance” where no such universal definition exists or was intended. Instead, decision-makers should refer to state education standards to determine what constitutes “educational performance.” The Second Circuit took this approach in J.D. ex rel. J.D. v. Pawlet School District and concluded that IDEA leaves it to each state to define “educational performance.” The Second Circuit denied eligibility to a child having “difficulty with interpersonal relationships and negative feelings” because these were not included in Vermont’s regulations defining “educational performance” for disabled students. Similarly, in Mr. and Mrs. I v. Maine Sch. Administrative District 55, the school denied eligibility to a child Asperger’s syndrome because she performed well academically and was not disruptive in class. The court disagreed, finding that Maine’s definition of “educational performance” encompassed communications skills, interpersonal relationships, career preparation, and health education, all of which were impacted by the child’s disability.

The difficulty arises in the states that do not specifically define “educational performance” in their regulations dealing with disabled children. In this majority of states, decision-makers should define “educational performance” with reference to the state curriculum.
and the areas of performance formally tracked by the schools. 35 The federal body in charge of administering IDEA – the Office of Special Education Programs (“OSEP”) 36 - apparently supports this position. In Letter to Anonymous, OSEP held that the definition of “educational performance” is left to states to define, and that the curriculum and areas of performance tracked by the schools should be consulted. 37 In the same year, however, OSEP relied on certain of IDEA’s provisions, rather than state standards, to conclude that educational performance includes “non-academic as well as academic areas.” 38 Five years later OSEP refused to develop a “single definition” of educational performance. 39 Because OSEP never expressly overruled its Letter to Anonymous policy statement that states define educational performance through their curriculum and areas of performance tracked by the schools, and because OSEP refuses to develop a single definition of educational performance, it likely continues to defer to states to define the term.

Referring to the state curriculum to define “educational performance” finds strong pedagogical and statutory support. The official state curriculum identifies the areas of instruction required by the state. 40 It is the clearest statement of the “educational performance” the state expects of its students. The IDEA provides that a state’s “educational standards” are embodied in its general curriculum 41 and that eligibility evaluations must include “information related to enabling the child to be involved in and progress in the general curriculum.” 42 These references suggest that a child’s educational performance for eligibility should also be determined by reference to the general curriculum. Referring to the state curriculum to define “educational performance” means that if public schools educate students in more than just academics, which many do, 43 they must consider all those areas “educational performance” when classifying disabled children. 44

The state curriculum, however, is not the only point of reference for defining “educational performance.” The areas of performance that states require schools to track, such as attendance and behavior, should also be considered. This conclusion finds support in IDEA, which provides “that some children have other educational needs resulting from their disability that also must be met, even though those needs are not directly linked to participation in the general curriculum.” 45 Thus, while attendance, tardiness and behavior may not be mentioned in

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35 Garda, supra note 4, at 465-81.
37 213 EHLR 247, 248-49 (OSEP 1989)
38 Letter to Lybarger, 17 EHLR 54, 56 (OSEP 1989); see also Letter to Pawlisch, 24 IDELR 959, 962 (OSEP 1995).
43 Garda, supra note 4, at 474-75.
44 See, e.g., Mr. and Mrs. I. v. Maine Sch. Administrative District 55, 2006 WL 224318 at *7, 10-13 (D.Me. 2006).
the state curriculum, the formal tracking of these performance areas shows that they are “educational performance” a state expects of its students.

Attendance, standing alone, should be considered “educational performance” because it provides a learning experience independent of the teacher’s instruction. This is one reason IDEA stresses mainstreaming eligible students into the general education classroom and requires “services that enable a disabled child to remain in [the public school classroom] during the day” be provided to eligible children.\(^{46}\) Because attendance itself leads to learning, it should be “educational performance” for eligibility purposes even if decreased attendance does not lead to poor grades. In practical terms, disabilities that lead to hospitalization, behavior problems that lead to exclusion from the classroom, and decreased mobility that leads to tardiness all adversely affect educational performance and should be qualifying if special education is needed.

Including behavioral problems within the definition of “educational performance” also finds strong support in the caselaw. The Supreme Court, in dicta, found that a child’s “very inability to conform his conduct to socially acceptable norms . . . renders him ‘handicapped’ within the meaning of [IDEA].”\(^{47}\) This dicta is consistent with a long line of Supreme Court cases finding that public education “must inculcate the habits and manners of civility as values in themselves.”\(^{48}\)

In summary, the authorities are split as to whether “educational performance” means exclusively academic performance or encompasses other areas of performance as well. States are free to define the term, but in the absence of an express definition, a child’s good grades and test scores should not preclude the child from IDEA eligibility so long as the student’s disability adversely affects an area of performance identified in the state curriculum or tracked by the state’s schools.

II. “ADVERSELY AFFECTS”

IDEA does not explain when a disability “adversely affects” educational performance.\(^{49}\) Two areas of disagreement arise when authorities interpret this provision. They first diverge on whether adverse effect is determined with or without the non-special education services already provided the child. Many disabled children receive non-special education services to address their disabilities, usually under Section 504 of the Rehabilitation Act of 1973 [hereinafter “Section 504”].\(^{50}\) If the child performs well with these services does the disability “adversely affect” the child’s educational performance? Decision-makers also disagree on how adverse the effect must be for the disability to qualify.

\(^{46}\) Cedar Rapids Cmty. Sch. Dist. v. Garret F. ex rel. Charlene F., 526 U.S. 66, 73 (1999); see id. at 76 (The district must “provide the services that Garret needs to stay in school.”); Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 894 (1984) (if service needed to stay in school all day then must be provided to eligible children); 20 U.S.C.A. § 1412(a)(5) (West 2005).


\(^{48}\) Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986); see also New Jersey v. T.L.O., 469 U.S. 325, 339 (1985) (noting the “substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds”); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969) (the Court has “repeatedly emphasized . . . the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools”).

\(^{49}\) Mr. and Mrs. I. v. Maine Sch. Administrative District 55, 2006 WL 224318 at *8 (D.Me. 2006); Letter to Lillie/Felton, 23 IDELR 714, 716 (OSEP 1994).

On the first issue, many authorities conclude that if a child performs well with non-special education services then the child’s disability does not “adversely affect” educational performance. Other courts and hearing officers ask what would the child’s educational performance be “but for” the services currently provided to determine adverse effect. For example, in Yankton School District v. Schramm, the Eighth Circuit found that the child’s orthopedic impairment adversely affected her educational performance because, “but for the specialized instruction and services provided by the school district, Tracy’s ability to learn and do the required class work would be adversely affected by her cerebral palsy.”

The latter cases are correct because it is unreasonable to find that a disability does not affect educational performance merely because the services necessitated by the disability lead to adequate educational performance. The fact that a disabled child requires services at all - even if only non-special education services under Section 504 - confirms that the disability adversely impacts the child’s educational performance. Decision-makers find to the contrary because they feel that eligibility should be denied to children already performing well without it. Yet the “needs special education” prong accomplishes the same purpose more appropriately. As explained below, if a child performs well with non-special education services then the child does not “need” special education and should not be IDEA eligible. It is proper to consider a child’s success with services in ascertaining “need” rather than in deciding if there is an adverse effect and existence of qualifying disability in the first instance.

The second issue of disagreement is how adverse must the effect be for the disability to qualify. Some courts and hearing officers find that a child with satisfactory performance may still have a disability that adversely affects educational performance because it “inhibits” performance, creates “difficulty” with performance or merely because the child’s performance could be “improved.” Other decision-makers require that the disability significantly affect performance to qualify. For example, in Doe ex rel. Doe v. Board of Education of State of

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51 See, e.g., St. Clair County Bd. of Educ., 29 IDELR 688 (Ala. SEA 1998) (orthopedic impairment did not adversely affect child’s educational performance because child performed well with non-special education services); Smithtown Cent. Sch. Dist., 29 IDELR 293, 300 (N.Y. SEA 1998) (“Petitioner argues that respondent cannot provide services to a child with a disability to insure that the child is receiving an appropriate education, then subsequently determine that the disability does not adversely impact the child’s education. I find that petitioner’s argument is overstated.”); Bd. of Educ., 21 IDELR 1024, 1028, 1033 (N.Y. SEA 1994) (hearing officer found that child’s ADD did not adversely affect his educational performance because he was successful in the regular education program with “high level of teacher direction” and “additional or individual instruction on a regular basis”); George W. Indep. Sch. Dist., 35 IDELR 287, 290 (Tex. SEA 2001) (because child is “successful in the regular mainstream classroom with the assistance of the amplification device already being provided to her by the school district . . . her hearing impairment does not adversely affect her educational performance”); Yankton School District v. Schramm, 93 F.3d 1369, 1374 (8th Cir. 1996) (dissent).

52 See, e.g., Weixel v. Bd. of Educ., 287 F.3d 138, 150 (2d Cir. 2002); Greenland Sch. Dist. v. Amy N., No. CIV. 02-136-JD, 2003 WL 1343023, at *8 (D.N.H. Mar. 19, 2003) (the “adversely affects” requirement is satisfied if the child’s “educational performance would have been adversely affected . . . but for the specialized instruction she was receiving”); Bristol Township Sch. Dist., 28 IDELR 330, 335 (Pa. SEA 1998) (“[B]ut for the specially designed instruction and services provided by Christina’s special education trained mother during Christina’s third and fourth grade years at I.C., Christina’s ability to physically function and/or to learn and do the required classwork would have been so adversely affected by her disability and all the unique needs attendant thereto, that she would never have made the educational progress the District so boldly asserts.”).

53 93 F.3d 1369, 1375 (8th Cir. 1996).


55 See, e.g., Greenland Sch. Dist. v. Amy N., No. CIV. 02-136-JD, 2003 WL 1343023, at *8 (D.N.H. Mar. 19, 2003) (without special education child would have performed below average in most subjects and failed others,
Connecticut, the child was depressed, violent, refused to go to school and was hospitalized yet the court found the child ineligible because his education was not “significantly impeded” as shown by his satisfactory educational performance before, during, and after his hospitalization. The court in *Gregory M. ex rel. Ernest M. v. State Board of Education of State of Connecticut* went further, finding that the disability did not adversely affect educational performance despite it resulting in low grades and average standardized test scores.

Requiring that performance be “significantly impeded” to fulfill the adverse effect prong improperly excludes children otherwise eligible under IDEA because the plain meaning of “adversely affects” is any effect. The lack of a qualifier in the term, such as “substantially affects” or “significantly impedes,” suggests that any negative impact on educational performance, no matter how slight, suffices for eligibility. Decision-makers adding a qualifier to adverse effect are engaging in inappropriate judicial lawmaking.

The “adversely affects” language limits eligibility by requiring that the disability, and not other factors, affects the child’s educational performance. It introduces a causation element to the eligibility analysis. There are countless reasons for children performing poorly in school, but only those reasons that directly result from an enumerated disability lead to eligibility. Authorities often deny IDEA eligibility because factors other than the disability adversely impacts educational performance.

In summary, a disability “adversely affects the child’s educational performance” when an enumerated disability, and not other factors, has any effect, no matter how slight, on any area of instruction mandated in the state curriculum or any area of performance formally tracked by the state’s schools.

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58 Mr. and Mrs. I. v. Maine Sch. Administrative District 55, 2006 WL 224318 at *8 (D.Me. 2006) (holding that “any adverse affect on educational performance, however slight, meets this prong of the definition.”)
59 *See, e.g., Bd. of Educ. of Allegan Public Schools and Allegan Intermediate Sch. Dist., 42 IDELR 158 (Mich SEA 2004)* (denying eligibility because the child’s behavioral problems did not result from her LD); *Houston County Pub. Sch. Sys., 35 IDELR 25 (Ala. SEA 2001)* (poor school performance was a result of failure to attend school and complete assignments therefore ADD did not adversely affect educational performance); *Mt. Diablo Unified Sch. Dist., 26 IDELR 338 (Cal. SEA 1997)* (child’s poor educational performance was a result of drug use and truancy, not emotional disturbance, therefore “adversely affects” requirements unfulfilled); *Glendale Unified Sch. Dist., 509 EHLR 203, 205 (Cal. SEA 1987)* (when child lost speaking ability for six months due to the parents’ failure to send her to therapy and her placement in a setting without communication, the hearing officer found the “adversely affects” prong unmet because “Petitioner failed to establish that her possible partial cessation of speech was caused by her [disability]”).
III.  “Needs”

Once it is established that a child has an enumerated disability, the issue becomes whether “by reason thereof, the child needs special education and related services.” IDEA “contains no explicit guidelines for determining whether a student with an impairment needs special education.” Rather, it is left to the states to give this term meaning, with the only limitation being that the state’s criteria may not “operate to exclude any students who, in the absence of the State’s criteria, would be eligible for services.” Yet this is virtually impossible to determine as IDEA and its regulations provide no clues whatsoever to the definition of “need.” Apart from the plain meaning of “need,” the language, structure and legislative history of IDEA simply do not help identify the children Congress envisioned as needing special education.

Not only is the meaning of need difficult to glean from IDEA itself, it is difficult to determine which state standards should be referenced in defining “need.” Some states simply define “need” in their regulations regarding disabled children. The difficulty arises in states that do not define “need” just as it arose in states that did not define “adversely affects educational performance.”

With almost no guidance from IDEA and no apparent general state educational standards to bring meaning to the term, it is no surprise that decision-makers historically struggle when determining who “needs” special education. There are two essential points of disagreement. The first is whether the child’s need for special education can be ascertained without considering the child’s current level of educational performance. In other words, does a child “need” special education merely because the child can benefit from it? If that question is answered in the negative, the issue becomes under what level must a child’s performance fall for a “need” to be found? The division in authority on these questions results in an artificial and variable line between those who do and do not require special education.

Many authorities find that a child “needs” special education merely because the child can benefit from it. This results in high-performing gifted children being found eligible despite out-performing their non-disabled peers. For example, in Benjamin R. the hearing officer found “a gifted child with very superior cognitive abilities” who performed well academically and socially in kindergarten still needed special education because the child was not fulfilling his potential. OSEP provides conflicting guidance on the issue. When asked whether a child

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60 Letter to Pawlish, 24 IDELR 959, 964 (OSEP 1995); see also J.D. ex rel. J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 66 (2d Cir. 2000); Mr. and Mrs. I. v. Maine Sch. Administrative District 55, 2006 WL 224318 at *15 (D.Me. 2006).
61 Letter to Pawlish, 24 IDELR at 963.
62 Garda, supra note 4, at 491-93.
63 See, e.g., MASS. GEN. LAWS ANN. ch. 71B, § 1 (West 1996) (a child needs special education when the child cannot “progress effectively” in regular education); COLO. REV. STAT. § 22-20-103(1.5) (2000) (a child only needs special education if the child cannot receive “reasonable benefit from ordinary education”); TENN. COMP. R. & REGS. 0520-1-9-.01(20) (2003) (a child needs special education when the child is unable “to be educated appropriately in the general education program.”)
64 COMMITTEE ON MINORITY REPRESENTATION IN SPECIAL EDUCATION OF THE NATIONAL RESEARCH COUNCIL, MINORITY STUDENTS IN SPECIAL AND GIFTED EDUCATION 2 (2002) (“Who requires special education? Answering that question has always posed a challenge.”)
65 Id. at 25, 27.
67 Benjamin R., 508 EHLR 183, 185 (Mass. SEA 1986).
advancing from grade to grade may need special education, OSEP apparently adopted the benefit standard by responding that if a “student’s educational performance would be adversely affected in the absence of [special education],” then the child needs special education. But this contradicts OSEP’s earlier position that children performing in the average range were not IDEA eligible because when “the student is progressing from grade to grade at the same rate as his or her age peers, then that student is not entitled under the Act to special education.”

The benefit standard employed by the above decision-makers and arguably OSEP is not supported by IDEA. IDEA expressly provides that the child must “need” special education, not merely that the child can benefit from it. The plain meaning of “need” signifies a necessity, exigency, or a lack of something essential. Congress clearly intended the term “need” to limit the class of eligible children and not simply to introduce the special education limitation. Employing the benefit standard reads the “need” limitation out of IDEA. Unless state standards employ a benefit standard, one cannot properly be read into IDEA. Most authorities reject the benefit standard and instead consider the child’s current performance level when ascertaining whether a child “needs” special education. These authorities diverge, however, on what level of performance results in a “need” for special education.

Before determining what level of performance - failing, below average, average, above average, or excellent - equates to a “need” for special education, decision-makers must know how to ascertain a child’s current level of educational performance. The critical question is whether performance level should be determined with or without the non-special education services the child may already be receiving. Authorities agree that the child’s educational performance should be ascertained taking into account the non-special education services the child receives under Section 504. In other words, children are not IDEA eligible if their needs are adequately addressed through non-special education services.

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68 Letter to Pawlisch, 24 IDELR 959, 966 (OSEP 1996); see also Letter to Lillie/Felton, 23 IDELR 714, 718 (OSEP 1995) (when asked if learning disabled students that receive good grades can be IDEA eligible, OSEP set forth the need requirement and the “adversely affects” requirement and entitled them the “common denominator”).

69 Letter to Hartman, 213 EHRLR 252, 254 (OSEP 1989). The above average performers were found ineligible based on their failure to fulfill the LD classification requirements and not on the need requirement. The below average performers were found eligible, without any need analysis, simply because they fit the definition of LD. Id.


71 BLACK’S LAW DICTIONARY 1054 (7th ed. 1999) (“1. The lack of something important; a requirement.”); Meriam Webster’s Online Dictionary, available at http://www.m-w.com (“to be needful or necessary”).

72 Metro. Nashville Pub. Sch. Sys., 27 IDELR 756 (Tenn. SEA 1997) (“It was clearly the intent of the legislature to restrict the provision of special education services to those students with significant need.”); PRESIDENT’S COMMISSION, supra note 3, at 30 (IDEA seeks to protect high need children); Luretha R. McClendon, Note, The Representation of Children with Disabilities in Connecticut Under the Individuals with Disabilities Education Act, 5 QUINNIPAC HEALTH L.J. 85, 92 (2001) (“Congress intended that only a certain class of children, those truly in need, were to receive the protection and benefits of the IDEA.”).

73 See, e.g., Ludington Area Schools, 39 IDELR 86 (Mich. SEA 2003) (Child did not perform well with non-special education services therefore child needed “special education”); Acad. Sch. Dist. #20, 21 IDELR 965 (Colo. SEA 1994) (concluding child did not need special education based on child’s performance, taking into account behavior management strategies); In re Laura H., 509 EHRLR 242, 245 (Mass. SEA 1988) (child not eligible because “[t]here is no current indication that she cannot continue to make effective educational progress in the regular education program, particularly with the modifications (including continued regular education guidance services) offered by Wellesley”); Ludington Sch. Dist., 35 IDELR 137, 140 (Mich. SEA 2001) (child not eligible because his “needs can be met in the regular education setting with some modifications, and cooperation and consistency from his parent”); Arlington Cent. Sch. Dist., 35 IDELR 205, 213 (N.Y. SEA 2001) (examined child’s
Some states go further, finding children ineligible until non-special education interventions are provided the child and shown to fail.\textsuperscript{75} The new IDEA, re-authorized in 2005, moves in this direction by suggesting that children be provided pre-referral services before eligibility attaches.\textsuperscript{76} IDEA allows local educational agencies to use up to fifteen percent of their funds to provide “early intervening services” to students before they are identified as needing special education.\textsuperscript{77} Congress encourages the provision of early intervening services to prevent referral of mere “instructional casualties” to special education and to reduce minority over-representation in special education.\textsuperscript{78} IDEA does not mandate that pre-referral interventions be attempted and failed before a “need” for special education is found - though this appears to be the future trend.\textsuperscript{79}

With knowledge of how to ascertain a child’s current level of educational performance, i.e. taking into account performance with accommodations - the question of what level the child’s performance must fall below before a “need” exists can be examined. There is agreement that a failing child “needs” special education.\textsuperscript{80} There is also agreement, at least for the decision-performance with non-special education services to determine if the child needed special education); Corvallis Sch. Dist. 509J, 28 IDELR 1026, 1038 (Or. SEA 1998) (“Thus, when related services and accommodations allow a student to make progress in the regular education program, as indicated by grades or performance on academic achievement test, there is no need for special education and therefore no eligibility under the IDEA.”); In re W. Chester Area Sch. Dist., 35 IDELR 235, 239 (Pa. SEA 2001) (child ineligible because child performed well with supports); George W. Indep. Sch. Dist., 35 IDELR 287, 293 (Tex. SEA 2001) (“Instead, the evidence showed that she is successful in the regular mainstream classroom with the assistance of the amplification device already being provided to her by the school district . . . There is no educational need for special education and related services under these circumstances.”); In re K.M., 29 IDELR 1027, 1035 (Vt. SEA 1999) (“[T]he student does not require a special program of instruction in order to obtain an appropriate education despite her handicaps. She has succeeded in a regular program of instruction, but she needs considerable accommodations to her handicap in order to do so.”).

\textsuperscript{74} 34 C.F.R. pt. 300, app. A, at 106 (2003) (“Because many students receiving services under IDEA will also receive services under the Rehabilitation Act, it is important, in planning for their future, to consider the impact of both statutes.”).

\textsuperscript{75} California expressly defines an eligible “individual with exceptional needs” as a student with an impairment that “requires instruction, services, or both, which cannot be provided with modification of the regular school program.” CAL. EDUC. CODE § 56026(b) (West 2003); see also id. § 56337(c) (learning disability requires a severe discrepancy between ability and that “discrepancy cannot be corrected through other regular or categorical services offered within the regular instructional program”); Norton v. Orinda Union Sch. Dist., No. CV-95-02808-SBA, 1999 WL 97288, at *3 (9th Cir. Feb. 25, 1999) (“IDEA protection is available in California only where modifications to the student’s regular educational program are ineffective.”).

\textsuperscript{76} H.R. REP. NO. 108-77 at 150 (2002).

\textsuperscript{77} 20 U.S.C.A. § 1413(f) and (a)(4)(A)(ii) (West 2005); H.R. REP. No. 108-77, at 108 (2003) (“The eligibility for special education services would focus on the children who, even with these services, are not able to be successful.”).


\textsuperscript{79} Local educational agencies are not required to spend funds on early intervening services unless a state finds that it or its local educational agencies have “significant disproportionality” of minority students in special education. 20 U.S.C.A. § 1418(d)(2) (West 2005).

\textsuperscript{80} See, e.g., Muller ex rel. Muller v. Comm. on Special Educ., 145 F.3d 95, 98 (2d Cir. 1998); see cases cited infra notes 84 - 87 (requiring that the child fail in order to need special education). But see Clear Creek Indep. Sch. Dist., 40 IDELR 107 (Tx. SEA 2003) (child with LD did not “need” special education despite six failing grades because child “passed the courses he repeated without special education intervention and achieved appropriate educational milestones throughout his education at CCISD, including passing the exit-level TAAS objectives on his first testing -- without modification.”); Austin Indep. Sch. Dist. v. Robert M., 168 F. Supp. 2d 635, 639 (W.D. Tex. 2001) (Hearing officer held that a child failing from a magnet program “did not and does not need special education. . . . It would be a rare case indeed where a student who affirmatively chose to attend a magnet school for gifted
makers who properly reject the benefit standard, that when a child’s educational performance is above average there is no “need” for special education.\textsuperscript{81} Most courts and hearing officers also

\textsuperscript{81} See, e.g., Grant v. St. James Parish Sch. Bd., No. CIV.A. 99-3757, 2000 WL 1693632, at *2, *5 (E.D. La. Nov. 8, 2000), aff’d, 273 F.3d 1102 (5th Cir. 2001) (unpublished table opinion); Eric H. v. Judson Indep. Sch. Dist., No. CIV.A. SA01CA0804-NN, 2002 WL 31396140, at *2 (W.D. Tex. Sept. 30, 2002) (while the court focused more on propriety of evaluation procedures than the “need” analysis, it concluded that child receiving As and Bs in honors courses could not “demonstrate a present need for special education services and related services because of the disability”); Morristown Public Schools, 44 IDELR 137 (OCR 2005) (child performing above average did not need to be evaluated for IDEA eligibility); Weston Pub. Sch. Dist., 34 IDELR 75, 83 (Mass. SEA 2001); R.B. by and through F.B. v. Napa Valley Unified Sch. Dist., 43 IDELR 188 (N.D.Cal. 2005) (child did not need special education because she performed above average academically); Bd. of Educ. of the Fayetteville-Manlius Central School District, 43 IDELR 158 (N.Y. SEA 2005) (child did not need special education because she received As and Bs); Fenton Area Pub. Schools, 44 IDELR 293 (Mich. SEA 2005) (child with dyslexia that never received lower than a B+ did not need special education to “maximize her potential” because “[s]pecial education is not designed for students who are already successful in regular education.”); Bd. of Educ. of the Fayetteville-Manlius Central School District, 43 IDELR 158 (N.Y. SEA 2005) (child did not need special education because she received As and Bs); St. Clair County Bd. of Educ., 29 IDELR 688 (Ala. SEA 1998) (child receiving As and Bs and active in extracurricular activities did not require special education); Long Beach Unified Sch. Dist., 33 IDELR 113, 119 (Cal. SEA 2000) (“Notwithstanding STUDENT’s need for classroom modifications, he has managed to maintain the grades necessary to remain enrolled in an accelerated program. This leads the Hearing Officer to the conclusion that STUDENT’s needs can be met through services available in the general education classroom.”); Ludington Sch. L.A. Unified Sch. Dist., 31 IDELR 71, 82 (Cal. SEA 1999) (hearing officer denied IDEA eligibility to a gifted student with an anxiety disorder because “STUDENT, who is eight years old, has achieved above-average grades in college classes at Santa Monica College”); In re Hollister Sch. Dist., 26 IDELR 632, 664 (Cal. SEA 1997) (“based on STUDENT’S ability to receive commendable grades in the absence of special education services, . . . the ability to show progress on measures of academic achievement, and to pass successfully from grade to grade . . . STUDENT did not require [special education]”); Santa Ana Unif. Sch. Dist., 21 IDELR 1189 (Cal. SEA 1994) (child with B average and performing “above grade level in most academic areas” did not need special education to address disability); Weymouth Pub. Sch., 21 IDELR 578, 588 (Mass. SEA 1994) (the child did not need special education because the child was “progressing effectively in regular education” as shown by his average and above average grades); Springfield Pub. Sch., 17 EHLR 264, 268 (Mass. SEA 1990) (child “performing above grade level” and who “earns very high grades” did not need special education); Smithtown Cent. Sch. Dist., 32 IDELR 46, 50 (N.Y. SEA 1999) (child with hearing deficits and ADD performed above average in school with non-special education services and therefore did not need special education.); Bd. of Educ., 29 IDELR 122, 128 (N.Y. SEA 1998) (autistic child that “succeeded in a regular education class” was properly declassified because “the record does not demonstrate that he can only receive appropriate educational opportunities from a program of special education”); Corvallis Sch. Dist. 509J, 28 IDELR 1026, 1038 (Or. SEA 1998) (because the child “was found to have achievement levels at or above grade level in all areas and considerably above grade level in several” she did not need special education); Pennsbury Sch. Dist., 37 IDELR 267, 270-71 (Pa. SEA 2002) (child who received “satisfactory” and “quite positive” grades did not need special education); Conrad Weiser Area Sch. Dist., 27 IDELR 100, 103 (Pa. SEA 1997) (gifted child with ADD and learning disability in written expression did not need special education because “[a]ssessments, standardized tests, and teacher testimony show that organizational weaknesses have not deterred his above grade level functioning, making special education instruction unwarranted”); Wayne Highlands Sch. Dist., 24 IDELR 476, 478 (Pa. SEA 1996) (child with Chronic Fatigue Syndrome that received “good grades” does not need special education); George W. Indep. Sch. Dist., 35 IDELR 287, 290 (Tex. SEA 2001) (“the evidence showed that she is successful in the regular mainstream classroom [receiving high grades] with the assistance of the amplification device already being provided to her by the school district. . . . There is no educational need for special education and related services under these circumstances.”) (citations omitted); Aransas County Indep. Sch. Dist., 29 IDELR 141, 144-45 (Tex. SEA 1998) (child with ADD and a learning disability was denied eligibility because he performed at or above grade level in all subjects”); In re
agree that a child whose educational performance is average does not surpass the “need” hurdle.  

The consensus ends here, though, as the authorities disagree on whether a child performing below average but passing from grade to grade “needs” special education. Some states legislate that children must fail in the regular classroom before finding a “need” for special education. Many courts and hearing officers, even without such an express state standard, require a child to fail in regular education before a “need” for special education exists. For example, in Kelby v. Morgan Hill Unified School District, the Ninth Circuit denied eligibility to a child with “poor grades, behavior problems and inconsistent work habits” because the child’s “learning difficulties are not so severe that he cannot benefit adequately from the regular educational program.” The Ninth Circuit requires less than “poor grades” before it will find that a child “needs” special education.

Many courts and hearing officers agree and require failure in regular education before finding a child eligible. They often rely on Board of Education of Hendrick Hudson Central
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School District v. Rowley,\textsuperscript{86} to conclude that because IDEA requires only “some educational benefit” to eligible children, any child already receiving some educational benefit - passing from grade to grade - is not eligible.\textsuperscript{87} This analysis is incorrect because Rowley did not delineate the eligibility standards of IDEA, it explained only the free appropriate public education that must be provided eligible children. The Eighth Circuit explained, when finding a child eligible despite the child’s good school performance, that “[t]he issue here is not whether current IDEA services are adequate [as it was in Rowley], but whether Tracy remains entitled to receive any benefits under IDEA.”\textsuperscript{88} OSEP employs the same analysis.\textsuperscript{89} The First Circuit similarly held that “[t]he Court’s use of ‘benefit’ in Rowley was a substantive limitation placed on the state’s choice of an educational program; it was not a license for the state to exclude certain handicapped children.”\textsuperscript{90}

Numerous authorities find that children passing yet performing poorly “need” special education.\textsuperscript{91} For example, in Blazejewski ex rel. Blazejewski v. Board of Education of Allegany Central School District, the court found the child was eligible despite passing from grade to grade because “he is achieving rather low marks in certain basic courses [and] . . . he lacks many of the basic survival skills needed to function in the outside world.”\textsuperscript{92} In Petaluma Joint Unified School District, the school district found the child ineligible, despite the child’s grades declining yearly until eighth grade when he received all Cs, Ds and Fs, because the child progressed from grade to grade without special education. The hearing officer disagreed, finding that the child

\textsuperscript{86}458 U.S. 176, 188-204 (1982).

\textsuperscript{87}See, e.g., Hoffman v. E. Troy Cmty. Sch. Dist., 38 F. Supp. 2d 750, 764 (E.D. Wis. 1999) (citing Rowley the court reasoned that “[t]hough not stellar and certainly not reflective of his full potential, Joseph’s mostly passing grades at East Troy suggest that he was still receiving ‘educational benefit’ from his classes, at least as understood under IDEA.”); Metro. Nashville Pub. Sch. Sys., 27 IDELR 756, 761 (Tenn. SEA 1997) (after citing Rowley, the hearing officer concluded that the child was already receiving some educational benefit from regular education and therefore did not need special education); Fauquier County Pub. Sch., 20 IDELR 579, 584 (Va. SEA 1998) (child needed special education because she “still will not be able to benefit from regular classroom instruction without specially designed instructional modifications and adaptations and related services”).

\textsuperscript{88}Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1375 (8th Cir. 1996); see also Natchez-Adams Sch. Dist. v. Searing ex rel. Searing, 918 F. Supp. 1028, 1038 (S.D. Miss. 1996) (rejecting the argument that a child passing from grade to grade does not need special education because it “confuses the standard to be applied in determining access to educational benefits with that required in designing the content of an IEP” as was done in Rowley).

\textsuperscript{89}Letter to Pawlisch, 24 IDELR 959, 963 (OSEP 1995) (finding that a child passing from grade to grade may still be eligible).

\textsuperscript{90}Timothy W. ex rel. Cynthia W. v. Rochester, N.H., Sch. Dist., 875 F.2d 954, 971 (1st Cir. 1989).

\textsuperscript{91}See, e.g., W. Chester Area Sch. Dist. v. Bruce C., 194 F. Supp. 2d 417, 421 (E.D. Pa. 2002) (the court rejected the “determination that Chad is ineligible for an IEP [because] his grades have never dipped below the passing level.”); Mary P. v. Ill. State Bd. of Educ., 919 F. Supp. 1173, 1180 (N.D. Ill. 1996), amended by 934 F. Supp. 989 (N.D. Ill. 1996) (rejecting the school district’s argument that a child passing from grade to grade does not need special education); see also Montgomery County Pub. Schs., 35 IDELR 135, 138, 141 (Md. SEA 2001) (child with ADD needed special education because despite passing he made “minimal educational progress” in a regular classroom); Phila. Sch. Dist., 27 IDELR 447 (Pa. SEA 1997) (without discussing the “need” requirement, the hearing officer found a gifted child that received Ds in Spanish was IDEA eligible as learning disabled).

needed special education because “despite attempts at modification of the regular instructional program, student continued to perform poorly” and failed two subjects.93

In the absence of state regulations to the contrary, decision-makers should find that a child “needs” special education if their educational performance is below average and should not require failure. Educators agree that children need assistance when they are performing poorly but still passing because they deplore the strategy of waiting until a child fails to provide any assistance.94 This is particularly true for children with disabilities, as early identification of educational problems and intervention “can prevent disabilities in many children and ameliorate their impact in those who develop them.”95 Without any express state standards, sound educational policy dictates that a “need” for special education be found prior to students failing.

In summary, a child should be deemed to “need” special education when any area of her educational performance is poor or below average. This standard eliminates average and above average performers from eligibility, an outcome that already finds virtually unanimous support from courts and hearing officers. The standard also includes children who are not failing but are performing poorly, which allows districts to respond and address problems early when there is more chance of successful treatment, rather than waiting for failure when treatment may be too late.

IV. “SPECIAL EDUCATION”

The final and most complicated eligibility hurdle is deciding if the child requires “special education and related services.” The need for “special education” is the critical distinction between eligibility under Section 504 and IDEA because Section 504 does not consider the child’s need for special education.96 “Special education” has a limited meaning and not all services provided by schools to disabled students are special education. As a result, the definition of “special education” is often determinative of IDEA eligibility97 and it is an “extremely important and nuanced question.”98

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95 PRESIDENT’S COMMISSION, supra note 3, at 7-8, 22-23.; see also Callegary, supra note 7, at 197.
96 If a child only needs related services, usually provided under Section 504, and not “special education” then the child is not eligible. 34 C.F.R. § 300.7(a)(2)(i) (2003); see also LAURA F. ROTHSTEIN, DISABILITIES AND THE LAW 93 (1984) (explaining that child must need special education under IDEA but not under Section 504); Yankton Sch. Dist. v. Schramm, 900 F. Supp. 1182, 1191 (D.S.D. 1995), aff’d, 93 F.3d 1369 (8th Cir. 1996); Letter to Teague, 20 IDELR 1462, 1463 (OSEP 1994).
97 See, e.g., Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1371 (8th Cir. 1996); Del. County Intermediate Unit v. Jonathan S., 809 A.2d 1051, 1056 (Pa. Commw. Ct. 2002) (Child ineligible despite orthopedic impairment that had adverse effect “[b]ecause there is no evidence of record that Student requires such specially designed instruction, he does not meet the controlling definition of a child with a disability . . . .”); Rochester City Sch. Dist., 31 IDELR 178, 185 (N.Y. SEA 1999) (“Though his IQ scores place him in the superior range of intellectual functioning, and his academic performance is in the average range, it is not clear that the child requires special education services.”); Smithtown Cent. Sch. Dist., 29 IDELR 293, 300 (N.Y. SEA 1998) (“I am unable to determine whether these accommodations employed by the child’s teachers to address the boy’s [disabilities] amounted to [special education]” and therefore whether the child needs special education and is eligible.); Wayne Highlands Sch. Dist., 24 IDELR 476, 477-78 (Pa. SEA 1996) (“Despite the parents’ assertion to the contrary, these accommodations do not rise to the level of specially designed instruction.”).
98 Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 162 (1st Cir. 2004).
IDEA defines “special education” as “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability . . .” 

“Specially designed instruction” means “adapting . . . the content, methodology, or delivery of instruction (i) to address the unique needs of the child that result from the child’s disability; and (ii) to ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children.”

“Special education,” therefore, is the adaptation of the content, methodology or delivery of instruction to address a child’s unique needs, and to ensure access to the general curriculum.

“Related services,” on the other hand, are “transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education . . .” Specific examples include “speech-language pathology and audiology services . . . psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services . . . counseling services, including rehabilitation counseling, orientation and mobility services, and medical services . . . .”

“Related services” are provided to eligible children only if the services are necessary to assist a child with a disability to benefit from “special education.” If a child needs only “related services” and not “special education,” then the child is not eligible.

The Supreme Court explains that “to be entitled to related services, a child must be handicapped so as to require special education. In the absence of a handicap that requires special education, the need for what otherwise might qualify as a related service does not create [eligibility].”

But this general rule has a major exception: states are permitted to include any of the enumerated “related services” that are also “special education” within their definition of “special education.” Some states adopt the narrow federal definition of “special education” that

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100 34 C.F.R. § 300.26(b)(3) (2003).
102 Id. The regulations add school health services, social work services in schools and parent counseling and training to the list of related services, 34 C.F.R. § 300.24(a), and provide specific definitions of each of the enumerated related services. 34 C.F.R. § 300.24(b) (2003).
105 Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 894 (1984) (citations omitted). See also Katherine S. v. Umbach, 2002 WL 226697 at *10 (M.D. Ala. 2002) (“a student who has an impairment, but who only needs a related service and not special education, is not a ‘student with a disability’ within the meaning of the law”); A.A. v. Cooperman, 526 A.2d 1103, 1106 (N.J. Super. Ct. App. Div. 1987) (invoking an orthopedically impaired child that needed only transportation and was therefore “not educationally handicapped because he had not been found to require special education”); Hackensack Bd. of Educ., 18 IDELR 988 (N.J. SEA 1992) (invoking an asthmatic child that needed only related service of transportation and was not IDEA eligible because she did not need special education).
106 See e.g. Corvallis Sch. Dist. 5091, 28 IDELR 1026, 12 (Or. SEA 1998) (noting that related services are not special education).
107 34 C.F.R. § 300.26(a)(2)(i) (2003). See also Letter to Tucker, 1 ECLPR ¶ 67 (OSEP 1990) (holding that states may include within their definition of “special education” any of the related services which are specially
excludes the enumerated “related services,” while others broadly define “special education” by including many, if not all, of the enumerated “related services.”

For example, a child who requires only speech-language pathology is not IDEA-eligible in states that employ the federal definition of “special education” excluding the related service of speech-language pathology, but the same child is IDEA-eligible states which include speech-language pathology within its definition of “special education.”

In summary, in order to be eligible under the IDEA a child with a qualifying disability must need “adapting” of the “content, methodology or delivery of instruction” to “address the unique needs of the child” and “ensure access of the child to the general curriculum.” This broad and ambiguous definition leads to diverse interpretations of “special education.” Authorities subscribing to a broad definition - that any adaptation to the general education environment qualifies - find support in the definition of “special education” which suggests that any adaptation of content, method or delivery is special education. Decision-makers adopting a narrow view – that only significant and unique adaptations qualify - find support in the definition of “special education” which requires that the adaptations be made to meet the unique needs of the child, as opposed to the generic needs of all students.

Before exploring these competing interpretations it is important to note that many decision-makers simply ignore this eligibility limitation. These courts and hearing officers presume that all children with disabilities need “special education.” For example, in Muller v. East Islip Union Free School District, a child was denied IDEA eligibility by the school district, the hearing officer, and the state review panel because, among other things, there was no evidence “that the child requires special education and/or related services to benefit from instruction.” The Second Circuit disagreed, finding the child eligible merely because her disability adversely affected her educational development.

The Court presumed, like many others, that a disability that adversely affects educational performance requires remediation through “special education.”

designed instruction and giving the example of a physical therapy program teaching positioning which could be considered special education if the state defines it as such).

108 Garda, supra note 5, at 1105.


110 Letter to Smith, 18 IDELR 683 (OSEP 1992) (“[S]pecially designed instruction’ is education planned for a particular individual or ‘individualized instruction.’”). See also Theresa N. Willard, Note, Economics and the Individuals With Disabilities Education Act: the Influence of Funding Formulas on the Identification and Placement of Disabled Students, 31 IND. L. REV. 1167, 1176 (“[S]pecialized services are those offered to the disabled child to address needs which cannot be served by the regular education program.”).

111 145 F.3d 95, 100 (2nd Cir. 1998).

112 Id. at 103. See also id. at 104, n.6 (“The IHO’s apparent belief that Treena’s emotional problems were unrelated to school is of little if any relevance, so long as those problems had a significant effect on her ability to learn.”).

113 Id. at 105. See also, e.g., Elida Local School District Board of Education v. Erickson, 252 F. Supp. 2d 476, 491 (N.D. Ohio 2003); Greenland Sch. Dist. v. Amy N., No. Civ. 02-136-JD, 2003 WL 1343023 (D.N.H. 2003), overruled on other grounds, 358 F.3d 150 (1st Cir. 2004) (finding IDEA eligibility without addressing whether services child required were special education); Corchado v. Rochester City Sch. Dist., 86 F. Supp. 2d 168, 171-72, 176 (W.D.N.Y. 2000) (finding eligibility without discussing need for special education merely because child had documented impairments); Rochester City, School District, 86 F. Supp. 2d 168, 176 (W.D.N.Y. 2000); In re Anthony F., 628 N.Y.S.2d 802, 803 (N.Y. App. Div. 1995); In re Kristopher H., 507 EHLR 183 (Wash. SEA 1985) (hearing officer did not consider the district’s argument that the child did not need special education, finding rather that the child was IDEA eligible because his disability adversely affected his educational performance);
This presumption is incorrect because a child’s disability may often be appropriately addressed by services that are not “special education.” Children with enumerated disabilities often need only “related services” or “accommodations” to address their needs. This disregard for the “special education” limitation has slowly transformed IDEA into a repository for learning disabled students, especially those struggling with reading. These students’ reading deficits may be addressed through something other than “special education,” such as regular education modifications or simply better reading instruction. This has led to the general rise in “special education” rolls and the disproportionate identification of minorities as disabled. Recognizing the “special education” limitation as well as comprehending exactly what services are and are not “special education,” therefore, is critical to curtailing the recent eligibility explosion and minority overrepresentation in special education.

Decision-makers’ failure to address the “special education” limitation is understandable due to the difficult nature of identifying what is and is not “special education.” The patchwork of decisional authority interpreting “special education” provides no firm guidance.

1. Adaptation of Content as “Special Education”

Decision-makers agree that instructing a child in a unique skill set is “special education.” A long line of decisions holds that children requiring habilitative services or training in basic life skills – skills significantly different than those taught to the general education population – require “special education” and are eligible. This is where the agreement ends, however, as

George West Indep. Sch. Dist., 35 IDELR 287, 290 (Tx. SEA 2001) (“[T]he legal issue is whether that impairment adversely affects her educational performance and thus whether she ‘needs’ special education and related services.”)

Other courts and hearing officers acknowledge the “special education” limitation, yet fail to identify the “special education” the child requires. See, e.g., West Chester Area School District v. Bruce, 194 F. Supp. 2d 417, 420 (E.D. Pa. 2002) (finding the child IDEA-eligible and in need of “special education” without identifying the “special education” the child required); Blazejewski v. Alleghany Central School District, 560 F. Supp. 701, 703 (W.D.N.Y. 1983) (ruling the child needed “special education” without identifying the services required by the child); In re Anthony F., 216 A.2d 564 (Sp. Ct. N.Y. 1995) (the court found that a child with speech and language deficits needed more than merely the “related service” of speech therapy, and was thus IDEA-eligible, but the court never specifically identified the “special education” the student needed).

114 Dixie Snow Huefner, Judicial Review of the Special Education Program Requirements Under the Education for All Handicapped Children Act: Where Have We Been and Where should we be Going?, 14 HARV. J.L. & PUB. POL’Y 483, n.63 (1991) (“The reason that the IDEA-B requires a student evaluated as disabled to need special education is that some students with disabilities can be educated successfully in the regular classroom without special education and related services.”). See also, West Chester Area Sch. Dist., 18 IDELR 802, 803 (Pa. SEA 1992) (finding that it is a “circular conclusion that in light of the adverse effect [of a disability], [a student] needs special education” as the existence of a disability and the need for “special education” are simply not coterminous).

115 PRESIDENT’S COMMISSION, supra note 3, at 3 (50% of children served under the IDEA are learning disabled, and overall, 40% of children identified under the IDEA are identified because of their inability to read); H.R. REP. NO. 108-77, at 153 (2003) (children “are being inappropriately referred to special education primarily because of reading difficulties”); 156 (The Committee on Education and Workforce reported to the House of Representatives that it was “discouraged by the practice of over-identifying children as having disabilities, especially minority students, largely because the children do not have appropriate reading skills.”).

116 See Garda, supra note 5, at 1108.

117 See e.g., Padilla v. Dep’t of Educ., 30 IDELR 503, 505 (Puerto Rico Cir. Ct. App. 1998) (noting that teaching a severely disabled child basic communication is “special education” because “education for disabled children should be afforded a broader scope, to include not only traditional academic skills, but also the basic functional skills of daily living . . . . After all, a person’s development as a human being is the ultimate purpose of
many courts and hearing officers find that any modification to content, no matter how slight, is “special education,” while others find children in need of only minor curriculum modifications provided to non-disabled students are not eligible.

The Eighth Circuit implicitly adopted the former interpretation in *Yankton School District v. Schramm*, holding that modifying the length and nature of the child’s assignments, providing teacher notes, and teaching the child to type using only her left hand and the first finger of her right hand were “special education.”118 The holding that modified typing instruction is “special education” appears correct because the child was taught an entirely different typing skill set than her peers. Yet not all teaching of unique skill sets is “special education.” Speech-language pathology, audiology services, physical and occupational therapy, counseling services, and orientation and mobility services, all of which teach different skills than are being taught in general education, are defined as “related services” and not “special education.” It is too simple to conclude, therefore, that the mere teaching of a different skill than is being taught the rest of the students is “special education,” as much depends on whether the state has included any related services in its “special education” definition.119 The *Yankton* court did not refer to the relevant state law to determine if the child’s typing instruction – maybe occupational therapy - was defined as a “related service” and not “special education,” possibly making her ineligible. Many courts and hearing officers employ this same incomplete analysis.120

In finding that the modified assignments were “special education,” the *Yankton* court did not discuss the extent of the modifications to the assignments, whether the modifications were qualitative or quantitative or whether modified assignments were available to general education students. Instead, the Eighth Circuit found that any content modification constituted “special education.”121

In contrast, other decision-makers hold that minor curriculum modifications, which are provided to non-disabled general education students, do not constitute “special education.” For example, in *Mountain Empire Unified School District*, an LD child required small group and individualized instruction, preferential seating, curriculum one year below grade level, tutoring, education.”); *In re Contra Costa County Consortium*, 1984-85 EHLR (Cal. SEA 1985) (noting that teaching severely disabled child basic communication skills is special education, which child needs, and is therefore IDEA-eligible); *Jenkins v. Florida*, 1984-85 EHLR 556:471 (M.D. Fla. 1985), *vacated and remanded in part on other grounds*, 815 F.2d 629 (11th Cir. 1987) (noting habilitative services provided to severely disabled is special education); *Polk v. Central Susquehanna Intermediate Unit No. 16, 853 F.2d 171, 182-83 (3d Cir. 1988), cert. den., 488 U.S. 1030 (1989) (noting that physical therapy and training in basic life skills are special education); *Gladys J. v. Pearland Independent Sch. Dist., 520 F. Supp. 869, 879 (S.D. Tex. 1981); Campbell v. Talladega County Bd. of Educ., 518 F.Supp. 47 (N.D. Ala. 1981).118 93 F.3d 1369, 1375 (8th Cir. 1996).

119 See *e.g.* Pittsburgh Sch. Dist., 24 IDELR 1119 (Pa. SEA 1996) (child requiring Life Skills Program, which was counseling to teach organization and responsibility, did not need special education and was not IDEA eligible); *Radnor Township Sch. Dist., 25 IDELR 1229, 1231 (Pa. SEA 1997) (drug and alcohol counseling does not “constitute specialized instruction”).

120 See *e.g.*, *Michael P. v. Illinois State Board of Education*, 919 F. Supp. 1173, 1180 (N.D. Ill. 1996), amended by 934 F.Supp. 989 (N.D. Ill. 1996) (holding that a child needing speech therapy needed “special education” but failed to examine state standards to see if speech therapy was included in definition of “special education”); *Natchez-Adams Sch. Dist. v. Searing*, 918 F.Supp. 1028, 1037-38 (S.D. Miss. 1996) (holding that a child needing occupational therapy needed “special education” but failing to examine state standards to see if occupational therapy was included in definition of “special education”).

121 Id. at 1375. See also *Mr. and Mrs. I v. Maine School Administrative District 55*, 2006 WL 224318, *14 (D.Me. 2006) (finding that “[t]he extra-instructional offerings [of] social-skills and pragmatic language instruction” were “special education” without ascertaining if these were offerings made to all general education students).
pull-out assistance in language arts, additional teacher time, and assistance from the special education aide in the classroom.\textsuperscript{122} The hearing officer denied eligibility because these services were not “special education,” but rather “services offered within the regular instructional program.”\textsuperscript{123} Similarly, in \textit{Howard County Public School}, the school district provided the student with an adjusted spelling list, corrective reading instruction, a unique reading/spelling program and allowed the parents to use alternative methods to complete assignments.\textsuperscript{124} It was agreed that the child needed these services, yet she was denied IDEA-eligibility because these modifications were “alternative teaching methods” and not “special education methods necessary for the child to receive educational opportunity, within the meaning of the IDEA.”\textsuperscript{125}

In each of these cases, the child required modification of the curriculum or the teaching of unique skills, yet the decision-makers refused to find that the child required “special education.” These decision-makers implicitly recognize that today’s classroom makes many accommodations and modifications for all students, and reserve eligibility only for those requiring significant modifications not provided to all students. The use of behavior management plans [hereinafter “BMPs”] exemplifies this presumption. BMPs essentially teach a child proper behavior through specified methods. Despite the fact that BMPs adapt the content of instruction, they are consistently found not to constitute “special education.”\textsuperscript{126} The implicit justification is that BMPs are simply good teaching techniques that should be applied to all students and not merely those with disabilities.

A significant number of small curricular modifications, however, are often viewed as “special education.” In \textit{Troy Area School District}, a child with physical difficulties affecting her balance and

\textsuperscript{122} 36 IDELR 29 (Cal. SEA 2001).
\textsuperscript{123} \textit{Id.} However, because the child did not do well with these regular education services she required special education. \textit{Id.}
\textsuperscript{124} 25 IDELR 771, 14 (Md. SEA 1997)
\textsuperscript{125} \textit{Id.} at 777. \textit{See also,} South Hadley Public Schools, 39 IDELR 209 (Mass. SEA 2003) (provision of visual aides, graphic organizers, socialization reinforcement and modeling and a friendship group were not “special education” because they were “supports that are provided routinely to students without identified disabilities.”); Bd. of Educ. of the Fayetteville-Manlius Central School District, 43 IDELR 158 (N.Y. SEA 2005) (group social skills programs, speech improvement services, speech counseling, remedial reading and remedial math as an academic intervention service are not “special education”); Avon Public Schools 25 IDELR 778 (Mass. SEA 1997); Corvallis Sch. Dist. 509J, 28 IDELR 1026 (Or. SEA 1998) (“social skills training” is not special education); Metro. Nashville Pub. Sch. Sys., 27 IDELR 756 (Tenn. SEA 1997) (holding that child did not receive special education at private school despite finding that he received individualized instruction); Smithtown Central Sch. Dist., 32 IDELR 46, 131 (N.Y. SEA 1999) (“The Section 504 accommodations designed to address the child's hearing impairment included . . . encouraging the child to maintain appropriate physical aspects necessary for communication, such as eye contact . . . I am unable to find that any of these accommodations constitute specially designed instruction.”).
\textsuperscript{126} \textit{See, e.g.,} R.B. by and through F.B. v. Napa Valley Unified Sch. Dist., 43 IDELR 188 (N.D.Cal. 2005) (child required only a behavior intervention plan and not special education to address her behavioral difficulties); Metro. Nashville Pub. Sch. Sys., 27 IDELR 756 (Tenn. SEA 1997) (noting that a provision of behavior management plan at private school was not special education); Corvallis Sch. Dist. 509J, 28 IDELR 1026 (Or. SEA 1998) (noting that a “strategy for managing outbursts” is not special education); In re K.M., 29 IDELR 1027 (Vt. SEA 1999) (noting that crisis management is an accommodation and not special education); Ludington Sch. Dist., 35 IDELR 137 (Mich. SEA 2001) (finding that a child with behavior management plan is “able to profit from regular education without special education support”); Radnor Township Sch. Dist., 25 IDELR 1229, 1231 (Pa. SEA 1997) (noting that a behavior management plan constitute “specialized instruction”); Gregory-Portland Independent Sch. Dist., 38 IDELR 168 (Tx. SEA 2002) (finding that a discipline plan was Section 504 accommodation and not special education).
strength required significant alteration to her physical education class. The District contended that the child needed only accommodations in PE, but the hearing officer concluded that “what Laura [needed] clearly [qualified] as ‘specially designed instruction.’ . . . [T]here is no lingering doubt that what Laura [needed] because of those challenges [was] well beyond that which is provided in the regular education curriculum. . . . Equally obvious is that the level of intervention that Laura will need to participate in most of them far [exceeded] the regular PE curriculum." The child’s accommodations were so significant that the child was actually learning a different skill set than her peers. Slight modifications to curriculum, when numerous and taken in toto, can constitute adaptation in content.

2. Adaptation of Method as “Special Education”

The use of general education materials to meet a disabled child’s needs may be “special education,” so long as the method of instruction is adapted. But decision-makers disagree as to what constitutes mere “accommodations” provided to students that are not “special education,” as opposed to modifications teachers make to their teaching method and content that are “special education.”

There is general agreement that provision of the following accommodations are not “special education:” oral tests or longer time periods to complete tests; additional time to complete assignments; aides to assist students with mobility, handwriting, organization, or behavior; organizational assistance or systems; note takers or interpreters; preferential

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127 30 IDELR 551, 552 (Pa. SEA 1999). For example, to learn how to kick a ball “significant strengthening of various muscles would be necessary as well as a breaking down of the task into discrete elements” and she would have to either substitute certain movements to meet the balance curriculum or not participate at all in certain activities. Id.
128 Id. at 555-56.
129 See also Bristol Township Sch. Dist., 28 IDELR 330, 333, 336 (Pa. SEA 1998) (holding that preferential seating, additional time to complete written work, oral testing; special modifications to classroom texts, workbooks and worksheets to eliminate visual complexity; an assistive communication device for writing, adaptation of school materials, assistance with organizational skills, use of information on tape and a full integration of all the services “are, in fact, special education and related services as defined by the IDEA and the PA Code” and that the issue “was not even close”); In re: Student with a Disability, 4 ECLPR 477 (Wash. SEA 2003) (orthopedically impaired child needed “special education” in the form of occupational therapy and modification to child’s day to help her develop use of hand).
131 See, e.g., Bd. of Educ. of the Oceanside Union Free Sch. Dist., 42 IDELR 288 (N.Y. SEA 2004) (additional time for tests was an accommodation and not special education); Santa Ana Unif. Sch. Dist., 21 IDELR 1189 (Cal. SEA) (finding that despite a need for oral instead of written tests, learning disabled child not IDEA-eligible because she did not need special education); In re Wayne Highlands Sch. Dist., 24 IDELR 476, 478 (Pa. SEA 1996) (finding child with chronic fatigue syndrome who needed techniques that minimized the time she had to spend in completing assigned tasks, including oral testing, was ineligible because “these accommodations do not rise to the level of specially designed instruction”).
132 See, e.g., Gregory-Portland Indep. Sch. Dist., 38 IDELR 168 (Tx. SEA 2002); Pennsbury Sch. Dist., 26 IDELR 1208 (Pa. SEA 1997) (finding visually impaired student that required more time to complete written assignments not IDEA eligible because she did not require special education); Howard County Pub. Sch., 25 IDELR 771, 777 (Md. SEA 1997) (finding that allowing the use of additional time to complete assignments is an “alternative teaching method” and not “special education methods necessary for the child to receive educational opportunity, within the meaning of the IDEA”); Arlington Cent. Sch. Dist., 35 IDELR 205 (N.Y.SEA 2001) (finding that a child that needed more time to complete assignments did not need special education).
133 See, e.g., Mountain Empire Unified Sch. Dist., 36 IDELR 29, 114 (Cal. SEA 2001) (finding that assistance from special education aide in classroom was not special education but rather a “service[ ] offered within regular instructional program”); Radnor Township Sch. Dist., 25 IDELR 1229, 1231 (Pa. SEA 1997) (finding that a


1:1 aide to assist with behavior problems does not “constitute specialized instruction”); St. Clair County Bd. of Educ., 29 IDELR 688 (Ala. SEA 1998) (finding that a child with orthopedic impairment who needed aid to assist load and unload from school bus, carry books and materials, carry lunch and assist in rest room use was not IDEA-eligible because she did not need special education); Norton v. Orinda Union Sch. Dist., 168 F.3d 500, No. 97-17029, 1999 WL 972888, *2, 29 IDELR 1068 (9th Cir. 1999) (finding that a use of aide to assist in handwriting which child required was a “modification of the regular school program” and not special education therefore child was not IDEA eligible).

See e.g., Conrad Weiser Area Sch. Dist., 27 IDELR 100 (Pa. SEA 1997) (child with SLD and ADD needed accommodation of organizational system to address missed work assignments but he was not IDEA eligible because he did not need special education); Howard County Pub. Sch., 25 IDELR 771, 777 (Md. SEA 1997) (noting that allowing use of “graphic organizers” is an “alternative teaching method” and not “special education methods necessary for the child to receive educational opportunity, within the meaning of the IDEA”); Corvallis Sch. Dist., 509J, 28 IDELR 1026 (Or. SEA 1998) (noting that “accommodations” of verbal reminders, a portable file and visual cues to address organizational problems are related services and not special education); Long Beach Unified Sch. Dist., 33 IDELR 113 (Cal. SEA 2000) (finding that the use of daily planner is an accommodation in the regular education program and not special education).

Letter to Pollo, 21 IDELR 1132 (OSEP 1994).

See e.g., Norton v. Orinda Union Sch. Dist., 168 F.3d 500, No. 97-17029, *2, 1999 WL 97288 (9th Cir. 1999) (holding that a child who required preferential seating did not need special education because preferential seating is merely a “modification of the regular school program”); Gregory-Portland Indep. Sch. Dist., 38 IDELR 168 (Tx. SEA 2002); Mountain Empire Unified Sch. Dist., 36 IDELR 29 (Cal. SEA 2001) (noting that preferential seating is a modification of the regular education curriculum and not special education); Howard County Pub. Sch., 25 IDELR 771, 777 (Md. SEA 1997) (noting that allowing preferential seating is an “alternative teaching method” and not “special education methods necessary for the child to receive educational opportunity, within the meaning of the IDEA.”); Corvallis Sch. Dist. 509J, 28 IDELR 1026, 1032 (Or. SEA 1998) (“The recommendations in her report . . . include various accommodations and supportive services ( . . . seating preference . . . ), but not specially designed instruction.”); Smithtown Central Sch. Dist., 32 IDELR 46, 131 (N.Y. SEA 1999) (“The Section 504 accommodations designed to address the child’s hearing impairment included seating the child close to the teacher; directing the child to move his seat at any time to insure hearing . . . I am unable to find that any of these accommodations constitute specially designed instruction.”); Bd. of Educ. of the East Syracuse-Minoa Central Sch. Dist., 21 IDELR 1024, 8 (N.Y.SEA 1994) (finding that even though child required preferential seating to address auditory processing deficit the child did not need special education).

See, e.g., Norton v. Orinda Union Sch. Dist., 168 F.3d 500, No. 97-17029, *2, 1999 WL 97288, 29 IDELR 1068 (9th Cir. 1999) (noting that the use of notebook computer which child required was a “modification of the regular school program” and not special education therefore child not IDEA-eligible); Conrad Weiser Area Sch. Dist., 27 IDELR 100 (Pa. SEA 1997) (finding that a child with SLD and ADD needed accommodation of “technological assistance” but he was not IDEA-eligible because he did not need special education); Pennsbury Sch. Dist., 26 IDELR 1208 (Pa. SEA 1997) (finding that a visually impaired student that required use of computer was not IDEA-eligible because she did not require special education); Howard County Pub. Sch., 25 IDELR 771, 777 (Md. SEA 1997) (finding that allowing the use of a computer to assist in spelling is an “alternative teaching method” and not “special education methods necessary for the child to receive educational opportunity, within the meaning of the IDEA.”); Aransas County Indep. Sch. Dist., 29 IDELR 141 (Tx. SEA 1998) (child with ADD and LD required “instructional modification” of computer assistance but was not IDEA-eligible because he did not need special education); Long Beach Unified Sch. Dist., 33 IDELR 113, 385-86 (Cal. SEA 2000) (“Appropriate modifications such as a tape recorder . . . are available through regular education. Implementing the types of accommodations previously written into STUDENT’s intervention plan will allow him to sustain his academic progress without placing unreasonable demands on him. As a result, the Petitioner fails to satisfy the second prong of the severe learning disability eligibility requirement because his disability can be accommodated in the regular education program.”); George West Indep. Sch. Dist., 35 IDELR 287, 1169 (Tx. SEA 2001) (“[A]lthough she needs the amplification device to assist her in the classroom environment, these facts alone do not rise to the level of an educational “need” for special education for IDEA eligibility purposes.”); Santa Ana Unified Sch. Dist., 21 IDELR 1189 (Cal. SEA) (noting that even though child required use of a spell check in classroom because of learning disability in spelling, child not IDEA eligible because he did not need special education). Rather, laptops,
accommodations merely allow the child to access instruction and demonstrate their learning – they are not modifications in methodology by the teacher and are properly excluded from the definition of “special education.” 138 The line separating other accommodations from modification to method is less clear. Authorities are split as to whether the coordination of accommodations is “special education.” 139 They also cannot agree on whether modified assignments are an adaptation to teaching method and therefore “special education.” 140

Some authorities go so far as to find that obvious teaching modifications, so long as they are minor and are available to all students, are not special education. The analysis in Smithtown Central School District is typical:

I am unable to find that any of these accommodations [-seating the child close to the teacher; directing the child to move his seat at any time to insure hearing; encouraging the child to maintain appropriate physical aspects necessary for communication, such as eye contact; requesting the child to repeat directions before beginning independent activities when necessary; monitoring the child during initial practice of activities; and encouraging the child to inform the speaker of his auditory needs on an ongoing basis -] constitute specially designed instruction. . . . The accommodations . . . are common strategies that apply to students in general, not just students with disabilities. 141

computers and other technological devices are considered “assistive technology devices” and are not considered as “special education.” 20 U.S.C.A. § 1401(1) (West 2005); 34 C.F.R. § 300.5 (2003).

138 But see, OSEP Policy Letter, 20 IDELR 1462 (1994) (finding that certain accommodations furnished to students in the regular classroom, such as provision of an interpreter for hearing impaired students or the use of modified materials for students with visual or physical impairments, may constitute “specially designed instruction.”) (emphasis added).

139 Compare Bristol Township Sch. Dist., 28 IDELR 330 (Pa. SEA 1998) (finding that coordination of related services is special education) to In re K.M., 29 IDELR 1027 (Vt. SEA 1999) (finding that case management to coordinate plan is an accommodation and not special education) and Callegary, supra note 7, at 170-72 (noting that service coordination is a related service).

140 Compare Yankton, 93 F.3d 1369, 1373 (8th Cir. 1996) and Greenland School District v. Amy N. No. Civ. 02-136-JD, 2003 WL 1343023, at *8 (D.N.H. 2003), aff’d on other grounds 358 F.3d 150 (1st Cir. 2004) (finding that modified assignments, parent checklists and contacts, behavior modification techniques, ability grouping, significant parental assistance with homework, preferential seating in the front of the class, and a tutor were special education) to Mountain Empire Unified Sch. Dist., 36 IDELR 29 (Cal. SEA 2001) (holding that take-home tests and assignments are not special education); Conrad Weiser Area Sch. Dist., 27 IDELR 100 (Pa. SEA 1997) (child with SLD and ADD needed accommodation of shortened assignments but not special education); Pennsbury Sch. Dist., 26 IDELR 1208 (Pa. SEA 1997) (visually impaired student that required shortened written assignments was not IDEA-eligible because she did not require special education); Long Beach Unified Sch. Dist., 33 IDELR 113, 385-86 (Cal. SEA 2000) (“Appropriate modifications such as . . . reduced reading assignments, and modified class and homework demands are available through regular education. . . . As a result, the Petitioner fails to satisfy the second prong of the severe leaning disability eligibility requirement because his disability can be accommodated in the regular education program.”).

141 Smithtown Cent. Sch. Dist., 32 IDELR 46, 131 (N.Y.SEA 1999) (citations omitted). See also Community Indep. Sch. Dist., 42 IDELR 244 (Tx. SEA 2004) (retaking tests, breaking questions up into smaller pieces, extra time for assignments, make-up of homework, and obtaining study guides, were not “special education” because these accommodations were extended to most of the general student population).
Employing similar analysis, decision-makers often hold that children that need tasks broken down into manageable pieces, written or concrete visual instructions, visual cues, additional monitoring of attendance, behavior or homework and additional communication between parents and the school are not in need of “special education.” Even students that require small classes or small group instruction - clear adaptations of instructional methodology -
are often not deemed in need of “special education.” Authorities are more evenly divided on whether the provision of a tutor constitutes “special education.”

3. Adaptation of Delivery as Special Education

The authorities are also divided as to what constitutes adaptation of delivery of instruction. The first point of disagreement is whether modifying who delivers the instruction is itself “special education.” Some states require that only certified special education teachers can provide “special education.” In other words, any adaptation by the regular classroom teacher, no matter how significant, cannot be considered “special education” in these states – the child must need modifications provided by a certified special education teacher. On the other hand, many decision-makers ignore who is providing the education to determine if it is “special

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147 See, e.g. Scottsdale Unified Sch. Dist., 38 IDELR 137 (Az. SEA 2002) (child that needed adapted homework assignments, extended time for completing assignments, assistance in organization and skill development attempting to enhance the student’s motivation, elimination of a first hour period, breaking assignments down into smaller segments, no after-school homework, after-school assistance from teachers and tutors, and peer assistance during school hours was found ineligible because these were accommodations and not “special education.”); Metro. Nashville Pub. Sch. Sys., 27 IDELR 756, 760 (Tenn. SEA 1997) (finding that provision of small classes at private school was not special education but rather a service offered within regular instructional program); In re K.M., 29 IDELR 1027 (Vt. SEA 1999) (finding that provision of small classes is an accommodation and not special education); Mountain Empire Unified Sch. Dist., 36 IDELR 29 (Cal. SEA 2001) (finding that small group placement and individualized instruction were not special education); Bellflower Unified Sch. Dist., 33 IDELR 262, 981 (Cal. SEA 2000) (finding that a child with reading learning disability required small group reading sessions with a reading specialist and later a reading tutoring program and yet was not IDEA-eligible because “STUDENT’S recent academic progress indicates that, at this point, he remains able to learn and to remediate his severe discrepancy within the regular education system”); Northshore Sch. Dist., 35 IDELR 144, 292 (Wash. SEA 2001) (finding that a child that required special reading group did not “need[] specially designed instruction”); Pennsbury Sch. Dist., 37 IDELR 267, 1173 (Pa. SEA 2002) (finding that a child performed well when he received “extra services in reading” including small group and individual reading services therefore he did not need special education).

148 Compare Flour Bluff Indep. Sch. Dist., 41 IDELR 109 (Tx SEA 2004) (child who needed tutoring did not need “special education”); Howard County Pub. Sch., 25 IDELR 771, 777 (Md. SEA 1997) (finding that when district permitted tutor to come into school once a week to assist student in production of written documents it was a mere “alternative teaching method” and not “special education methods necessary for the child to receive educational opportunity, within the meaning of the IDEA”); Los Alamitos Unified Sch. Dist., 26 IDELR 1053 (Cal. SEA 1997) (finding that student provided with a reading tutor offered services within the regular instructional program and not special education); Aransas County Indep. Sch. Dist., 29 IDELR 141 (Tx. SEA 1998) (finding that a child with ADD and LD required “instructional modification” of an after-school tutor and counseling but was not IDEA eligible because he “has not demonstrated a need for special education services”); In re K.M., 29 IDELR 1027 (Vt. SEA 1999) (finding that “academic support as needed” and “supported study” are accommodations and not special education); Arlington Central Sch. Dist., 35 IDELR 205, 865-72 (N.Y. SEA 2001) (finding that a child in “reading recovery program” who later saw a private tutor was not IDEA eligible because he did not need special education) to Mr. and Mrs. I v. Maine Sch. Administrative District 55, 2006 WL 224318, *14 (D.Me. 2006) (“the offered one-on-one tutoring is adapting the ‘methodology’ and ‘delivery of instruction . . . ’”); Toledo Pub. Sch. Dist., EHLR 401:335 (Oh. SEA 1989) (finding a child IDEA-eligible because he needed special education in the form of tutoring); Greenland Sch. Dist. v. Amy N., 2003 WL 1343023 (D.N.H. 2003) (finding that child succeeded in school because he was provided a tutor, which was special education).

149 BONNIE TUCKER & BRUCE GOLDSTEIN, LEGAL RIGHTS OF PERSONS WITH DISABILITIES: AN ANALYSIS OF FEDERAL LAW Chapter 3B (LRP 2003).

150 See, e.g., Smithtown Cent. Sch. Dist., 32 IDELR 46, 131 (N.Y. SEA 1999) (“I am unable to find that any of these accommodations constitute specially designed instruction. The child is not in a special class, nor does he have special education teachers.”).
education,” holding that assistance from a special education teacher is not necessarily “special education,” or that “special education” can be provided by general educators.\footnote{See, e.g., Bristol Township Sch. Dist., 28 IDELR 330 (Pa. SEA 1998) (finding that fact that the special education teacher was not required did not mean the child does not need special education); Ashland Sch. Dist., 28 IDELR 630 (Or. SEA 1998) (finding that child who moved to Learning Center and was taught by special education teacher was not IDEA eligible because she succeeded without special education); Weston Pub. Sch. Dist., 34 IDELR 75, 276 (Mass. SEA 2001) (“Although he is receiving support from the third grade special education teacher, he does not require specialized instruction or modifications to the general curriculum and would not have difficulty accessing the curriculum without her support.”).}

There is also disagreement on the parallel issue of whether parents delivering instruction, typically through assistance with homework, constitutes “special education.” Some courts find that parental assistance, particularly if substantial, is an adaptation in delivery that qualifies as “special education” while other courts do not.\footnote{Compare Conrad Weiser Area Sch. Dist. v. Dep’t of Educ., 603 A.2d 701, 705 (Pa. 1992) (finding that the child needed special education because he needed parental assistance with homework); Greenland Sch. Dist. v. Amy N., 2003 WL 1343023 at *8 (D.N.H. 2003), aff’d on other grounds 358 F.3d 150 (1st Cir. 2004) (finding that significant parental assistance constituted special education); Toledo Pub. Sch. Dist., EHLR 401:335 (Oh. SEA 1989) (finding that child IDEA-eligible because he needed special education in the form of substantial parental help) to West Haven Bd. of Educ, 36 IDELR 221 (Conn. SEA 2002) (finding that additional homework assistance was not special education).}

Finally, the authority is divided as to whether delivery of instruction in a unique setting alone is special education. In \textit{Weixel v. Board of Education of the City of New York}, the district court held that the provision of the general curriculum to a child at home did not constitute special education.\footnote{287 F.3d 138, 141-42 (2d Cir. 2002).} The Second Circuit disagreed, holding that the child’s impairment “made it impossible for her to attend school. As a result of her inability to attend classes, she required ‘special education’ in the form of home instruction.”\footnote{Id. at 150. See also Bd. of Educ. of the Wappingers Falls Central Sch. Dist., 39 IDELR 116 (N.Y. SEA 2003) (child’s migraine headaches required provision of the regular curriculum in the home which is “special education”).} In \textit{Katherine S. v. Umbach}, on the other hand, the child needed homebound instruction and residential placement, but the court denied eligibility, finding that instruction in alternative settings does not constitute “special education.”\footnote{2002 WL 226697, at *12 (M.D. Ala. 2002).} Similarly, in \textit{In re Wayne Highlands Sch. Dist.}, the hearing officer found that homebound instruction of the regular education curriculum is not “special education,” and therefore a child with Chronic Fatigue Syndrome that required homebound instruction was not IDEA-eligible.\footnote{24 IDELR 476 (Pa. SEA 1996). See also Pocono Mountain Sch. Dist., 36 IDELR 224 (Pa. SEA 2002) (“Tiber’s physical condition required homebound instruction beginning in January 1998 and continuing through the 1998-1999 school year. This accommodation and support was clearly not an adaptation in content, methodology or delivery.”).}

4. The Proper Interpretation of “Special Education”

It is not possible to declare either the broad or narrow definition of “special education” as correct. The ambiguous statutory language lends itself equally to both interpretations.\footnote{See Garda, supra note 5, at 1121-24 (asserting that the definition of “special education” must be statutorily changed to eliminate the current ambiguities).} While a “proper” definition cannot be identified as a matter of pure statutory and regulatory interpretation, as a matter of pedagogy and policy the narrow definition of “special education” -
significant adaptations in content, method and delivery that are not provided to all general education students – should prevail. In other words, children with enumerated disabilities should only be eligible if they need significant individualized instruction beyond that provided to all students. This circumscribed definition acknowledges that minor modifications to content, delivery and instruction are not “special education,” but rather good pedagogy for all students.¹⁵⁸

All children require certain adaptations in the regular classroom - not just children with disabilities. Good teaching requires adjustment to classroom instruction to meet the varying individual needs of all students.¹⁵⁹ Educators “acknowledge that students learn in varied ways – some by hearing, others by doing, some alone, others in the company of peers, some in rapid fire fashion, others reflectively. . . To teach well is to attend to all of these things.”¹⁶⁰ Therefore, minor modifications to content, method or delivery should be encouraged in regular education and not resigned exclusively to “special education.” Children are often referred for IDEA eligibility despite only needing extra support or intensified instruction.¹⁶¹ Such extra support and intensified instruction should be carved out of the definition of “special education” otherwise instructional casualties, particularly minorities, will be found in need of “special education.” There simply must be alternatives to special education. “If special education is the only place where students with learning difficulties can receive supplemental help, the greater the attraction of this program will be.”¹⁶² Children who need only the minor modifications available to all should not be identified as needing “special education.” Rather, only significant adaptations in instructional content, unavailable to all other children irrespective of disability, should be considered “special education.” As noted above, many decision-makers already employ a similar unwritten standard, finding that generic programs available to all or minor modifications are not special education.¹⁶³

V. Conclusion

¹⁵⁸ See, e.g., ROBERT J. MARZANO, ASSOCIATION FOR SUPERVISION AND CURRICULUM DEVELOPMENT, WHAT WORKS IN SCHOOLS 93 (2003) (“[T]he most effective classroom managers tended to employ different types of strategies with different types of students, whereas ineffective managers did not . . . Where some students need encouragement, other students need a gentle reminder, and still others might require a firm reprimand.”).

¹⁵⁹ ENHANCING PROFESSIONAL PRACTICE, A FRAMEWORK FOR TEACHING, 49-50 (Association for Supervision and Curriculum Development, 1996).

¹⁶⁰ CAROL ANN TOMLINSON, HOW TO DIFFERENTIATE INSTRUCTION IN MIXED ABILITY CLASSROOMS, Chapter V (Association for Supervision and Curriculum Development, 2d ed. 2001).


¹⁶³ See also Old Orchard Beach Sch. Dep’t, 21 IDELR 1084, 1086, 1088 (Me. SEA 1994) (finding that emotionally disturbed child placed in a personalized program that was available to all at-risk kids, whether suffering from a disability or not, did not need special education); Ashland Sch. Dist., 28 IDELR 630 (Or. SEA 1998) (finding that child placed in Learning Center which was available to all students was not IDEA-eligible because she progressed with related services); Smithtown Central Sch. Dist., 29 IDELR 293, 297 (N.Y.SEA 1998) (“Teaching techniques and modifications which the child's teacher used with all of the children in her classroom would obviously not fall within the definition of special education under either Federal or State law.”); West Haven Bd. of Educ., 37 IDELR 56, 271 (Conn. SEA 2001) (finding that child that needed help with homework and meeting deadlines did not need special education because “[t]hese types of needs can be met in the regular education program through the progress reports and after school assistance from teachers, which is available to all students at the high school, including this student”); Long Beach Unified Sch. Dist., 33 IDELR 113, 385-86 (Cal. SEA 2000) (“Appropriate modifications such as . . . modified class and homework demands are available through regular education. . . . As a result, the Petitioner fails to satisfy the second prong of the severe leaning[sic] disability eligibility requirement because his disability can be accommodated in the regular education program.”).
The statutory requirements for IDEA eligibility appear straightforward: a child must have an enumerated disability that adversely affects educational performance and by reason thereof the child must need special education. Application of these apparently simple provisions has proven problematic, however, and the authorities are divided as to the meaning of each of these terms. Decision-makers are split as to what constitutes “educational performance” - merely graded academic performance or other areas of performance as well, and if other areas of performance, which ones? The authorities also cannot agree on when educational performance is “adversely affected” - does any effect suffice or must there be a significant impact? They also split on when a child “needs” special education - does a “need” arise merely because the child can benefit from special education or must the child’s performance fall below a certain level, and if so, what level? Further, must non-special education services be provided to the child before a “need” is found? Finally, decision-makers have yet to formulate a static and consistent definition of “special education” – is it any modification to instructional content, method or delivery, or only significant modifications that are not provided to general education students?

Courts’ and hearing officers’ inconsistent answers to these questions leaves eligibility teams with little guidance when determining if a particular child is eligible. The consequences are disastrous, as unprincipled eligibility decision lead to both over and under identification of eligible children and the disproportionate identification of minority students as disabled. Uniform eligibility determinations cannot be hoped for on a national level, as the definition of many of the key terms are left to the states, but a consistent and proper analytical framework must be demanded. This Article outlines such a framework and suggests answers to the difficult questions posed above when the state standards are silent. “Educational performance” should mean any area of instruction mandated in the state curriculum or any area of performance formally tracked by the state’s schools to ensure that emotionally disturbed children are not under-identified for services. “Adversely affects” should mean that the child’s enumerated disability, and not other factors, has any effect, no matter how slight, on the child’s educational performance. A child should be found in “need” of special education if any area of the child’s educational performance is poor or below average, which ensures that districts do not wait until a child fails to commence services. Finally, “special education” should be limited to significant modifications to instructional content, method or delivery that is not provided to general education students to ensure that IDEA does not simply act as a safety net for a broken general education system which disproportionately and negatively impacts minorities.