Untangling Eligibility Requirements under the Individuals with Disabilities Education Act

Robert A. Garda Jr.
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I. INTRODUCTION ............................................. 441
II. BACKGROUND OF IDEA ................................... 451
III. "ADVERSELY AFFECTS EDUCATIONAL PERFORMANCE" ........... 460
   A. "Educational Performance" ..................................... 461
      1. The Problem ............................................. 461
      2. The Solution ........................................... 465
         a. Curriculum .......................................... 468
         b. Areas of Performance Tracked by States' Schools ....... 475
   B. "Adversely Affects" ......................................... 481
IV. "NEEDS SPECIAL EDUCATION" ............................... 486
   A. "Special Education" ......................................... 486
   B. "Needs" .................................................... 491
      1. The Benefit Standard ................................... 493
      2. The Performance Standard ............................... 498
         a. The Problem ........................................ 501
         b. The Solution ....................................... 507
V. CONCLUSION .................................................. 512

I. INTRODUCTION

Children eligible under the Individuals with Disabilities Education Act ("IDEA")¹ are entitled to what every child wishes for in school: "instruction specially designed to meet the unique needs of the . . . child, supported by such services as are necessary to permit the child ‘to benefit’ from the instruction."² Certainly more could be wished for, as the entitlement to this "free appropriate public education" ("FAPE")³ does not require maximizing the child’s potential.⁴

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³ The statutory definition of the FAPE that must be provided eligible children is: special education and related services that—
The Sixth Circuit explained what school districts must provide to eligible children in popular terms: "[IDEA] requires that the Tullahoma schools provide the educational equivalent of a serviceable Chevrolet . . . [and not] a Cadillac . . . " But this Chevy must "confer some educational benefit," which many find to be meaningful, and is significantly more than what general education children are entitled to.

(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.


While IDEA eligibility is sometimes opposed because of the resulting stigma to children,\(^9\) for most children eligibility means the difference between receiving essential “special education and related services” at public expense or nothing at all.\(^10\) Even children eligible for services under Section 504 of the Rehabilitation Act of 1973 (“Section 504”)\(^11\) (a nondiscrimination statute that works in tandem with IDEA and also requires the provision of a free appropriate public education\(^12\)) often seek IDEA eligibility because it specifies services and

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9. Oberti *ex rel.* Oberti v. Bd. of Educ., 995 F.2d 1204, 1217 n.24 (3d Cir. 1993) (“stigma, mistrust and hostility . . . have traditionally been harbored against persons with disabilities”) (citing Minow, *supra* note 8, at 202-11); H.R. REP. NO. 108-77, at 149 (2003); Minow, *supra* note 8, at 181 (“identification as handicapped . . . labels the child as handicapped and may expose the child to attributions of inferiority for this labeling with the attendant risks of stigma, isolation, and reduced self-esteem”).


(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.


The term “related services” means transportation, and such developmental, corrective, and other supportive services (including 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, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.


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rights not enumerated in Section 504.13 Because IDEA eligibility results in educational benefit, services, and unfortunately, a potentially damaging stigma, an eligibility determination "is one of the most important, if not the most important, decision that will ever be made in that person's life."14

IDEA eligibility decisions are equally important to parents of disabled students for the same reasons. In addition, their child's eligibility entitles them to "meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate."15 They participate in the creation of their child's Individualized Educational Program

and accompanying text (discussing the interplay between Section 504 and IDEA).

13. See, e.g., Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1372 (8th Cir. 1996) (child eligible under Section 504 sought IDEA eligibility because only IDEA required the school to provide transition services such as instruction in driver's education, self-advocacy, and independent living skills); In re Laura H., 509 EHLR 242 (Mass. SEA 1988) (child sought IDEA eligibility because she desired closed circuit television for chemistry lab rather than mere provision of alternative biology class that was provided as a Section 504 accommodation); see also Wegner, supra note 12, at 410 (IDEA "provides more guidance concerning the types of services available and the methodology for service selection than is the case under section 504's implied accommodations requirement. The EHDA also creates detailed procedural rights not found in Section 504 . . .".). For a detailed discussion of the differences between services provided under IDEA and Section 504, see generally Thomas F. Guernsey, The Education for All Handicapped Children Act, 42 U.S.C. S 1983, and Section 504 of the Rehabilitation Act of 1973: Statutory Interaction Following the Handicapped Children's Protection Act of 1986, 68 Neb. L. REV. 564 (1989).

14. This statement was penned by Senator Stafford, a co-sponsor of the original IDEA. Stafford, supra note 12, at 79.

15. Honig v. Doe, 484 U.S. 305, 311-12 (1988); see also Sch. Comm. v. Dep't of Educ., 471 U.S. 359, 368 (1985) (stating that parents help develop eligible child's educational program and assess its effectiveness); Bd. of Educ. v. Rowley, 458 U.S. 166, 207 (1982) (finding that parents and educators are primarily responsible for formulating the educational goals and methods for eligible children); Babin, supra note 8, at 222 (noting high level of parental involvement); Judith DeBerry, Comment, When Parents and Educators Clash: Are Special Education Students Entitled to a Cadillac Education?, 34 St. Mary's L.J. 503, 506 (2003) (stating that parents are involved in all decisions that affect their eligible child's education); Tara J. Parillo, Comment, The Individuals with Disabilities Education Act (IDEA): Parental Involvement and the Surrogate Appointment Process, 74 Or. L. Rev 1339, 1339 (1995) (stating that parents are equal partners in educational process); Tamara J. Weinstein, Note, Equal Educational Opportunities for Learning Deficient Students, 68 Geo. Wash. L. Rev. 500, 506 (2000) (finding that parents have a central role in the education of their eligible children). Further, "[e]mpowering parents to be more involved in the decisions about the education of their child is the focus of many changes" in the reauthorized IDEA, currently pending in Congress. H.R. REP. No. 108-77, at 155 (2003).
(“IEP”), which means they help in planning their child’s educational goals, the special education and related services their child will receive and how they will be evaluated. While the parents’ actual impact on the final IEP and on their child’s educational programming may be questioned, they at least have a


18. See Clune & Van Pelt, supra note 16, at 35 (IDEA “increased parental participation somewhat, but probably not nearly to the extent that Congress originally contemplated”); Theresa Glennon, Disabling Ambiguities: Confronting Barriers to the Education of Students with Emotional Disabilities, 60 TENN. L. REV. 295, 352 (1993) (parents have little effect on the outcome of IEP meetings); Rebecca Weber Goldman, A Free Appropriate Public Education in the Least Restrictive Environment: Promises Made, Promises Broken by the Individuals with Disabilities Education Act, 20 U. DAYTON L. REV. 243, 279 (1994) (“active participation by parents does not generally occur” and parents “simply defer to the recommendations of the school district”); Hill,
comprehensive relationship with the people involved in their child’s education unlike the parents of non-eligible children.\footnote{19} If the parents don’t like the IEP, their child’s progress under the IEP, or believe any other of their significant “procedural safeguards”\footnote{20} are violated, they may initiate an impartial due process hearing and then an action in state or federal court.\footnote{21} In short, IDEA compels schools to seek parental input regarding the child’s educational programming and holds schools responsible if that educational programming does not benefit the child—rights that parents of general education students only dream about.\footnote{22}
Educators share the same high stakes as children and parents in IDEA eligibility determinations, as they must provide the parents with procedural safeguards, create and implement the IEP and pay for the special education and related services that comprise the child's free appropriate public education. This is no small matter, as over seventy-eight billion dollars is spent annually on the roughly six million children receiving special education and related services. Eligibility rules impact not only how much educators spend, but also how much money states and school districts receive. IDEA is a funding statute under which the federal government covers a portion of the state's costs to educate eligible children. In exchange for the funds, states must agree to provide, among other things, the entitlements discussed above. The amount of funding a state (and usually district and school) receives hinges on the number of IDEA eligible children it serves. Because states receive no federal monies for children eligible solely under Section 504, there is arguably a strong incentive to over-identify children as IDEA eligible. Irrespective of the incentives

23. Eligibility standards are also vital to educators as they make eligibility decisions on a daily basis to fulfill their obligation to find, classify and serve disabled students within their jurisdiction. This is known as the "child find" obligation. 20 U.S.C. § 1412(a)(3)(A) (2000) (identifying the state child find obligations); id. § 1414(a)(1)(A) (identifying the local education association's child find obligations); 34 C.F.R. §§ 300.125(a)(1), 300.451 (2003). For an in-depth discussion of IDEA's child find provisions, see Clune & Van Pelt, supra note 16, at 21-25, Shum, supra note 17, at 251-52, and Street, supra note 7, at 36-37.


created by the funding scheme, the impact of eligibility criteria on educators’ budgets is undeniable.

IDEA eligibility criteria even affect general education students. IDEA is intended to underwrite only a portion of the full cost of educating eligible children. Further, the federal government woefully underfunds IDEA, historically covering much less of the costs than promised. As a result, schools “are devoting a growing share of finite resources to disabled children to the exclusion of non-disabled children.”

Considering the importance of eligibility criteria to disabled students, parents, educators and even regular education students, one would presume that the criteria are clearly delineated and uniformly understood. Yet they are intricately tangled and often misapplied by courts, hearing officers and inevitably parents and educators. Definitive and precise rules may not be possible due to the individualized nature of classifying a child as disabled. But IDEA’s eligibility criteria, the most complex criteria in IDEA, only add additional layers

(Many problems of over-identification result from IDEA’s current child-count based funding system that “reduces the proactive scrutiny that such referrals would receive if they did not have the additional monetary benefit.”); MARK C. WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE § 2.2(1) (1992); Marc S. Krass, The Right to Public Education for Handicapped Children: A Primer for the New Advocate, 1976 S. ILL U. L.F. 1016, 1066 (the funding formula creates incentives to serve more children); Minow, supra note 8, at 181 (“the labeling process is designed to secure funding”); Willard, supra note 25, at 1185 (there is a “financial incentive for labeling children disabled”). But see H.R. REP. No. 108-77, at 143 (2003) (“The Committee does not believe that individual educators identify children in order to maximize the level of funds that flow to the school, district, or State.”).

29. See supra note 25; see also H.R. REP. No. 108-77, at 377 (2003) (Congress intended to pay for only a portion of the excess costs of educating eligible children); ROTHSTEIN, supra note 20, at 86 (“The EACHA was not intended to provide all the funding needed for education of children with disabilities but was intended to relieve some of the burden of the high cost of educating handicapped children.”).

30. H.R. REP. No. 108-77, at 93 (2003) (“Historically, the appropriations for the Act have not come close to reaching the 40 percent level. In the years prior to 1995, funding for the Part B program reached roughly 7 percent of the average per pupil expenditure.”); PRESIDENT’S COMMISSION, supra note 24, at 29; Goldman, supra note 18, at 244 n.11. The federal government is currently paying only eighteen percent of the national per pupil expenditure. Anne L. Bryant, Making IDEA Right: NSBA’s Top Priority, SCHOOL BOARD NEWS, May 20, 2003.


32. Krass, supra note 28, at 1017.
of density to an already thick medical and psychiatric topic.\textsuperscript{33} Aggravating this intricacy is the incomplete and often confused eligibility analysis emitted by courts and hearing officers. These decision-makers delve deep into what constitutes a "free appropriate public education" for children eligible under IDEA while often tersely evaluating eligibility in the first instance.\textsuperscript{34} The eligibility knot is further tightened by the lack of scholarship in the area, as the scholars, like the courts, focus on what must be provided to IDEA eligible children rather than on who is eligible.\textsuperscript{35} This is maddening for children, parents, and educators alike, as programming issues do not even arise until the eligibility question is resolved, and only then when the child is found eligible.\textsuperscript{36}  

\textsuperscript{33} President's Commission, supra note 24, at 21 (finding the eligibility requirements among the most "complex" requirements in IDEA); WEBER, supra note 28, § 2.2(1) ("The definition of children covered under IDEA is doubly circular."); Jeffrey F. Champagne, Special Education Law—Sometimes It's Simple: An Examination of Honig v. Doe, Timothy W. v. Rochester, New Hampshire, School District, Dellmuth v. Muth, and Moore v. District of Columbia, 59 Educ. L. Rep. (West) 587, 588 (1990) (eligibility standards are circular); Minow, supra note 8, at 179-80 ("[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.").

\textsuperscript{34} See infra Parts II, III (discussing incorrect eligibility analysis by courts and hearing officers); see also DeBerry, supra note 15, at 505 (the overriding litigation issue usually involves the provision of FAPE).

\textsuperscript{35} A Westlaw search revealed 780 law journal articles mentioning "free appropriate public education." See, e.g., Daniel & Coriell, supra note 20, at 578-93 (discussing the level of services required under IDEA); Goldman, supra note 18, at 255-60; Huefner, supra note 7; Streett, supra note 7, at 45-46; Bonnie Poitras Tucker, Board of Education of the Hendrick Hudson Central School District v. Rowley: Utter Chaos, 12 J.L. & EDUC. 235 (1983) (discussing impropriety of Rowley, the Supreme Court decision regarding FAPE); Babin, supra note 8, at 225-30; Miriam M. Laver, Recent Decision, Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988), 62 TEMP. L. REV. 429 (1989); McClenon, supra note 16, at 102-06; see also infra note 154 (identifying commentary on Rowley). In contrast, eligibility standards are typically only summarized or criticized in passing in the literature. See, e.g., Callegary, supra note 25, at 186-88 (discussing the "adversely affects" eligibility requirement); Streett, supra note 7, at 43-44 (mentioning eligibility requirements); Ketterman, supra note 4, at 934-36 (same); McClenon, supra note 16, at 91-101 (summarizing eligibility standards).

\textsuperscript{36} It is particularly problematic to schools, as the substantive ambiguity of IDEA eligibility standards combined with "the procedural mechanisms may empower parents to demand an evaluation of the child, and to pursue educational services responsive to his or her needs even where the child in previous times would not have been considered handicapped." Minow, supra note 8, at 180.
The confusion surrounding eligibility standards leads to the disastrous results of both over-identification and under-identification of IDEA eligible children. Indeed, one of Congress’s primary concerns in reauthorizing IDEA, a process currently underway, is the over-identification of IDEA eligible students, particularly minority students. Such misplacement stigmatizes the students, denies them an opportunity for a high quality education, limits their opportunities for post-secondary education and employment, and takes valuable resources away from truly disabled students. On the other hand, under-identification, usually of emotionally disturbed children, leaves children with significant emotional, social and behavioral needs unserved and often unable to participate effectively in society.


38. PRESIDENT’S COMMISSION, supra note 24, at 8 (current identification methods lead to failing to identify children); Callegary, supra note 25, at 179, 184 (the lack of clear definitions leads to inconsistent application of eligibility standards and the underserving of emotionally disturbed children); Glennon, supra note 18, at 296 (ambiguities in eligibility criteria result in failing to respond to social and emotional needs of students); Shum, supra note 17, at 244 (the inconsistent application of eligibility standards operates to exclude disabled children).

39. H.R. Rep. No. 108-77, at 143 (2003) ("The Committee is concerned that there continues to be a problem with the overidentification of children, particularly minority children, as having disabilities."); id. at 137 (purpose of the reauthorized IDEA is "reducing the overidentification or misidentification of nondisabled children, including minority youth"); id. at 142 (the bill adds provisions "[t]o address the over- and under-inclusion of students in special education"); id. at 149-50.

40. Id. at 137-38, 149 (identifying the "significant adverse consequences" resulting from misidentification, including stigma that seriously affects the child's self-perception, separation from the core curriculum, and limited access to post-secondary education and employment opportunities).

41. Prior to the enactment of IDEA, "the most poorly served of disabled students were emotionally disturbed children." Honig v. Doe, 484 U.S. 305, 309 (1988). These children "remain the most underserved population of students with disabilities." H.R. Rep. No. 101-544, at 39 (1990), reprinted in 1990 U.S.C.C.A.N. 1723, 1761; see also Glennon, supra note 18, at 303 (most emotionally disturbed children are not served at all); Hannon, supra note 17, at 723 (only nineteen percent of emotionally disturbed children are served). For a discussion of the significant effects of under-identification of emotionally disabled students, see Callegary, supra note 25, at 179, and Shum, supra note 17, at 154-55.
This Article attempts to untangle the web of IDEA eligibility standards in order to determine who is entitled to its extensive benefits. The overriding question addressed is whether children passing from grade to grade may still be IDEA eligible. When the Supreme Court stated famously in Board of Education of the Hendrick Hudson Central School District v. Rowley that not every child passing from grade to grade is receiving a free appropriate public education under IDEA, it necessarily recognized a class of children who were IDEA eligible despite passing marks.42 Identifying the characteristics of these children is the destination of this Article. But the journey crystallizes the scope of IDEA by identifying which disabling problems IDEA seeks to capture and address, and how severe the problem must be to concern IDEA. The journey also provides courts, hearing officers, educators and parents a clear roadmap to IDEA’s eligibility criteria and the tools to make correct eligibility decisions.

Part II of this Article briefly discusses the purposes of IDEA and sets forth its eligibility criteria and procedures. In broad summary, IDEA requires that in order for a child to be eligible the child must have an enumerated disability that adversely affects the child’s educational performance and by reason thereof the child needs special education. Part III analyzes the meaning of the second eligibility requirement—"adversely affects educational performance." The Article proposes that the term “educational performance” include all areas of performance required in the state curriculum and all areas of performance tracked by the state’s schools. Therefore, a disability that leads to poor behavior adversely affects the child’s educational performance, despite the child’s good grades, if the state curriculum requires instruction in behavior or the state schools track behavior. Part IV discusses the “needs special education” requirement and concludes that it is indeed a limit on IDEA eligibility separate from the “adversely affects” element. The Article concludes that IDEA does not require finding that a child needs special education merely because the child can benefit from it. Rather, a need for special education should be found only when the child is performing poorly or below average in any area of educational performance. Therefore, children performing better than their peers do not need special education and are not eligible even if their disability adversely affects their educational performance.

II. BACKGROUND OF IDEA

Congress enacted IDEA’s predecessor, the Education for All Handicapped Children Act ("EAHCA"), in 1975.43 The historical underpinnings of the EAHCA are extensively discussed in the scholarship and are only briefly

summarized here. Both Congress's fears and hopes in passing EAHCA are important to understanding the eligibility criteria.

Congress's primary trepidation in passing the EAHCA was trampling on the primacy of state control of education. Congress was aware not only of "the States' traditional role in the formulation and execution of educational policy" but also that it is their most important function. Local control over education has been historically justified on grounds of pedagogy, politics and ethics.

Local control is pedagogically justified because, as the Supreme Court has noted, it is necessary for a quality education. The complex nature of education

44. See, e.g., Rowley, 458 U.S. at 189-204; ROTHSTEIN, supra note 20, at 84-89; Susan Smith Blakely, Judicial and Legislative Attitudes Toward the Right to an Equal Education for the Handicapped, 40 OHIO ST. L.J. 603, 606-13 (1979); Callegary, supra note 25, at 167-68; Goldman, supra note 18, at 246-50 (discussing judicial and legislative landmarks that led to the enactment of IDEA); Hill, supra note 17, at 130-36; Huefner, supra note 7, at 484-85 (setting forth history of educating disabled prior to IDEA); Shum, supra note 17, at 234-36 (history of IDEA); Weber, supra note 7, at 355-64; Babin, supra note 8, at 216-24; LaDonna L. Boeckman, Note, Bestowing the Key to Public Education: The Effects of Judicial Determinations of the Individuals with Disabilities Education Act on Disabled and Nondisabled Students, 46 DRAKE L. REV. 855, 857-65 (1998) (in-depth discussion of the genesis of IDEA); DeBerry, supra note 15, at 508-11 (discussing the legislative history of IDEA); Daniel H. Melvin II, Comment, The Desegregation of Children with Disabilities, 44 DEPAUL L. REV. 599, 603-18 (1995) (detailing the legislative history of IDEA, the history of de jure exclusion of children with disabilities, early legislation to aid disabled children, and constitutional theories regarding rights of disabled children); Willard, supra note 25, at 1168.

45. Rowley, 458 U.S. at 207; see also Milliken v. Bradley, 418 U.S. 717, 741 (1974) (holding that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools"); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40, 58-59 (1973) (states and localities legitimately control education); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("public education in our Nation is committed to the control of state and local authorities"); Babin, supra note 8, at 247 (stating that the duty of education "should be . . . on individual states rather than the federal government"); Harrison, supra note 31, at 528; Smith, supra note 8, at 843 ("education has traditionally been the states' province under the Tenth Amendment").


48. Mergens, 496 U.S. at 289 (Stevens, J., dissenting).

alone mandates local autonomy over educational decisions. Federal usurpation of education would destroy experimentation, innovation and competition for educational excellence, the hallmarks of local control. Indeed, no public institution stands to gain more from multiple viewpoints and experimentation with multiple methodologies than schools. Most importantly, though, local control over education is necessary so that states, localities and schools can formulate and apply their curricula to inculcate their students with local community values.

Local control over education is politically necessary because it offers parents meaningful participation in educational policies affecting their children. Parents can approach responsive local school boards with their education issues rather than a distant oversized bureaucracy far removed from local concerns. Indeed, "[i]t is fair to say that no single agency of government at any level is closer to the people whom it serves than the typical school board." It is for these reasons—educational quality, instilling community values, parental input and local accountability—that local control over education is ethically necessary. Parents simply must be able to influence their children’s education “without surrendering control to distant politicians.”

Thus, in passing the EAHCA Congress sought to preserve the local nature of education while furthering the national interest in the education of disabled children. This balance was accomplished by, among other things, deferring to

(1972) (Breyer, J., dissenting).

50. Krass, supra note 28, at 1047.
52. Rodriguez, 411 U.S. at 50.
53. Bd. of Educ. v. Pico, 457 U.S. 853, 864 (1982); see also Dowell, 498 U.S. at 248 (stating that local control allows school programs to fit local needs); Mergens, 496 U.S. at 289 n.26 (Stevens, J., dissenting) (stating that educational decisions should “be made by educators familiar with the experience and needs of the particular children affected and with the culture of the community in which they are likely to live as adults”); Milliken, 418 U.S. at 741-42 (noting that local autonomy over education is necessary to ensure that community concerns are taught in the schools); Rodriguez, 411 U.S. at 49-50 (same).
55. Pico, 457 U.S. at 891 (Burger, J., dissenting) (stating that school boards involve “democracy in a microcosm” and are “truly ‘of the people and by the people’”).
56. Id. at 894 (Powell, J., dissenting).
57. Mergens, 496 U.S. at 289 n.26 (Stevens, J., dissenting) (citing Meyer v. Nebraska, 262 U.S. 390, 399-403 (1923)); see also Wright v. Council of Emporia, 407 U.S. 451, 469 (1972) (society demands local and direct control over educational decisions affecting one’s child).
58. Babin, supra note 8, at 247 (Congress sought to not “supplant the authority of states in providing . . . education.”).
the states for the substantive and qualitative elements of education under IDEA.\(^5\) For example, in defining the free appropriate public education to be provided eligible children, Congress incorporated state educational standards.\(^6\) This allows states to enhance the minimum federal “some educational benefit” standard.\(^6\) In summary, Congress ensured that states and schools “remain charged with defining educational standards for disabled children” when passing the EAHCA.\(^6\)

The EAHCA’s intrusion into the traditionally exclusive realm of states and localities was justified because disabled children were either being provided inadequate education or entirely excluded from schools.\(^6\) Congress’s hope for disabled students in passing IDEA was to achieve equality of access and self-sufficiency.\(^6\) The first purpose was to assist states in carrying out their constitutional obligation to provide disabled students with equal protection of the

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60. 20 U.S.C. § 1401(8)(B) (2000). For discussion of the incorporation of state educational standards into the FAPE standard, see Dannenberg, supra note 8, at 635 (“[R]eluctance to interfere in state education policy is precisely why checklist element ‘C’ incorporates state definitions of a minimally appropriate education into the IDEA’s ‘free appropriate public education’ definition and guarantee. To do otherwise would have the federal government either supersede a state’s definition of an appropriate education or require differential and lesser treatment of disabled children.”); and Scott F. Johnson, Reexamining Rowley: A New Focus in Special Education Law, 2003 BYU EDUC. & L.J. 561.

61. See, e.g., Union Sch. Dist. v. Smith, 15 F.3d 1519, 1524 (9th Cir. 1994) (“State standards that impose a greater duty to educate handicapped children, if they are not inconsistent with federal standards, are enforceable in federal court under IDEA.”); Burlington v. Mass. Dep’t of Educ., 736 F.2d 773, 788-89 (1st Cir. 1984) (holding state standards enhancing minimal federal substantive “free appropriate public education” definition enforceable under IDEA through required incorporation), aff’d, 471 U.S. 359 (1985).

62. Babin, supra note 8, at 236.

63. 20 U.S.C. § 1400(c)(2) (2000); see also PRESIDENT’S COMMISSION, supra note 24, at 11 (before enactment of IDEA, only one in five disabled children received public education, one million children were excluded entirely and 3.5 million did not receive appropriate services); Daniel & Coriell, supra note 20, at 571-72 (history of educating disabled children is exclusion by courts and states); Minow, supra note 8, at 166-67 (history of educating disabled children “emphasized the exclusion of exceptional children from mainstream classrooms or from schooling altogether”); Weber, supra note 7, at 355-56 (explaining the historical exclusion of disabled children from schools prior to the enactment of IDEA); Babin, supra note 8, at 213-14.

64. Weber, supra note 7, at 362-63; Hannon, supra note 17, at 719-20; Ketterman, supra note 4, at 917-18. For an in-depth discussion of the purposes and congressional intent in passing IDEA, see Shum, supra note 17, at 236-37 (discussing the objectives of IDEA); and Harrison, supra note 31, at 521-28 (discussing congressional intent).
Congress sought to accomplish this by bringing previously excluded handicapped children into the public schools. But Congress protected disabled students' equal protection rights by providing only equality of access rather than equality of opportunity. Put another way, the equal protection purpose of IDEA is served by providing disabled students access to an adequate education rather than providing disabled students access to an education equal to that being given to non-disabled students. As the Supreme Court put it, IDEA opens the door of public education, but does not "guarantee any particular level of education once inside" except "some educational benefit."

The second fundamental goal was to assist disabled children in achieving self-sufficiency. This is also the primary goal of education for non-disabled students. Adopting the maxim that "[i]f you think education is expensive, try ignorance," Congress justified its IDEA expenditures on the ground that the

65. Bd. of Educ. v. Rowley, 458 U.S. 176, 198 (1982); see also Weber, supra note 7, at 411 ("Congress enacted that legislation pursuant to its duty to enforce the fourteenth amendment to the United States Constitution.").


67. Id.

68. Id. at 192, 200.

69. Id. at 201 n.23; see also Myers & Jenson, supra note 7, at 428 ("The raison d'etre of the Act is assistance of handicapped children on their road to independence."); Harrison, supra note 31, at 523 (The Act's "legislative history makes plain that Congress also meant to further the national goal of self-sufficiency for handicapped Americans."). For an in-depth discussion of the importance of self-sufficiency in IDEA, see Hannon, supra note 17, and Harrison, supra note 31, at 521-26.

70. Wisconsin v. Yoder, 406 U.S. 205, 221 (1972); see also Krass, supra note 28, at 1025 ("The objectives of public education in general are to prepare children to live successfully in society, to meet the demands placed upon them as adults, and to be able to contribute something to society and, thus, receive compensation to meet the needs of personal sustenance and pleasure."); Babin, supra note 8, at 290 ("The purpose of education is to prepare schoolchildren for the future to provide the skills and knowledge necessary for life, work, and participation in society."); id. at 246 ("the primary governmental purpose for providing education [is] to ensure a productive populace that is fully capable of participating in society, thereby promising economic and social gains for all members of that society"); Boeckman, supra note 44, at 858; Smith, supra note 8, at 855-56 ("the purpose of education is children's emotional and intellectual development such that they can compete in the economy and function in political society"). Educators also agree that self-sufficiency is the proper goal of education in general, and of education for the disabled in particular. See IRVING R. DICKMAN, INDEPENDENT LIVING: NEW GOAL FOR DISABLED PERSONS 9, 14-16 (1975); MARILENE E. JACQUES, REHABILITATION COUNSELING: SCOPE AND SERVICES 4 (1970); FRIEDRICH PAULSEN, A SYSTEM OF ETHICS 641 (Frank Thilly ed., 1903).

cost of supporting a dependent, disabled population for life was far greater than the cost of educating that population to become independent.\textsuperscript{72}

Congress reiterated these dual goals of equality and self-sufficiency when reauthorizing IDEA in 1997.\textsuperscript{73} Congress will likely re-emphasize these same goals when it completes the reauthorization of IDEA currently underway.\textsuperscript{74} With these fundamental purposes in mind, it is easy to presume that all children medically certified as disabled are IDEA eligible. A quick reading of IDEA, its regulations and its predecessor statutes may lead to the same conclusion, as they are replete with statements that “all children with disabilities” should be served under IDEA.\textsuperscript{75} The legislative history of IDEA and its reauthorizations also abound with statements that “all” disabled children should be served.\textsuperscript{76} Indeed, the title of the original act was the Education for All Handicapped Children Act.\textsuperscript{77} Despite the sheer quantity of references to “all” disabled children, and the

\textsuperscript{72} S. REP. NO. 94-168, at 9 (1975), reprinted in 1975 U.S.C.C.A.N. 1425, 1433 (excluding disabled students from education meant: “public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society.”); H.R. REP. NO. 94-332, at 9 (1975) (“The long-range implications are that taxpayers will spend many billions of dollars over the lifetime of these handicapped individuals simply to maintain such persons as dependents on welfare and often in institutions. With proper educational services many of these handicapped children would be able to become productive citizens contributing to society instead of being left to remain burdens on society.”); see also Melvin, supra note 44, at 618; Weinstein, supra note 15, at 515.

\textsuperscript{73} 20 U.S.C. § 1400(c)-(d) (2000); 34 C.F.R. § 300.1(a) (2003).

\textsuperscript{74} H.R. 1350, 108th Cong. § 601(d) (2003); S. 1248, 108th Cong. § 601(d) (2003). The House Report accompanying the bill also provided that “[t]he purpose of special education and related services is to ensure that children with disabilities are able to focus on their strengths and interests to become integrated into the mainstream of American society.” H.R. REP. NO. 108-77, at 86 (2003).

\textsuperscript{75} IDEA references “all children with disabilities” in over twenty different provisions. See, e.g., 20 U.S.C. §§ 1400(d), 1411(b)(2)(C), 1411(e)(2)(B), 1411(g)(4), 1412(a)(1)-(2), 1412(a)(3)(A), 1412(a)(10)(B)(i), 1412 (a)(18)(C), 1413(g)(1), 1413(g)(3) 1413(i)(1), 1419(b)(2), 1419(g)(2) (2000). The federal regulations also refer to “all children with disabilities” in over twenty different provisions. See, e.g., 34 C.F.R. §§ 300.121(a), 300.121(b)(2)(ii), 300.122(a), 300.123, 300.124, 300.128(a), 300.136(b)(4), 300.153(b), 300.245(a)(2), 300.300(a)-(b), 300.304 (2003). The First Circuit identified eight separate parts of IDEA’s predecessor statute, the EAHCA, mentioning “all” handicapped children. Timothy W. ex rel. Cynthia W. v. Rochester, N.H., Sch. Dist., 875 F.2d 954, 959-60 (1st Cir. 1989).

\textsuperscript{76} See Timothy W., 875 F.2d at 962-68 (summarizing pertinent legislative history).

\textsuperscript{77} Id. at 959; see also Brooke Whitted, Educational Benefits After Timothy W.: Where Do We Go from Here?, 68 Educ. L. Rep. (West) 549, 551-52 (1991).
rhetoric in the case law and legislative history, it is beyond dispute that not all children diagnosed with disabilities are IDEA eligible.

Rather, IDEA defines an eligible “child with a disability” as a child 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.” States set the criteria for establishing the existence of an enumerated disability, typically requiring a medical certification or diagnosis. Accordingly, the first significant limitation on eligibility is that the child must have one of the enumerated disabilities.

78. See, e.g., Timothy W., 875 F.2d at 961; Kruelle v. New Castle County Sch. Dist., 642 F.2d 687, 690, 695 (3d Cir. 1981) (“The Education Act embodies a strong federal policy to provide an appropriate education for every handicapped child” and there was an “unequivocal congressional directive to provide an appropriate education for all children regardless of the severity of the handicap.”); Quintana ex rel. Padilla v. Dep’t of Educ., 30 IDELR 503 (P.R. Cir. Ct. App. 1998) (all handicapped children are entitled to a free appropriate public education).

79. Jefferson County Bd. of Educ., 29 IDELR 690, 696 (Ala. SEA 1998); D.B., 507 EHLR 303 (Conn. SEA 1985); Metro. Nashville Pub. Sch. Sys., 27 IDELR 756 (Tenn. SEA 1997); see also PRESIDENT’S COMMISSION, supra note 24, at 48 (“Not every student with a disability in elementary, middle or high school receives special education services because his or her disability does not impair their ability to learn to such a degree that special education services are necessary.”); BONNIE P. TUCKER & BRUCE A. GOLSTEIN, LEGAL RIGHTS OF PERSONS WITH DISABILITIES: AN ANALYSIS OF FEDERAL LAW 13:5 (1991) (“Not all children with disabilities are covered by [IDEA]: rather, only those handicapped children who are educationally handicapped fall within the scope of the Act.”); Streett, supra note 7, at 43 (“Not all children with disabilities are eligible.”).

80. 20 U.S.C. § 1401(3)(A)(i) (2000). The statute enumerates only ten qualifying disabilities whereas the regulations enumerate thirteen separate disabilities. 34 C.F.R. § 300.7(c)(1)-(13) (2003). The disparity is explained by the fact that the regulations separately define certain combinations of disabilities identified in the statute, id. § 300.7(c)(2) (“deaf-blindness”); id. § 300.7(c)(7) (“multiple disabilities”), and further define deafness separately from hearing impairment. Id. § 300.7(c)(3), (5).

81. States employ various approaches to establish the existence of an enumerated disability, but most require a medical diagnosis or certification. PRESIDENT’S COMMISSION, supra note 24, at 23.

82. The exception to this limitation is that states may, at their discretion, define “child with a disability” between ages three and nine to include children “experiencing developmental delays [in] . . . physical development, cognitive development, communication development, social or emotional development, or adaptive development.” 20 U.S.C. § 1401(3)(B)(i) (2000). The enhanced flexibility for this age group that results from eliminating the specific disabling categories stems from the “recognition that it is sometimes difficult to pinpoint a child’s disability during the early developmental years.” Dixie Snow Huefner, The Individuals with Disabilities Education Act
Further, the enumerated disability must "adversely affect[] a child's educational performance" to be considered qualifying. In other words, a disability is not qualifying and eligibility does not attach, despite a medical diagnosis, unless the disability "adversely affects a child's educational performance." The only disability excepted from the requirement is specific learning disability ("SLD"). Accordingly, the second significant limitation on eligibility, for nine of the ten enumerated disabilities, is that the disability must adversely affect educational performance.

Finally, IDEA defines an eligible child as a child with a qualifying disability "who, by reason thereof, needs special education and related services." The "needs special education" requirement for eligibility is emphasized throughout the statute and its regulations and is the final significant limitation on IDEA eligibility.

The statutory procedures that schools must follow to find a child eligible are straightforward. Each child suspected of a disability must be assessed and evaluated. Once the evaluation is complete, an eligibility team comprised of the parents and a team of professionals determine whether the child is IDEA eligible. In summary, to find IDEA eligibility, the eligibility team must find

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83. 34 C.F.R. § 300.7(c)(1), (3)-(6), (8), (9), (11)-(13) (2003). The definitions of deaf-blindness and multiple disabilities require that the conditions "must cause[] . . . educational needs" in order to qualify. *Id.* § 300.7(c)(2), (7); see also Ketterman, *supra* note 4, at 937.

84. Shum, *supra* note 17, at 240-41.

85. Even SLD implies educational difficulty by requiring "a disorder . . . [that] may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations," all components of educational performance. 20 U.S.C. § 1401(26)(A) (2000); 34 C.F.R. § 300.7(e)(10)(i) (2003); *see also* Letter to Lybarger, 17 EHLR 54, 55 (OSEP 1990) (inquirer notes that even SLD implies educational difficulty).


89. 20 U.S.C. §§ 1411(b)-(c), 1412(a), 1414(a) (2000); 34 C.F.R. §§ 300.125(a)(1)(i), 300.320 (2003).

that the child is of qualifying age\textsuperscript{91} and (1) has an enumerated disability,\textsuperscript{92} (2) the disability adversely affects educational performance,\textsuperscript{93} and (3) by reason thereof the child needs special education.\textsuperscript{94} 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.\textsuperscript{95} Yet it is clear that each of the three hurdles must be surpassed for eligibility to attach and that the second hurdle is removed only for children with learning disabilities.\textsuperscript{96}

91. States are required to serve children ages six through seventeen and may choose to not serve children from the ages of three through five and eighteen through twenty-one if children without disabilities of the same ages are not provided public education. \textit{Id.} \textsection{1412(a)(1)(B)(i); 34 C.F.R. \textsection{s} 300.122(a)(1), 300.300(b)(5) (2003). For discussion of the age requirements under IDEA, see WEBER, \textit{supra} note 28, \textsection{2.1. See also} 20 U.S.C. \textsection{1412(a)(1)(A) (2000).

92. 20 U.S.C. \textsection{1401(3)(A)(i) (2000); 34 C.F.R. \textsection{s} 300.7(a)(1), 300.7(c) (2003).

93. 34 C.F.R. \textsection{300.7(c) (2003).


95. \textit{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.’") (footnotes 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.’"); Eric H. \textit{ex rel.} Gary H. v. Judson Indep. Sch. Dist., No. CIV.A. SA01CA0804-NN, 2002 WL 31396140, at *5 (W.D. Tex. Sept. 30, 2002) ("to qualify for special education, a student (1) must have one or more of the disabilities recognized by IDEA and (2) need special education services") (footnotes omitted); Bd. of Educ., 29 IDELR 122, 125 (N.Y. SEA 1998) ("a child must not only have a specific physical or mental condition, but such condition must adversely impact upon the child’s performance to the extent that he or she requires special education"); Corvallis Sch. Dist. 509J, 28 IDELR 1026 (Or. SEA 1998) ("Even if the evidence showed that the student met all four of the minimum criteria for autism, this would not, by itself be enough. It must also be established that the disability adversely impacts the student’s educational performance and the student requires special education as a result of the disability. The need for special education is an essential, and separate, requirement.") (footnotes omitted); Aransas County Indep. Sch. Dist., 29 IDELR 141 (Tex. SEA 1998) ("First, the student must have a specified physical or mental impairment identified through an appropriate evaluation. Second, the student must evidence a need for special education services by an inability to progress in a regular education program."); see also \textit{PRESIDENT'S} COMMISSION, \textit{supra} note 24, at 23; Champagne, \textit{supra} note 33, at 589 ("The statute’s technical definition creates a two-part test. First, the child must have at least one of the listed handicapping conditions. Second, that condition must result in a need for special education.").

96. \textit{See, e.g.,} Doe \textit{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").
Because application of the age requirement is relatively straightforward and rarely litigated, it is not analyzed in this Article. 97 Establishing an enumerated disability is also not addressed, despite its complexity and the fact it is often litigated, because it is more the domain of the medical and psychiatric fields than the legal field. Instead, this Article focuses on the “adversely affects educational performance” and “needs special education” eligibility requirements, which often are determinative of eligibility for children passing from grade to grade in general education.

III. “ADVERSELY AFFECTS EDUCATIONAL PERFORMANCE”

IDEA eligibility initially hinges on the existence of a disability that “adversely affects the child’s educational performance.” 98 Plainly stated, the disability must lead to “educational” problems. Yet IDEA does not inform decision-makers as to which problems are educational and qualify and which are non-educational and do not qualify, leaving the term “adversely affects educational performance” undefined. 99 This does not stop courts and hearing officers from improperly inventing federal and universal meanings for these terms rather than deferring to state standards. The result is wildly varied interpretations of these terms by decision-makers. Some require that academic performance be adversely affected before eligibility attaches, while others find eligibility when any aspect of the human experience is adversely affected, resulting in both over and under-identification. Some find that the adverse effect must be significant before eligibility attaches while others find that any effect suffices. These few examples establish the deleterious effects on children from decision-makers’ misunderstanding of the “adversely affects educational performance” requirement. 100

97. The difficult issue in applying the age requirement arises when the child is past the age of majority yet still seeks IDEA eligibility. For a review of these cases and discussion of IDEA’s age requirements, see WEBER, supra note 28, § 2.1.

98. See supra notes 83-85 and accompanying text.


100. See supra notes 37-41 and accompanying text (discussing existence of and problems resulting from over and under-identification of students).
A. "Educational Performance"

1. The Problem

The controversy in defining "educational performance" is whether it 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. The ramifications on IDEA eligibility are significant. If the child cannot form social relations, or attend school regularly, or control behavior, yet performs well academically, does the child's disability adversely affect educational performance? If so, the child is entitled to IDEA's extensive benefits, assuming the child needs special education. If not, the child is not eligible no matter the need for special education. Defining educational performance, therefore, defines the scope of IDEA by identifying the problems it seeks to capture and address.

The disagreement among the courts and hearing officers results from their improper attempts to glean a federal definition of educational performance where no such universal definition exists or was intended. Inventing a federal definition of educational performance is tempting because "the term . . . is so essential an element in eligibility criteria, it is difficult to understand why it was not defined in the original legislation or in subsequent regulation-making or interpretation." In yielding to the temptation, decision-makers often apply personal notions of which student problems should be considered educational in finding a federal definition of educational performance that is limited to exclusively academic performance.

For example, in Doe ex rel. Doe v. Board of Education of the State of Connecticut, the child became depressed, violent, refused to go to school and was hospitalized. The court found the child ineligible, despite testimony that he needed a residential placement, 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

101. See cases cited infra notes 104-13, 116-21; see also Callegary, supra note 25, at 187, 188 ("Several courts have stated that when examining whether there is an adverse affect on educational performance, an IEP Team should not limit their review to academic progress but should also examine the student's progress socially and emotionally" but "some courts have focused only on academic progress when analyzing whether the child's emotional problems were having an adverse affect on his or her educational performance."); id. at 185 ("Case law that examines whether a child has an emotional disturbance often turns on the courts' interpretation of the adverse affect clause . . . .").

102. See infra notes 125-29 and accompanying text.


results) before, during, and after his hospitalization were satisfactory or above."\textsuperscript{105} The court provided no justification for its conclusion that a child’s poor behavior alone is not educational performance unless it leads to lower grades.\textsuperscript{106}

Similarly, in \textit{Doe ex rel. Doe v. Belleville Public School District No. 118}, the court found that IDEA “would apply to AIDS victims only if their physical condition is such that it adversely affects their educational performance; i.e., their ability to learn and to do the required classroom work.”\textsuperscript{107} The court simply 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.”\textsuperscript{108} Many decision-makers similarly do not consider attendance alone as educational performance.\textsuperscript{109}

Likewise, in \textit{In re Child with Disabilities}, the hearing officer held that a gifted child receiving good grades did not have an emotional disability that adversely affected educational performance despite the child having “serious but fluctuating difficulties with peer relations” and “an inability to build or maintain

\textsuperscript{105} \textit{Id.} at 70 (footnote omitted); \textit{see also} \textit{id.} (“In sum, there was sufficient evidence presented to the state hearing officer from which she reasonably concluded that the plaintiff’s education was not significantly impeded or adversely affected by his behavior problems and that he was therefore not entitled to special education.”).

\textsuperscript{106} \textit{See also} Gregory M. \textit{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”); 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. Therefore . . . STUDENT cannot be found to be eligible for special education services under the category of emotionally disturbed.”).

\textsuperscript{107} \textit{Doe ex rel. Doe v. Belleville Pub. Sch. Dist. No. 118}, 672 F. Supp. 342, 345 (S.D. Ill. 1987). The \textit{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. \textit{Id.}

\textsuperscript{108} \textit{Id.} at 344 n.3.

\textsuperscript{109} \textit{See}, e.g., 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 “adversely affects” 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) (“The school needs to provide an educational program and make it assessible but they can not make the AG attend school or learn from it.”).
satisfactory interpersonal relationships with peers and teachers."\(^{110}\) The hearing officer, like many others, provided no rationalization for finding that social relations are not educational performance.\(^{111}\) Communication and physical performance are also often excluded from the definition of educational performance without justification.\(^{112}\) These courts and hearing officers essentially employ their own notions of what constitutes educational performance when inventing a narrow federal definition.\(^{113}\)

The resulting academic centered definition results in educators 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."\(^{114}\) The narrow meaning of educational performance 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.\(^{115}\)

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111. See, e.g., 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"); 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) (without citing authority, 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").

112. See, e.g., St. Clair County Bd. of Educ., 29 IDELR 688, 696 (Ala. SEA 1998) (orthopedic impairment did not adversely affect child's educational performance because she received good grades without special education); 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 "adversely affects" requirement because "[a]cademically, he is achieving at a rate which is commensurate with his cognitive ability").

113. See also Jefferson County Bd. of Educ., 29 IDELR 690 (Ala. SEA 1998) (child's asthma did not adversely affect her educational performance because it did not affect her academic performance); Bd. of Educ., 21 IDELR 1024, 1033 (N.Y. SEA 1994) ("I do not agree with their assertion that the child's academic performance is only one area to be considered in determining whether he has a learning disability.").

114. Glennon, supra note 18, at 334; see supra note 41 (discussing deleterious effects of under-identification).

115. Glennon, supra note 18, at 355-56 ("[M]any schools have interpreted educational performance to be limited to academic performance. Thus, students who
The analysis employed by the courts and hearing officers finding children with non-academic problems within the grasp of IDEA is also flawed, as it conjures a fictitious federal definition of educational performance without limits. Typically, these decision-makers glean a federal definition of educational performance from parts of IDEA that do not deal with eligibility. For example, in *Greenland School District v. Amy N.*, the child’s Attention Deficit Hyperactivity Disorder ("ADHD") led to intense feelings of anxiety, distractibility, and difficulty with organization, staying on task, and following instructions. The school district found the child ineligible because it believed her success in the regular classroom with interventions meant her ADHD did not adversely affect her educational performance. The court disagreed, and relying on IDEA’s evaluation procedures, held that "grades and test results alone are not the proper measure of a child’s educational performance." It essentially concluded that all areas of performance for which IDEA requires evaluation fall within the federal definition of educational performance. This definition has no limits, however, as IDEA requires that children be evaluated "in all areas [related to the] suspected disability." A different tack, with the same result, was employed in *In re Kristopher H.*, where the district refused 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. The hearing officer disagreed, and turning to the dictionary, found that educational performance "includes not only the narrow conception of instruction, to which it was formerly limited, but embraces all forms of human experience."  

*The legal reference citations are omitted here.*

117. *Id.* at *3.
118. *Id.* at *8.
120. *In re Kristopher H.*, 507 EHLR 183, 187 (Wash. SEA 1985); see also *id.* at 183 ("Most importantly, any behavioral maladjustment/inappropriateness has not adversely affected educational performance. In a typically structured regular classroom setting, Kris is an actively involved and productive learner. Actual scholastic achievement (academic skills) are commensurate with or above chronological age/grade placement and cognitive potential.").
121. *Id.* at 187; see also 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

[https://scholarship.law.missouri.edu/mlr/vol69/iss2/3](https://scholarship.law.missouri.edu/mlr/vol69/iss2/3)
These unlimited federal definitions of educational performance mean that the mere existence of a disability fulfills the "adversely affects educational performance" prong and essentially reads the limitation out of IDEA. The result is a significant over-identification of children as these requirements each act separately to limit eligibility. At best, these vague definitions leave eligibility teams without any standards to draw lines between non-academic problems that qualify and those that don’t. Because there is no federal definition of educational performance, the issue is which standards should be consulted in deciding if the adversely affected performance is educational or non-educational.

2. The Solution

Rather than rely on Noah Webster’s or judges’ notions of when a child’s problems are educational and qualifying, or an implied definition from the federal government, decision-makers should instead turn to the recognized experts in education to define educational performance—states and localities.

Considering that Congress protected state control over education by incorporating state standards into IDEA’s “free appropriate public education” criteria, it is no surprise that at least one circuit court, scholars, and likely the Office of Special Educational Programs (“OSEP”) (the federal body in purpose of education,” or at least learning communication allows education).

122. See also Yankton Sch. Dist. v. Schramm, 900 F. Supp. 1182, 1191 (D.S.D. 1995) (stating in dicta that the “adversely affects” requirement does not “narrow[] eligibility for special education”), aff’d, 93 F.3d 1369 (8th Cir. 1996). The court concluded that if the child needs special education she necessarily has qualifying educational problems. The Eighth Circuit affirmed but analyzed each requirement separately. Id.

123. See supra notes 38-40 and accompanying text.

124. Accordingly, I reject Professor Glennon’s solution that “Congress should . . . define educational performance” as states and localities must maintain their primacy in education. Glennon, supra note 18, at 356.

125. See supra notes 60-61.

126. J.D. ex rel. J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 66 (2d Cir. 2000).

127. See, e.g., Callegary, supra note 25, at 187; Shum, supra note 17, at 241; Streett, supra note 7, at 44.

128. OSEP is less than clear on the subject. In Letter to Anonymous, 213 EHLR 247, 248-49 (OSEP 1989), OSEP held that the definition of “adversely affects educational performance” is left to states to define, and that the curriculum and areas of performance tracked by the schools should be consulted. Id. However, in the same year, OSEP relied on IDEA’s IEP and evaluation requirements, rather than state standards, to conclude that educational performance includes “non-academic as well as academic areas.” Letter to Lybarger, 17 EHLR 54, 56 (OSEP 1989); see also Letter to Pawlisch, 24 IDELR 959, 962 (OSEP 1995). A mere five years later OSEP refused to develop a “single definition” of educational performance. Letter to Lillie/Felton, 23 IDELR 714
charge of administering IDEA\textsuperscript{129}), conclude that state educational standards are also incorporated into IDEA's eligibility criteria, even without their express incorporation.

Interpreting a federal definition of educational performance where none exists would destroy the delicate balance Congress drew between state control over education and the federal interests in ensuring disabled children have access to education to achieve self-sufficiency. A federal definition of the areas of educational performance expected of students in public schools would entirely displace states' "traditional latitude to determine appropriate subjects of instruction."\textsuperscript{130} One state may deem interpersonal relationships to be an important educational performance expected of its students and instruct in that area, while another may find emotional development to be educational performance and instruct in that area, while yet another may focus exclusively on academic performance. If the federal definition of educational performance includes or excludes these areas of performance, the state's education system will transmit the values of the federal government rather than its community.

While deferring to states to define educational performance results in fifty different eligibility standards, it is certainly better than the alternative of making states and localities the mere teaching conduits of federal values. Varied eligibility standards are also not disconcerting in light of the fact that the "free appropriate public education" due eligible students also incorporates differing state standards.

Furthermore, courts are particularly ill equipped to glean a federal definition of educational performance because they "lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'"\textsuperscript{131} Courts are simply not as capable as educators to determine which areas of performance by a student are educational and which are not.\textsuperscript{132} Asking


\textsuperscript{131} Bd. of Educ. v. Rowley, 458 U.S. 176, 208 (1982) (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973)); see also Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985) (noting Supreme Court's "reluctance to trench on the prerogatives of state and local educational institutions" as federal courts are ill-suited to "evaluate the substance of the multitude of academic decisions that are made daily by" experts in the field); Rowley, 458 U.S. at 206 (finding that IDEA is not "an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review").

\textsuperscript{132} Missouri v. Jenkins, 515 U.S. 70, 131 (1995) (Thomas, J., concurring)
a judge to define educational performance is akin to asking an educator to define stare decisis or constitutional free speech rights. The experts immersed in education daily can best identify what is educational performance and what is not. Accordingly, states, rather than the federal government, judges and hearing officers, are the best authority to bring meaning to the term “educational performance.”

While deferring to states to define educational performance is not a revolutionary concept, application of this concept by decision-makers certainly is revolutionary, as shown by the above decisions. The lone exception is the Second Circuit, which summarily concluded in J.D. ex rel. J.D. v. Pawlet School District that IDEA leaves it to each state to define the terms “adversely affects” and “educational performance.” Ascertaining the state standard was a simple endeavor in J.D. because Vermont expressly defined “educational performance” in its regulations regarding disabled students as “oral expression,” “listening comprehension,” “written expression,” “basic reading skills,” “reading comprehension,” “mathematics calculation,” “mathematics reasoning,” and “motor skills.” The Second Circuit easily found the child ineligible because his problems—“difficulty with interpersonal relationships and negative feelings”—were not included in this definition.

The difficulty arises in the states that do not specifically define educational performance in their regulations dealing with disabled children. Most states do not, leaving decision-makers at a loss as to which state standards bring meaning to the term. Educators know exactly where to turn, though, as they identify the educational performance they expect of students by the areas of instruction required in the curriculum and in the areas of performance formally tracked.

(“Federal courts do not possess the capabilities of state and local governments in addressing difficult educational problems.”).

133. Even if the federal government should define educational performance, it has refused to do so. See supra note 99.

134. J.D. ex rel. J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 66 (2d Cir. 2000).

135. Id. (citing VT. SPECIAL EDUC. REGS. § 2362(2)(b), (3)).

136. Id. at 68.

137. Id. The court concluded that “J.D.’s basic skills, and hence his educational performance, were not adversely affected by his disability within the meaning of the Vermont Rule.” Id. at 67. The child earned As and Bs and performed well above grade level. Id. at 63.
a. Curriculum

The official state curriculum, or curriculum guidelines, identifies the areas of instruction required by the state, i.e., what the state wants its children to know, and therefore the educational performance the state expects of its students. There is simply no clearer statement of what the state considers educational performance than what it requires students to be taught as memorialized in its curriculum.

Referring to the state curriculum to define educational performance is not only pedagogically sound, it is virtually mandated by IDEA. While it is inappropriate for decision-makers to derive a federal definition of educational performance from sections of IDEA not dealing with eligibility, it is certainly appropriate to consult these sections when ascertaining which parts of state law give meaning to the term “educational performance.” It is instructive, for example, that IDEA’s regulations acknowledge that a state’s “educational standards” are embodied in its general curriculum. It is more instructive that eligibility evaluations must include “information related to enabling the child to be involved in and progress in the general curriculum.” If that were not enough, IDEA provides that a child’s current level of “educational performance” for programming purposes is “the child’s involvement and progress in the general curriculum” (i.e., the same curriculum as for nondisabled children).

138. States have the primary authority to select the curriculum, yet it is well settled that local school boards make curriculum decisions as well. See, e.g., Bd. of Educ. v. Pico, 457 U.S. 853, 864 (1982) (“local school boards must be permitted ‘to establish and apply their curriculum’”); Pratt v. Indep. Sch. Dist., 670 F.2d 771, 775 (8th Cir. 1982) (the school board’s “comprehensive powers and substantial discretion” include “the authority to determine the curriculum that is most suitable for students and the teaching methods that are to be employed, including the educational tools to be used”); see also Patricia L. Van Dorn, Note, Proposal for a “Lawful” Public School Curriculum: Preventive Law from a Societal Perspective, 28 IND. L. REV. 477, 492 (1995).


These references establish that a child's educational performance for eligibility should also be determined by reference to the general curriculum.

Despite the plain language in IDEA explaining that its references to the general curriculum mean the entire curriculum, it is arguable that IDEA's references are only to the academic or graded curriculum. There is facial support in Supreme Court decisions narrowly defining the term "curriculum" in other contexts. For example, in Board of Education of the Westside Community Schools v. Mergens ex rel. Mergens, the Supreme Court, relying on dictionary definitions, held that "curriculum" means only "the whole body of courses offered" by the school and not "anything remotely related to abstract educational goals." This activity-based definition was employed in finding that the chess club, scuba club and peer advocate club were "noncurriculum related" clubs under the Equal Access Act, and thus the school had to allow equal access by the "noncurriculum related" religious club. The circumscribed definition of "curriculum" was necessary because including the school's broad educational goals rendered the Equal Access Act "hortatory."

The exact opposite conclusion is true under IDEA, as all areas of instruction in the curriculum, and not just the course listings, infuse meaning into the term "educational performance." A state may require instruction in good manners and therefore expect the educational performance of good manners from its students. The fact that a course on manners is not offered or that students' manners are not graded should not preclude eligibility for a child whose disability adversely affects manners. If instruction in an area is required it is certainly something the state wants its students to know, whether or not it is graded, and the area of instruction is therefore educational performance by students.

300.347(a)(3)(ii) (2003); id. pt. 300, app. A, at 101 ("The requirements regarding services provided to address a child's present levels of educational performance and to make progress toward the identified goals reinforce the emphasis on progress in the general curriculum . . . ."); id. at 100 ("The IEP requirements under Part B of the IDEA emphasize the importance of three core concepts: . . . the involvement and progress of each child with a disability in the general curriculum including addressing the unique needs that arise out of the child's disability . . . . Accordingly, the evaluation and IEP provisions of Part B place great emphasis on the involvement and progress of children with disabilities in the general curriculum. (The term 'general curriculum,' as used in these regulations, including this Appendix, refers to the curriculum that is used with nondisabled children."); id. at 101 ("The strong emphasis in Part B on linking the educational program of children with disabilities to the general curriculum is reflected in § 300.347(a)(2) . . . .").

145. Id. at 244.
146. Id. at 246-47.
147. Id. at 244.
Furthermore, I do not propose, as in *Mergens*, that the state’s “abstract educational goals” be included in the definition of “curriculum,” and thereby educational performance. Rather, only the concrete areas of required instruction identified in the curriculum define educational performance. Many states identify broad goals for their students.\(^\text{148}\) However, it is the curriculum that is taught the students to reach those goals that defines educational performance, not the aspirational goals themselves. The state essentially defines the educational performance it expects of its students to reach the broad goals through its curriculum. Accordingly, the Supreme Court’s holding in *Mergens* that abstract educational goals are not part of the curriculum does not mean that IDEA’s references to curriculum are limited only to the academic or graded curriculum.

The same is true of the narrow activity-based meaning of “curriculum” the Supreme Court provided in *Hazelwood School District v. Kuhlmeier*, when it employed a new standard for regulating school speech in curriculum-based activities—in that case the school newspaper.\(^\text{149}\) The Court did not expressly define “curriculum,” but noted that the term included “school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.”\(^\text{150}\) Because the Court needed only to determine which school activities were part of the curriculum, its narrow definition is inapplicable to IDEA which hinges eligibility on educational performance, not activities which bear the imprimatur of the school.

The legislative history being created for the new reauthorized IDEA also supports the argument that IDEA’s references to “curriculum” are only to the academic or graded curriculum. The House Report for the reauthorized IDEA contains several statements that the IEP must “specifically address the child’s academic achievement” but leaves the references to “curriculum” unchanged.\(^\text{151}\) However, the references to academic achievement are designed to align IDEA with the academic based standards of the new No Child Left Behind Act and are not meant to mutually exclude other areas of performance.\(^\text{152}\) The legislative

\(^{148}\) See, e.g., *KY. REV. STAT. ANN.* § 158.6451(1)(b) (Michie 2000); *MINN. STAT. ANN.* § 120B.11.1(b) (West 2000).


\(^{150}\) *Id.* at 271.

\(^{151}\) *H.R. REP. No.* 108-77, at 136 (2003); *see also id.* at 108 ("[T]he bill makes several important changes to improve the focus of the IEP on the educational program and the academic achievement of children with disabilities.").

\(^{152}\) *Id.* at 83 ("Aligning the IDEA’s accountability system with NCLB is essential to ensuring that children with disabilities have the chance to learn and succeed academically . . . ."); *id.* at 92 ("The Committee believes that these are important activities and are an essential component of the effort to improve academic achievement . . . . Aligning the IDEA’s accountability system with the No Child Left Behind Act is essential to ensuring that children with disabilities have the chance to learn and succeed . . . .")
history also contains numerous references to the non-academic needs of eligible children.153

In summary, there is nothing in IDEA or its legislative history that supports the conclusion that its references to "curriculum" are exclusively to the academic or graded curriculum and therefore that "educational performance" is limited only to performance that is graded. The cases defining the free appropriate public education to be provided eligible children also dispel this notion. In Board of Education of the Hendrick Hudson Central School District v. Rowley,154 the Supreme Court held that an eligible deaf child performing above average and easily passing from grade to grade with limited IDEA services was not entitled to a full-time sign language interpreter because the school district

academically."); id. at 96 ("The No Child Left Behind Act established a rigorous accountability system for States and local educational agencies to ensure that all children, including children with disabilities, are held to high academic achievement standards . . .").

153. See, e.g., id. at 12 (identifying prereferral services for children who need behavior and academic support); id. at 104 ("The Committee also encourages local educational agencies to provide positive behavior interventions and supports to children that have demonstrated behavioral problems within school."); id. at 106 ("The bill makes changes to the reevaluation process to enable the local educational agency to reevaluate the child if his or her educational needs, including improved academic achievement, make such a reevaluation necessary.").

154. 458 U.S. 176 (1982). Rowley is only briefly summarized here as virtually every scholarly work on IDEA to date analyzes the case and its progeny. For in-depth discussions of Rowley, see Cathy A. Broadwell & John C. Walden, "Free Appropriate Public Education" After Rowley: An Analysis of Recent Court Decisions, 18 J.L. & Educ. 35, 37-41 (1988); Callegary, supra note 25, at 174-77; Daniel & Coriell, supra note 20, at 576-93 (criticizing Rowley); Hill, supra note 17, at 157-62; Hufner, supra note 7, at 488-95 (criticizing Rowley for not examining the child's progress on IEP goals); Minow, supra note 8, at 189-91 (explaining Rowley based on notions of self-sufficiency); Myers & Jenson, supra note 7, at 409-16; Tucker, supra note 35, at 235 (criticizing Rowley); Weber, supra note 7, at 367-74; Wegner, supra note 12, at 181-94 (concluding Rowley was correctly decided); Kenneth G. Anderson, Comment, The Meaning of Appropriate Education to Handicapped Children Under the EHCA: The Impact of Rowley, 14 SW. U. L. REV. 521, 538 (1984) (arguing congressional funding increase and recognition of handicapped children's dependence on schools indicate congressional desire to guarantee more than some benefit); Patricia L. Arcuri, Note, Handicapped Children—Statutory Mandate for "Free Appropriate Public Education" Satisfied when Handicapped Benefit from Specialized Instruction and Support Services, 14 Rutgers L.J. 989, 1000 (1983) (criticizing Rowley as contrary to Act); Boeckman, supra note 44, at 866-67; Kathryn M. Coates, Comment, The Education of All Handicapped Children Act Since 1975, 69 Marq. L. Rev. 51, 74 (1985); Dannenberg, supra note 8, at 632-35; DeBerry, supra note 15, at 523-25; Eyer, supra note 7, at 620-22; and Hannon, supra note 17, at 725-28, 733-35 (criticizing Rowley).
was already providing her a "free appropriate public education." The Court held that a school district fulfills its obligations to IDEA eligible children if it follows IDEA’s procedures and if the child’s educational program is “reasonably calculated to enable the child to receive educational benefits.” For disabled children in the general education classroom, like the plaintiff, the Court found that “educational benefit” is achieved when the educational program is “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” But the Court expressly did not hold “that every handicapped child who is advancing from grade to grade in a regular public school system is automatically receiving a ‘free appropriate public education.’” Rather, it considered such advancement “an important factor in determining educational benefit.”

By finding that not every handicapped child who is advancing from grade to grade in a regular public school system is being properly served under IDEA, the Supreme Court recognized a class of IDEA eligible children who are achieving in the graded areas of performance, yet need additional “educational benefit.” It follows that the adversely affected educational performance required for eligibility may include more than just the graded areas of performance; otherwise the class of children identified by the Court would not exist. By defining “educational benefit” this way, Rowley virtually impels the conclusion that educational performance for purposes of eligibility means all areas of instruction in the curriculum and not just graded areas of instruction.

156. Id. at 206-07; see also id. at 203 (FAPE is met “by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.”); id. at 201 (“the ‘basic floor of opportunity’ provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child”).
157. Id. at 203-04.
158. Id. at 203 n.25. This holding is now codified at 34 C.F.R. Section 300.121(e)(1) (2003) (“Each State shall ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child is advancing from grade to grade.”); and id. § 300.121(e)(2) (“The determination that a child [advancing from grade to grade] is eligible under this part, must be made on an individual basis by the group responsible within the child’s LEA for making those determinations.”).
159. Rowley, 458 U.S. at 203.
160. See also 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) (holding that educational performance can mean more than a child’s ability to meet academic criteria “[b]ecause the Supreme Court explicitly rejected the notion that the sole test for an appropriate education was advancement from grade to grade, or, in other words, academic achievement, the court finds no authority from Rowley to impose such a requirement on the test for eligibility in the present case”); Blazejewski ex rel. Blazejewski v. Bd. of
Rowley's progeny lead to the same conclusion. Debate rages as to whether the "educational benefit" that must be provided to eligible children includes non-academic benefits. Courts employ a variety of analytical tools to decide the issue, discussion of which is beyond the scope of this Article, but a majority of courts hold that a child must progress in more than just graded areas in order to be provided educational benefit and a free appropriate public education. 161

Educ., 560 F. Supp. 701, 705 (W.D.N.Y. 1983) (holding that child's learning disability adversely affected his educational performance even though he was advancing from grade to grade because Rowley did not hold that "every handicapped child who is advancing from grade to grade in a regular public school system is automatically receiving a 'free appropriate education'"). But see Lyons ex rel. Alexander v. Smith, 829 F. Supp. 414, 418 (D.D.C. 1993) (finding that child with disability impacting social adjustment did not have a disability that adversely affected educational performance because, as Rowley held, "[t]he achievement of passing marks is one important factor in determining educational benefit").

161. See, e.g., City of San Diego v. Cal. Special Educ. Hearing Office, 93 F.3d 1458, 1467 (9th Cir. 1996) ("educational benefit is not limited to academic needs, but includes the social and emotional needs that affect academic progress, school behavior, and socialization"); Seattle Sch. Dist. No. 1 v. B.S., 82 F.3d 1493, 1500 (9th Cir. 1996) ("Everyone agrees that A.S. is exceptionally bright and thus was able to test appropriately on standardized tests. This is not the sine qua non of "educational benefit," however. "[T]he term "unique educational needs" [shall] be broadly construed to include the handicapped child's academic, social, health, emotional, communicative, physical and vocational needs."") (alterations in original) (citations omitted); Lenn v. Portland Sch. Comm., 998 F.2d 1083, 1089-90 (1st Cir. 1993) (a child's placement must be intended to address his academic, physical, emotional, and social needs); Jefferson County Bd. of Educ. v. Breen, 864 F.2d 795 (11th Cir. 1988); Clevenger v. Oak Ridge Sch. Bd., 744 F.2d 514 (6th Cir. 1984); Manchester Sch. Dist. v. Charles F., No. CIV. 92-609-M, 1994 WL 485754, at *4-5 (D.N.H. Aug. 31, 1994). But see Gonzalez v. P.R. Dep't of Educ., 254 F.3d 350, 352 (1st Cir. 2001) (behavior must be addressed only when it interferes with a child's ability to "learn" rather than treating behavior itself as an area of educational benefit). For an excellent analysis of cases determining "whether learning behavioral controls, or other social and emotional skills, are themselves part of a program of special education and related services" and an argument "that programs designed to address behavioral, emotional and social skills" are educational in nature, see Glennon, supra note 18, at 340-44. See also Judith Welch Wegner, Variations on a Theme—The Concept of Equal Educational Opportunity and Programming Decisions Under the Education for All Handicapped Children Act of 1975, 48 LAW & CONTEMP. PROBS. 169, 195 (1985) (weight of judicial authority adopts broad inclusionary approach for defining educational needs); id. at 198-205 (discussing cases using inclusionary and exclusionary educational needs definition and arguing for inclusionary approach); Streett, supra note 7, at 46 ("the concept 'educational benefit' embraces more than academic subjects"); Hannon, supra note 17, at 731-32 (noting that in cases where children need more than academic training, courts shift "their focus from academic progress to social and emotional fulfillment and the attainment of basic skills necessary to live. The courts' goals appear to be children’s self-sufficiency . . . .") (footnote omitted).
In summary, a child has a disability that adversely affects educational performance if it affects any area of performance in which the state curriculum requires instruction. Accordingly, a disability that adversely affects academic performance is qualifying (assuming the child needs special education) because all states require the teaching of academics. The same is true for disabilities with physical effects, because all states require the teaching of physical education, at least for certain grades.  

States also include communication in their curricula, meaning that a child's inability to communicate adversely affects educational performance even if the child performs well academically.  

Many states include interpersonal relationships, emotional health, manners and other non-academic performance areas in their curricula. The recent emergence of

162. See, e.g., Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1371 (8th Cir. 1996) (discussed infra notes 190-93 and accompanying text). The school district's argument was that the child's orthopedic disability did not adversely affect her educational performance as the curriculum no longer required her to take physical education. Id.

163. See, e.g., N.C. GEN. STAT. § 115C-81(a1) (1999); UTAH CODE ANN. § 53A-1-402.6(1)(a) (2000). Many decision-makers reach the same conclusion, but without referring to the state curriculum. 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'"); 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"); 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.").

164. See, e.g., ALA. CODE § 16-6B-2(h) (2001) (schools must instruct students to "develop[]...the following character traits:...respect for others,...cooperation,...self control,...punctuality"); CAL. EDUC. CODE § 52015(a)(C) (West 1989) (must provide instruction that will enable students to "[d]evelop knowledge and skills in...physical, emotional, and mental health"); FLA. STAT. ch. 1003.42(2)(f), (m) (1998) (instructors shall teach "what it means to be a responsible and respectful person" and "emotional health"); 105 ILL. COMP. STAT. ANN. 5/27-23.2 (West 1998) (requiring state to develop a "model curriculum for reduction of self-destructive behavior"); id. at 23.4 ("districts shall provide instruction in...[t]he consequences of violent behavior"); IND. CODE ANN. § 20-10.1-4-4 (Michie 2000) (requiring teacher to "present his instruction with special emphasis on honesty, morality, courtesy, obedience to law"); id. § 20-10.1-4-4.5(b) (requiring "instruction that stresses the nature and importance of the following:...[r]especting authority...[t]reating others the way one would want to be treated...[r]especting one's parents and home"); IOWA CODE ANN. § 279.50(1) (West 2003) (schools "shall provide instruction in...self-esteem...interpersonal relationships");
character education in state curricula leads to unprecedented breadth of what children are taught in schools.¹⁶⁵ For good or ill, many public schools today educate students in more than just academics. If they do, they must consider all those areas “educational performance” when classifying disabled children. The dramatic expansion of instruction areas cannot justify excluding these curricular components from a child’s educational performance when considering eligibility.

b. Areas of Performance Tracked by States’ Schools

The curriculum, however, is not the only state standard that brings meaning to the term “educational performance.” The areas of performance that states require schools to track, such as attendance and behavior, must also be included within educational performance. Educators recognize that schools employ more than just the formal curriculum to teach students, and identify five parts to the teaching that occurs in schools:

[T]he official curriculum, the operational curriculum (the curriculum as it is implemented by teachers), the hidden curriculum (the unstated norms and values communicated to students in school), the null curriculum (what is not taught), and the extra curriculum (planned experiences outside of school subjects, such as sports teams).¹⁶⁶

While ascertaining the formal curriculum is a simple process, as it is a written expression of what students should know,¹⁶⁷ the teacher-specific and

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¹⁶⁵ See, e.g., ALA. CODE § 16-6B-2(h) (2001) (enumerating twenty-five character traits to be taught); ARIZ. REV. STAT. ANN. § 15-154.01(B) (West 2002) (enumerating seventeen character qualities that schools may include in their “character education”).

¹⁶⁶ O’Brien, supra note 139, at 149-50 (footnotes omitted).

subjective nature of the remaining instruction prevents discerning which areas of that instruction the state expects its students to perform. After all, a teacher may provide a religious slant to the curriculum (the operational curriculum) or encourage students to "stop and smell the roses" (the hidden curriculum), but no state would consider this to be educational performance expected of its students. Yet when a state requires that an area of performance be formally tracked, this subjectivity dissolves and a clear picture of what the state considers to be educational performance emerges. Thus, while attendance, tardiness and behavior may not be mentioned in the curriculum, the formal tracking of these performance areas shows that they are educational performance a state expects of its students.

Referring to areas of performance tracked by schools to define educational performance is supported by IDEA. The goals in an IEP—the driving force of an IEP—must be related to enabling the child to progress in the regular curriculum and to "meeting each of the child's other educational needs that result from the child's disability." 168 As a result, many IEPs include non-curricular goals. 169 By identifying non-curricular yet educational needs, IDEA recognizes that children with such needs are eligible. The regulations support this conclusion by recognizing "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." 170 These extra-curricular yet educational needs are best identified as the areas of performance formally tracked by schools and required by states, as these are undoubtedly of concern to the educators. Accordingly, if attendance and behavior are not specifically addressed in the curriculum, they must still be considered educational performance as virtually all schools track and rate these performance areas. 171

169. Schoenfeld v. Parkway Sch. Dist., 138 F.3d 379, 382 n.2 (8th Cir. 1998) (noting in dicta that "[a]cademic achievement is not the only measure of the appropriateness of a child's education"); In re Janie H., 507 EHLR 375, 377 (Ga. SEA 1986) ("education has not been limited to academic matters"); Glennon, supra note 18, at 301 (stating that "many IEPs include more than academic goals shared by all students. Many students with disabilities have learning goals relevant to their disability," and providing examples.); id. at 342 ("behavioral, social, and emotional skills are an appropriate focus of a special education program for an 'emotionally conflicted' child"); Huefner, supra note 7, at 516 n.53 (some eligible children are mainstreamed into the regular education classroom to learn appropriate social behavior and not academics); id. at 497 ("Instruction in such social and behavioral skills is appropriately considered 'educational.'").
171. All states have required attendance at school since 1918. Jonathan B.
With respect to attendance, it is "self-evident that the inability to be present in a classroom adversely affects one's educational performance."172 An inability to attend school closes the "door of public education"173 and must be considered educational performance to ensure "meaningful access to education."174 Attendance, standing alone, is important educational performance because it provides a learning experience separate and apart from the teacher's instruction. The mainstreaming requirements of IDEA drive this point home.175 IDEA strongly prefers that eligible children perform in the public school classroom rather than restrictive settings such as residential placements or resource classrooms because children learn more than academics in the classroom.176 It is for this reason that "services that enable a disabled child to remain in [the public school classroom] during the day" are required for eligible children.177 Because attendance itself leads to learning, it is educational performance for

Cleveland, School Choice: American Elementary and Secondary Education Enter the "Adapt or Die" Environment of a Competitive Marketplace, 29 J. MARSHALL L. REV. 75, 85 (1995); see, e.g., KY. STAT. ANN. § 158.6451(c) (Michie 2000) ("Schools shall increase their students' rates of attendance."); NEB. REV. STAT. § 79-209 (1996) ("All school districts shall have a written policy on excessive absenteeism."); R.I. GEN. LAWS § 16-2-16 (2001) (requiring schools to have "rules and regulations for the attendance and classification of the pupils . . . and discipline of the public schools"); see also KATHLEEN P. BENNETT & MARGARET D. LECOMPTE, THE WAY SCHOOLS WORK: A SOCIOLOGICAL ANALYSIS OF EDUCATION 190 (Naomi Silverman & Judith Harlan eds., 1990) ("Schools require that students be punctual . . . . Absenteeism is frowned upon and generally noted on evaluations.").

172. In re Burton Valley Sch. Dist., 504 EHLR 256, 258 (1982) (finding that a child performing well academically but whose behavior prevented consistent class attendance fulfilled adverse effect element); see also Streett, supra note 7, at 44 ("ADHD adversely affects daily school performance if the child cannot attend to his work and remain in class or in school."); Shum, supra note 17, at 243 (an inability to attend school is an adverse effect on educational performance).


176. See, e.g., Hannon, supra note 17, at 743 ("The rationale underlying the [LRE] requirement echoes the overall goal of self-sufficiency: the concern that children receive the most normal education possible . . . in the least restrictive setting . . . to adapt to the world beyond the educational environment and . . . to allow the nonhandicapped to adapt to them.") (quotation marks omitted).

177. 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."); id. at 79 ("This case is about whether meaningful access to the public schools will be assured . . . . It is undisputed that the services at issue must be provided if Garret is to remain in school."); Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 894 (1984) (if service needed to stay in school all day then it is a necessary aspect of the IEP).
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.

In-school behavior should be similarly treated. Considering that the Supreme Court repeatedly finds that public education “must inculcate the habits and manners of civility as values in themselves,” it is no surprise that the Court stated in dicta that a child’s “very inability to conform his conduct to socially acceptable norms . . . renders him ‘handicapped’ within the meaning of [IDEA].” More important than the Supreme Court’s admonition that discipline and behavior should be taught by schools, however, is the fact that

178. 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. As a result of her inability to attend classes, she required ‘special education’ in the form of home instruction.”); 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”); Jefferson County Bd. of Educ., 29 IDELR 690 (Ala. SEA 1998) (child’s asthma did not adversely affect her educational performance because it did not affect her attendance and she performed well academically); 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).

179. 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”); Goss v. Lopez, 419 U.S. 565, 592-93 (1975) (Powell, J., dissenting) (“Education in any meaningful sense includes the inculcation of an understanding in each pupil of the necessity of rules and obedience thereto. This understanding is no less important than learning to read and write. One who does not comprehend the meaning and necessity of discipline is handicapped not merely in his education but throughout his subsequent life. . . . The lesson of discipline is not merely a matter of the student’s self-interest in the shaping of his own character and personality; it provides an early understanding of the relevance to the social compact of respect for the rights of others. The classroom is the laboratory in which this lesson of life is best learned.”); 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”).

schools also consider behavior part of educational performance by monitoring, tracking and often grading it.181

However, the poor behavior must occur in-school, as out-of-school behaviors such as those relating to parent/child relationships are typically not tracked by schools and not covered in the curriculum.182 OSEP agrees, but on the ground that IDEA’s “provisions and requirements relate to the educational environment. . . .[Therefore] for eligibility purposes, the student must meet the [“adversely affects”] prong within the educational environment. . . .”183 The only exception should be when the out-of-school behavior affects an area of educational performance, such as completing homework or attending school.

In summary, 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. This definition ensures state primacy in education while fulfilling the dual purposes of IDEA.

IDEA’s equality purpose rings hollow if only academic performance counts for children seeking eligibility while the state considers non-academic performance to be important for all students. Defining educational performance with respect to the entire curriculum and areas of performance formally tracked by the school ensures that areas of performance are treated uniformly for disabled and non-disabled students alike. If attendance and good behavior are expected of general education students, equality demands that attendance and

181. President’s Commission, supra note 24, at 26 (calling for eligibility “assessments that reflect learning and behavior in the classroom”); Glennon, supra note 18, at 325-32 (arguing that schools over-emphasize discipline and behavior control to the detriment of emotionally disturbed children).


183. Letter to Anonymous, 213 EHLR 247, 249 (OSEP 1989); see also Katherine S. v. Umbach, No. CIV.A. 00-T-982-E, 2002 WL 226697, at *12 (M.D. Ala. Feb. 1, 2002) (“[I]t is key that none of the evidence, especially including reports and testimony from the experts who evaluated Katherine, supports a finding that her emotional difficulties caused her to be disabled in an educational context or in need of special education or related services.” Rather, her problems existed only at home.); Old Orchard Beach Sch. Dep’t, 21 IDELR 1084 (Me. SEA 1994) (“Because a parent has difficulty controlling her child does not qualify the child for special education. . . . If the parents are unable to help her with time management and decision making because of the family dynamics, they need to contact the community mental health agency that provides services. This is not a responsibility of the school.”); Fauquier County Pub. Sch., 20 IDELR 579 (Va. SEA 1993) (child’s at-home behavior problems did not adversely affect educational performance); Callegary, supra note 25, at 186 (emotional disturbance must exist in school environment to fulfill “adversely affects” prong).
good behavior qualify as educational performance for IDEA eligibility purposes. States expressly defining educational performance differently for disabled students than regular education students violate IDEA because they improperly exclude children that would otherwise be eligible.184

IDEA’s goal of self-sufficiency is also best served by referring to the state curriculum and areas of performance tracked by states. States and localities, the experts in education, are best suited to identify which areas of performance are important for their students to attain self-sufficiency. Furthermore, including the areas of performance tracked and taught, but not graded, is justified because more than academic instruction is required for a child to achieve self-sufficiency.185 A child that performs well academically but cannot control behavior will not be prepared for independence and self-sufficiency upon graduation.

Finally, a curriculum and tracking centered definition of educational performance protects the individualized nature of eligibility determinations. Because schools track and grade more areas of performance for primary school students than junior high and high school students, younger students will have more qualifying disabilities.186 This is consistent with IDEA, which expressly allows states to ignore the enumerated disabilities and the “adversely affects” requirement, and therefore expands eligibility for younger students.187

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184. The only limitation on a state’s eligibility criteria is that it may not “operate to exclude any students who, in the absence of the State’s criteria, would be eligible for services under [IDEA].” Letter to Pawlisch, 24 IDELR 959, 964 (OSEP 1995). Accordingly, the critical question left unanswered in J.D. ex rel. J.D. v. Pawlet School District, 224 F.3d 60, 66 (2d Cir. 2000), discussed supra notes 134-37 and accompanying text, is whether Vermont’s definition of educational performance for eligibility purposes operates to exclude otherwise eligible children. The definition should be stricken if it defines educational performance for disabled students more restrictively than the state educational standards define educational performance for regular education children.

185. PRESIDENT’S COMMISSION, supra note 24, at 47 (“academic achievement alone will not lead to successful results for students with disabilities”); Glennon, supra note 18, at 356 (“[E]ducational performance [should] include . . . other school-related skills, including behavioral, social, and emotional skills. These skills are related to success for children in future schooling and work situations.”); Ketterman, supra note 4, at 935 (“An emotional disability that adversely affects a child’s well-being and relationships with others must be considered as an adverse affect upon the educational goal of creating productive members of society.”)

186. See, e.g., IOWA CODE ANN. § 256.11 (West 2003) (Iowa curriculum identifies different areas of instruction for different grades).

187. IDEA allows states to find children ages three through nine eligible based on “developmental delays . . . in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development.” 20 U.S.C. § 1401(3)(B)(i) (2000).
With the scope of educational performance delineated, the difficult issue becomes whether the educational performance is adversely affected by the disability or other factors, like lack of motivation, care or willingness. There are countless reasons for children not doing their homework, but only those reasons that directly result from an enumerated disability lead to eligibility. Eligibility is often denied because factors other than the disability cause the adverse effect on educational performance. The higher eligibility hurdle than causation, though, is the “needs special education” requirement, as many of these educational problems can be addressed by non-special education services or simply do not lower a child’s performance enough to require attention. Before addressing the need requirement, though, the meaning of “adversely affects” must be explored.

B. “Adversely Affects”

With the meaning of educational performance in-hand, the “adversely affects” language is easily understood. States, of course, are free to define the term. In states that do not define the term, decision-makers consistently stumble over two obstacles in its application. The first is whether adverse effect is determined with or without the non-special education services already provided the child. As explained below, “special education” is a term of art specifically defined by IDEA. Many disabled children receive non-special education services to address their disabilities, usually under Section 504. If the child performs well with these services, is educational performance “adversely affected” by the disability? The second obstacle is determining how adverse the effect must be for the disability to qualify.

188. See, e.g., 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]”); see also 34 C.F.R. § 300.7(b)(10)(ii) (2003) (learning disability does not include learning problems that are the result of environmental, cultural or economic disadvantage).

189. See infra notes 214-26 and accompanying text (discussing definition of special education and differences between Section 504 and IDEA).
The first issue is illustrated by the disagreement between the Eighth Circuit majority and dissent in *Yankton School District v. Schramm*. The majority 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 majority essentially asked what would the child’s educational performance be “but for” the services currently provided to determine adverse effect. The dissent disagreed:

The majority assumes that, were the school district to deny Ms. Schramm every reasonable accommodation to her disability, her academic performance would be adversely affected by her impairment. . . . Because Ms. Schramm will continue to receive these reasonable accommodations [under Section 504] regardless of her status under the IDEA, I perceive no reason to disregard their existence and to speculate on what impact Ms. Schramm’s impairments could have on her academic performance without them.

Put simply, the dissent concludes that if a child performs well with non-special education services then the child’s disability does not adversely affect educational performance. The dissent is not alone in reaching this conclusion.

190. 93 F.3d 1369, 1374 (8th Cir. 1996).
191. *Id.* at 1375.
192. For other courts employing the “but for” analysis, see 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”); and 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.”).
193. *Yankton*, 93 F.3d at 1378 n.2 (Magill, J., dissenting).
194. *See also* 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 can not 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. School districts can, and indeed are required to, provide supplementary services to children before referring them to the CSE.”); Bd. of Educ., 21 IDELR 1024, 1028, 1033 (N.Y. SEA 1994)
It stretches logic to find that a disability does not affect educational performance merely because the services necessitated by the disability lead to adequate educational performance. To receive Section 504 services, the child’s impairment must limit one or more major life activities, here education.195 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.

The Yankton dissent’s logic is appealing, as it denies IDEA eligibility to children already performing well without it. Yet the “needs special education” prong accomplishes the same purpose more appropriately. As argued 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.196 It is suitable 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.197 Imagine explaining to parents, whose child has a medically diagnosed disability and receives Section 504 services, that their child does not have a disability under IDEA. A more palatable explanation, and the one required by IDEA, is that a child who performs well with non-special education services has a qualifying disability but is not eligible because special education is unnecessary.

Similar grounds resolve the second issue troubling decision-makers—how adverse must the effect be for the disability to qualify. In Yankton the Eighth Circuit found the “adversely affects” requirement fulfilled because the orthopedic impairment resulted in “difficulty taking notes or completing her assignments” and the child “would be late to class and unable to take her books.”198 It did not find that the orthopedic impairment would result in academic failure if not addressed, but rather that her orthopedic impairment

(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”).


196. See infra notes 287-91 and accompanying text.

197. 34 C.F.R. § 300.7(c) (2003) (a child does not have a qualifying disability unless it adversely affects educational performance).

198. Yankton, 93 F.3d at 1375.
would affect the child’s “academic success” if not addressed. In Muller v. Committee on Special Education, the Second Circuit found the “adversely affects” prong satisfied because the child’s “performance improved in settings in which her emotional problems were being addressed.” In Mary P. v. Illinois State Board of Education, a federal district court held that a child’s mild speech impairment which would “inhibit his ability or desire to communicate with his teachers and peers meets the criteria of ‘speech impairment’ which ‘adversely affects the child’s educational performance.’” These courts 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.”

Many decision-makers disagree, requiring that the disability significantly affect performance to qualify. In Doe ex rel. Doe v. Board of Education of State of Connecticut the child was depressed, violent, refused to go to school and was hospitalized. The court found the child ineligible because his education

199. Id. (“Tracy’s academic success has depended upon these special measures . . .”).

200. Muller v. Comm. on Special Educ., 145 F.3d 95, 103 (2d Cir. 1998).


202. 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, therefore disability adversely affected educational performance); Los Alamitos Unified Sch. Dist., 26 IDELR 1053, 1060, 1063 (Cal. SEA 1997) (“STUDENT’S educational performance was not so adversely affected by the [ADD] as to demonstrate a need for special education.” The ADD did not limit the child “such that her educational performance was adversely affected in a significant way.”) (emphasis added); In re Hollister Sch. Dist., 26 IDELR 632, 660 (Cal. SEA 1997) (serious emotional disturbance did not adversely affect educational performance because the child “has always been mainstreamed in regular education classes and has consistently received better than passing grades”); Bristol Township Sch. Dist., 28 IDELR 330, 335 (Pa. SEA 1998) (“but 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”) (emphasis added); Fauquier County Pub. Sch., 20 IDELR 579, 583 (Va. SEA 1993) (disability has no adverse effect because “Child has made effective progress in school, including math where [child] experienced past difficulty, is well adjusted there, can effectively perform educational tasks in an independent fashion, follows class rules, substantially maintains control and does not disrupt the class”).

was not "significantly impeded" as shown by his satisfactory educational performance before, during, and after his hospitalization.\textsuperscript{204} The court in \textit{Gregory M. ex rel. Ernest M. v. State Board of Education of State of Connecticut} went further, finding the "adversely affects" prong unsatisfied even though the child received Cs and Ds.\textsuperscript{205} It held that the child's "education was not significantly impeded or adversely affected by his behavioral difficulties."\textsuperscript{206} Even when the child later became "oppositional, disruptive and distractible"\textsuperscript{207} and his "marks deteriorated"\textsuperscript{208} the court found no adverse effect because "he still achieved within the national average range on [standardized tests] . . . [and made] significant progress."\textsuperscript{209} The court in essence concluded that the disability did not adversely affect educational performance despite it resulting in low grades and average standardized test scores.\textsuperscript{210}

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 adverse, suffices for eligibility. Decision-makers adding a qualifier to adverse effect are engaging in inappropriate judicial lawmaking, which the Supreme Court always abhors, but particularly when interpreting IDEA.\textsuperscript{211}

\textsuperscript{204} Doe, 753 F. Supp. at 70.
\textsuperscript{206} Id. at 702.
\textsuperscript{207} Id. at 698.
\textsuperscript{208} Id. at 702.
\textsuperscript{209} Id.
\textsuperscript{210} \textit{See also} Trumann Pub. Sch., 18 IDELR 790 (Ark. SEA 1992) (child's speech impairment did not adversely affect his educational performance despite receiving a "needs improvement" grade in articulation).
\textsuperscript{211} \textit{See}, e.g., Cedar Rapids Cmty. Sch. Dist. \textit{v.} Garret F. \textit{ex rel.} Charlene F., 526 U.S. 66, 77 (1999) (refusing to accept "the District's cost-based standard [for the provision of medical services under IDEA]") because it "would require us to engage in judicial lawmaking without any guidance from Congress"); Honig \textit{v.} Doe, 484 U.S. 305, 323, 325 (1988) ("[W]e decline petitioner's invitation to rewrite the [IDEA]" to add a dangerousness exception to IDEA's "stay-put" provisions because "we are . . . not at liberty to engraint onto the statute an exception Congress chose not to create" and the Act simply "means what it says."); \textit{see also} Champagne, \textit{supra} note 33, at 589 ("more complex legal reasoning about the intent of the statute, and more common-sense based arguments about the needs associated with managing the educational process, fell before the simple wording of the statute"); Whitted, \textit{supra} note 77, at 549, 553 ("The Supreme Court is quite literal in [interpreting IDEA] and will not insert meanings that were never present.").
Requiring a significant effect on educational performance before eligibility attaches is understandable because of the fear of opening the eligibility floodgates to children whose disability only minimally affects their performance. But the need requirement is the proper analytical tool to close these floodgates, as the term “need” compels ascertaining the child’s current performance level. The term “adversely affects,” on the other hand, plainly means that any effect suffices irrespective of the child’s current performance level.

States can certainly interpret the adverse effect element as requiring a low level of performance. In New York, for example, a child’s condition must adversely impact the child’s performance to the extent that he or she requires special education or related services. As the New York standard essentially acknowledges, though, the “needs special education” prong is the more appropriate limitation on eligibility when the concern is the severity of the problem, just as it is when considering a child’s success with non-disabled services.

In conclusion, 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.

IV. “NEEDS SPECIAL EDUCATION”

A. “Special Education”

The above discussion emphasizes the importance of the “needs special education” limitation on IDEA eligibility. Indeed, the need for “special education” is the critical distinction between eligibility under Section 504 and IDEA. “Special education” is a term of art, with a limited meaning, and not

212. See infra Part IV.B.

213. N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1(mm) (2003). For application of this unified standard, see Corchado ex rel. Corchado v. Bd. of Educ., 86 F. Supp. 2d 168, 171 (W.D.N.Y. 2000) (The “crux of the issue [was] whether [the child’s] ‘educational performance was adversely affected by his difficulties to an extent warranting special education.’”); Rochester City Sch. Dist., 31 IDELR 178, 184 (N.Y. SEA 1999) (“a child must not only have a specific physical or mental condition, but such condition must adversely impact upon the child’s performance to the extent that he or she requires special education and/or related services”); and Smithtown Cent. Sch. Dist., 29 IDELR 293, 299 (N.Y. SEA 1998).


215. 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 ROTHSTEIN, supra note 20, at 93 (explaining that child must need special education under IDEA but not under Section 504); WEBER, supra note 28, § 2.2(1)
all services provided by schools to disabled students are special education.\textsuperscript{216} A child with Attention Deficit Disorder ("ADD") may need preferential seating and the use of a word processor, but not special education.\textsuperscript{217} A child with a physical impairment may need mobility assistance to get around school, but not special education.\textsuperscript{218} A speech-impaired child may need speech pathology services, but not special education.\textsuperscript{219} Section 504's coverage is broader than IDEA's because it does not consider the child's need for special education.\textsuperscript{220} Children eligible under Section 504 still seek IDEA eligibility, though, because IDEA specifies more services and procedural safeguards.\textsuperscript{221} As a result, the definition of special education is often determinative of IDEA eligibility.

For example, in Yankton School District v. Schramm, a child with cerebral palsy required adaptive physical education, physical therapy, transportation to and from school, shortened writing assignments, copies of the teachers' class notes, a computer for taking notes, separate sets of books for school and home, ("Nevertheless, some children with physical limitations or other conditions have no unique needs that call for special instruction, but cannot receive an equal education without services that IDEA classes as related services. If such a child meets the definition of an individual with handicaps found in the Rehabilitation Act of 1973, the school district must provide the services to the child."); McClendon, \textit{supra} note 16, at 92.

\textsuperscript{216} See \textit{supra} note 10.

\textsuperscript{217} Norton v. Orinda Union Sch. Dist., 168 F.3d 500 (9th Cir. 1999) (unpublished table opinion) (a child with ADD requiring preferential seating, use of word processor and handwriting assistance was not IDEA eligible because those services were not special education).

\textsuperscript{218} W. WEBER, \textit{supra} note 28, § 8.1 n.4 ("The most commonly discussed examples of children who are disabled for purposes of Section 504 but not IDEA are... students with physical disabilities or health impairments who require no special education as that term is defined in state and federal law."); see also Letter to Pawlisch, 24 IDELR 959, 960 (OSEP 1995) (The inquirer noted that "[n]ot every child with an impairment defined under Part B needs special education as a result such impairment. This is most simply illustrated by reference to a child with a severe physical impairment who needs no modification to the regular education program by reason of that impairment.").

\textsuperscript{219} Weymouth Pub. Sch., 21 IDELR 578 (Mass. SEA 1994) (lisp had adverse effect on child's educational performance but child was not IDEA eligible because he did not need special education).

\textsuperscript{220} 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); Brittan (CA) Elementary Sch. Dist., 16 EHLR 1226, 1228 (OCR 1990); WEBER, \textit{supra} note 28, § 8.1; Daniel & Coriell, \textit{supra} note 20, at 575; Guernsey, \textit{supra} note 13, at 564, 566 ("Section 504 is broad and general in coverage, while EAHCA is narrow and specific."); Stafford, \textit{supra} note 12, at 80 (Section 504 is "broader in scope" than IDEA); Wegner, \textit{supra} note 12, at 395-404.

\textsuperscript{221} Some scholars assert that the free appropriate public education under Section 504 requires a higher level of educational benefit than IDEA, but no court has so held. See Guernsey, \textit{supra} note 13, at 591.
and instruction on how to type with one hand.\textsuperscript{222} With these services, the child received almost straight As and participated in numerous extracurricular activities.\textsuperscript{223} The Eighth Circuit did not address whether the successful child in fact "needed" special education.\textsuperscript{224} Rather, the issue was "whether those services constitute 'special education and related services' under the IDEA," which the court answered affirmatively.\textsuperscript{225} Many eligibility decisions similarly hinge on whether the services the child requires are in fact special education.\textsuperscript{226}

Regrettably, courts and hearing officers often fail to consider the special education restriction, often presuming that if a child's disability adversely affects educational performance then the child needs special education. The Second

\textsuperscript{222} Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1371 (8th Cir. 1996).
\textsuperscript{223} Id.
\textsuperscript{224} Id. at 1374 n.4.
\textsuperscript{225} Id. The dissent agreed, but concluded that the child was ineligible because she was "achieving academic success without special education programs." Id. at 1377 (Magill, J., dissenting).
\textsuperscript{226} See, e.g., 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 because "[t]he record . . . is bereft of any evidence that Student's gross and fine motor development delays require the adapting of content, methodology, or delivery of instruction to address Student's unique needs. Because 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 . . . ."); Old Orchard Beach Sch. Dep't, 21 IDELR 1084, 1090 (Me. SEA 1994) ("AG is now in a personalized program with a low teacher/student ratio, lots of accountability, a case manager to communicate with home on a regular basis and deal with social skills issues, and taking one course at the high school by her choice. If she were labelled, nothing would change as this program is the one described by the psychologists to meet her needs and the program serves both special education and regular education students."); 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. The child's health concerns provide an explanation for his frequent absences, but there is little explanation in the record for his failure to complete homework. These issues could be addressed without the need for 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) ("The parents contend that Laura is in need of specially designed instruction and assert that Laura has been receiving just such instruction . . . . The District counters that Laura simply requires accommodations to her regular education program and that these accommodations do not qualify as specially designed instruction. . . . Despite the parents' assertion to the contrary, these accommodations do not rise to the level of specially designed instruction.").
Circuit’s analysis in Muller ex rel. Muller v. Committee on Special Education, East Islip Union Free School District is illustrative. In Muller a state review officer and appeal panel determined that a child with depression and Oppositional Defiant Disorder was not IDEA eligible under the “serious emotional disturbance” classification 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 IDEA eligible because “her emotional difficulties adversely affected her educational development.” The court did not discuss the “needs special education” requirement the hearing officer and review panel relied on to deny eligibility, instead presuming that a disability that adversely affects educational performance requires remediation through special education. A similar presumption was made in Corchado ex rel. Corchado v. Board of Education, Rochester City, School District. The hearing officer and state appeal officer both found a child with seizure disorder, ADD, tremors, and speech and language deficiencies ineligible under IDEA because he performed well academically and therefore did not need special education. The court reversed, and notwithstanding its statement that “not every child who has a disability needs special education,” still held that “denying him special education benefits because he is able to pass from grade to grade despite documented impairments that adversely affect his educational performance is wrong.” Many other courts and hearing officers likewise assume that if a child’s disability

227. 145 F.3d 95 (2d Cir. 1998).

228. Id. at 100 (quotation marks omitted). Interestingly, the Second Circuit did not provide the administrative decisions with the deferential standard of review required by Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 206 (1982), and 20 U.S.C. Section 1415(e)(2) because the issue was not about the appropriateness of an educational plan, a factual matter best resolved by educators, but rather a legal issue of eligibility. Muller, 145 F.3d at 102.

229. Muller, 145 F.3d 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.”).

230. The Second Circuit did not necessarily reach the wrong conclusion; it simply employed an incomplete analysis. It may be that the child needed special education, considering she needed “small group settings in which she could receive much needed emotional support and individualized attention," id. at 99, but the court did not expressly consider this eligibility requirement or finding by the lower review officers. This omission is surprising considering the Second Circuit’s opinion two years later in J.D. ex rel. J.D. v. Pawlet School District, 224 F.3d 60, 66-67 (2d Cir. 2000), where the court treated the “adversely affects” prong and the “needs special education” prong independently.

231. 86 F. Supp. 2d 168 (W.D.N.Y. 2000).

232. Id. at 171-72, 176.

233. Id. at 176.
adversely affects educational performance then the child needs special education.\textsuperscript{234}

This presumption fails because, as noted above, a child’s disability may often be appropriately served by something other than special education.\textsuperscript{235} The emotionally disturbed child in \textit{Muller}, for example, may have needed only the unidentified accommodations the district offered in its Section 504 plan, and not special education, to address her educational needs.\textsuperscript{236} The presumption also fails because not every educational problem needs addressing. As discussed below, a child that achieves a B+ in math instead of an A because of a disability fulfills the “adversely affects” requirement but does not “need” special education, even if special education would help.\textsuperscript{237} Determining that a child’s disability adversely affects educational performance simply does not answer the question of whether the child needs special education.

In short, the “needs special education” and adverse effect requirements are independent restrictions on eligibility. To be sure, these requirements are intertwined. After all, to be eligible a child must need special education by reason of, or on account of, an enumerated disability that adversely affects educational performance.\textsuperscript{238} The union of “adversely affects” and “need” in one

\textsuperscript{234} \textit{See}, e.g., \textit{In re Anthony F.}, 628 N.Y.S.2d 802, 803 (N.Y. App. Div. 1995) (The court concluded that the child needed special education because he has “behavioral problems that are attributable to his speech impairment. . . . and that, unless these problems are addressed, they will continue to affect his learning abilities.” While the court noted in a different context that the experts testified that the child needed special education, the court did not cite this testimony to support its conclusion that the child needed special education.); Benjamin R., 508 EHLR 183, 185 (Mass. SEA 1986) (child found IDEA eligible despite being “gifted . . . with very superior cognitive abilities” and performing well socially and academically in kindergarten because “perceptual deficits exist which impact on educational progress”); 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); George W. Indep. Sch. Dist., 35 IDELR 287, 290 (Tex. SEA 2001) (“the legal issue is whether that impairment adversely affects her educational performance and thus whether she ‘needs’ special education and related services”); \textit{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).

\textsuperscript{235} \textit{See supra} notes 217-19 and accompanying text; \textit{see also} Huefner, \textit{supra} note 7, at 497 n.63.

\textsuperscript{236} \textit{Muller ex rel. Muller v. Comm. on Special Educ.}, 145 F.3d 95, 100 (2d Cir. 1998). This, presumably, is why the hearing officer and state review panel found the child did not need special education. \textit{Id.} at 100-01.

\textsuperscript{237} \textit{See infra} Part IV.B.2.

sentence, however, does not mean a union of analysis. Both terms still act independently to limit eligibility and still must be defined and applied.

Despite its importance to eligibility, this Article does not address the nebulous definition of special education. The principal focus of this Article is to identify the circumstances where children passing from grade to grade may still be IDEA eligible. But the special education strand needs no unfurling to answer this primary question, as it is the "adversely affects educational performance" and "need" language that often preclude eligibility for such children. I assume that special education would assist the child, and determine instead when it is needed.

B. "Needs"

IDEA "contains no explicit guidelines for determining whether a student with an impairment needs special education."239 Rather, like the "adversely affects" prong, it is left to the states to give this term meaning.240 The only limitation is 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" under IDEA.241 Yet this is virtually impossible to determine as IDEA and its regulations provide no clues whatsoever to the definition of "need." While the IEP, assessment and free appropriate public education requirements of IDEA helped identify the educational problems IDEA seeks to address, nothing in those same provisions informs decision-makers as to what level the problems must reach before a need for special education is found or whether the child's level of performance is even considered in the need analysis.

The legislative history is similarly barren. The predecessor to the EAHCA and IDEA was the Elementary and Secondary Education Act of 1965 ("ESEA").242 The ESEA provided grants to states to meet the needs of educationally disadvantaged children but did not identify or attempt to define disabled children.243 The ESEA was amended in 1966 to specify programs authorized for "handicapped children" and defined them as children with certain enumerated disabilities "who by reason thereof require special education and related services."244 The legislative history gave no indication as to who requires special education. The EAHCA adopted the "requires special education"

239. Letter to Pawlisch, 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).
240. Letter to Pawlisch, 24 IDELR at 963.
241. Id.
243. Id. § 601.
limitation without legislative comment. The language remained until the 1990 reauthorization of IDEA, which only changed "requires" to "needs," again without legislative comment. 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.

Further, traditional canons of statutory construction, while always problematic, are particularly dubious for defining "need" under IDEA. As Professor Llewellyn pointed out long ago, opposing canons of statutory construction apply to almost every question of interpretation that might be posed. This problem is acute under IDEA. A broad definition including many children is justified because "IDEA is remedial legislation" that should be construed "broadly to effectuate its goals and purposes." On the other hand, a limited definition is justified because IDEA was enacted pursuant to Congress's spending power and must be interpreted "narrowly, in order to avoid saddling the States with obligations that they did not anticipate." Traditional canons of statutory construction lead no closer to the meaning of need than do the language, structure and legislative history of IDEA. The result is that it is virtually impossible for states to determine if their definition of need improperly acts to exclude otherwise eligible children.

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. For example, Massachusetts provides that there is a need for special education when the child is "unable to progress effectively in a regular education program." Colorado pronounces that a child only needs special education if

248. Va. Dep't of Educ. v. Riley, 106 F.3d 559, 576 (4th Cir. 1997) (Murnaghan, J., dissenting) ("Clearly, the IDEA is remedial legislation. A familiar canon of statutory construction requires courts to interpret remedial legislation, such as the IDEA, broadly to effectuate its goals and purposes.").
250. MASS. GEN. LAWS ANN. ch. 71B, § 1 (West 1996); MASS. REGS. CODE tit. 603, § 28.02(j) (2003). To "progress effectively" in regular education means:
[T]o make documented growth in the acquisition of knowledge and skills, including social/emotional development, within the general education program, with or without accommodations, according to chronological age and developmental expectations, the individual educational potential of the child, and the learning standards set forth in the Massachusetts Curriculum
the child cannot receive "reasonable benefit from ordinary education." The problem arises in states that do not define "need" just as it arose in states that did not define "adversely affects educational performance." However, Congress left no breadcrumb trail to the proper state standards to bring meaning to the term as it did when pointing to the state curriculum for the meaning of educational performance. Furthermore, incorporating state standards into the definition of educational performance was straightforward, as a state's curriculum and the areas of performance its schools track easily imparted meaning to the term. No general state educational standards so obviously inform decision-makers of when a child needs special education. Even the states that expressly define "need" beg the question of when a child is "progressing effectively," being "educated appropriately" or receiving "reasonable benefit" in regular education.

With almost no guidance from IDEA and no apparent general state educational standards to bring meaning to the term "need," it is no surprise there is sharp disagreement among decision-makers. There are two essential points of debate. The first is whether the child's need for special education can be ascertained without considering the child's current level of educational performance. Put another way, should a child be deemed to need special education merely because the child can benefit from it? The second issue is if current educational performance levels are to be considered in ascertaining a need for special education, under what level must a child's performance fall for eligibility.

1. The Benefit Standard

Many decision-makers, without any justification from state standards, improperly find that a child needs special education merely because the child can benefit from it. They eliminate the child's current educational performance level from the equation and find that eligibility attaches if special education will improve the child's performance. The result is that high-performing gifted children are found in need of special education despite out-performing their non-disabled peers.

Frameworks and the curriculum of the district.
251. COLO. REV. STAT. § 22-20-103(1.5) (2000).
253. A state's minimum performance goals are an inappropriate standard to determine need. See infra notes 320-23 and accompanying text.
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. 254 A need was found because the child's "language and cognition skills surpass his performance skills" and "perceptual deficits exist which impact on educational progress." 255 Likewise, in Conrad Weiser Area School District v. Department of Education, the school district denied a mentally gifted child eligibility as learning disabled because of his success in regular education. 256 The court stated that a child needs special education when his performance level "is not sufficient to demonstrate success in the regular classroom." 257 Despite the performance-based test it enunciated, and despite the child's classroom success, the court held that the child needed special education because he "had problems with the rate and degree of completion of his written work." 258 Similarly, in West Chester Area School District v. Bruce C., the school district refused to find a child with ADD eligible because he performed average to above average academically, though he dropped from Level I to Level III courses. 259 The court disagreed, holding that "a student's entitlement to IDEA services 'must be gauged in relation to the child's potential'" and therefore the appeals panel "erred in focusing on Chad's grades while disregarding Chad's potential." 260

A more awkward analysis, with the same result, was employed in Natchez-Adams School District v. Searing ex rel. Searing, where a child with cerebral palsy "made good academic progress" and "was making progress in the gross and fine motor skills area" without special education. 261 The court cited the need requirement but concluded that "[b]y suggesting that it has no obligation to provide occupational therapy for Evan unless the Searings first demonstrate that this service is required, Natchez-Adams confuses the standard [for eligibility]" with the free appropriate public education standard. 262 These decision-makers essentially hold that because a child can benefit from special education, it is needed.

255. Id.
257. Id. at 704 (quoting 22 PA. CODE § 342.25(a)(2)).
258. Id. at 705.
260. Bruce C., 194 F. Supp. 2d at 421 (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 835 F.2d 171, 185 (3d Cir. 1988)).
262. Id. at 1038.
Even OSEP arguably employs this benefit standard. When asked whether a child advancing from grade to grade may need special education, OSEP responded that if a “student's educational performance would be adversely affected in the absence of [special education],” then the child needs special education.\textsuperscript{263} In other words, if special education can help, it is needed. But this contradicts OSEP’s earlier position when it analyzed the eligibility of three categories of learning disabled children: those performing “above,” “comparably” to and “below” the level of their age peers.\textsuperscript{264} It found that the average performers were not IDEA eligible because:

In the case where a student’s disability does not interfere with the student’s ability to benefit from participation in the regular education program without supplementary aid and services, and 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.\textsuperscript{265}

While later policy statements superseded certain portions of this position, the need analysis taking into account the child’s current educational performance was not altered.\textsuperscript{266} The department in charge of interpreting IDEA, therefore, provides conflicting guidance on the issue.

The benefit standard employed by the above decision-makers and arguably OSEP is not mandated by IDEA and is likely not mandated by general state educational standards. IDEA expressly provides that the child must need special education, not merely that the child could benefit from it.\textsuperscript{267} Congress clearly

\textsuperscript{263} 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”).

\textsuperscript{264} Letter to Hartman, 213 EHLR 252, 254 (OSEP 1989).

\textsuperscript{265} Id. (citations omitted). 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.

\textsuperscript{266} Letter to Lillie/Felton, 23 IDELR at 720 (finding that portions of the Hartman position were superseded by Letter to Ulissi, 18 IDELR 683 (OSEP 1992)). The Hartman letter found that classification as LD was inappropriate if the child was achieving commensurate with age peers or the child’s own potential ability. The Ulissi letter superseded only this portion of the Hartman letter, finding that the discrepancy must be in ability versus performance and that comparison to same age peers was inappropriate to find a qualifying LD discrepancy. Letter to Ulissi, 18 IDELR at 687. The Ulissi letter never discussed the “need” eligibility requirement but focused exclusively on the regulations defining LD. Id.

intended the term "need" to limit the class of eligible children.\textsuperscript{268} It does not simply introduce the special education limitation, but rather is itself a restriction on eligibility. Applying the benefit standard reads the need limitation out of IDEA. The Supreme Court is particularly wary of such judicial lawmaking under IDEA and would almost certainly interpret "need" according to its plain meaning.\textsuperscript{269}

Contrasting the "need" term to "adversely affects" refines its limiting connotation. The plain meaning of adverse effect is any effect no matter the child's current performance level. The plain meaning of "need," on the other hand, signifies a necessity, exigency, or a lack of something essential.\textsuperscript{270} Ascertaining a child's need for services, therefore, unavoidably involves knowing the child's current level of educational performance. After all, the key factor distinguishing what one wants from what one needs is what one already has. The benefit standard does not consider what the child already has or can do; instead any benefit from special education suffices. Accordingly, unless state standards employ a benefit standard, one cannot be read into IDEA.

If the plain meaning of "need" does not end the matter, other provisions of IDEA do. The IEP must include "a statement of the child's present levels of educational performance."\textsuperscript{271} The goals of the IEP and the special education and related services provided to the child hinge on these performance levels.\textsuperscript{272} Because performance level determines the level of services the child needs to reach the IEP goals, it should also determine if services are needed at all for eligibility purposes.

On the other hand, another IDEA provision requires states to identify, locate and evaluate all children with disabilities residing in the state "regardless of the severity of their disabilities."\textsuperscript{273} This language arguably supports the position that eligibility should be determined without reference to the child's current educational performance, i.e. how severely the disability impacts the child. Yet courts hold that this language actually defeats a derivative of the benefit

\textsuperscript{268} 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 24, at 30 (IDEA seeks to protect high need children); McClendon, supra note 16, at 92 ("Congress intended that only a certain class of children, those truly in need, were to receive the protection and benefits of the IDEA.").

\textsuperscript{269} See supra note 211.

\textsuperscript{270} BLACK'S LAW DICTIONARY 1054 (7th ed. 1999) ("1. The lack of something important; a requirement. 2. Indigence."); Meriam Webster's Online Dictionary, available at http://www.m-w.com ("to be needful or necessary").


standard—that a severely disabled child must be able to benefit from special education before eligibility attaches.\textsuperscript{274} The First Circuit rejected this proposition because “[t]he language of the Act is directly to the contrary: a school district has a duty to provide an educational program for every handicapped child in the district, regardless of the severity of the handicap.”\textsuperscript{275} If an ability to benefit from special education is unnecessary to find a need for it, the mere fact that a child can benefit from special education should also not establish a need for it.\textsuperscript{276}

Indeed, most decision-makers implicitly reject the benefit standard and instead consider the child’s current performance level when ascertaining whether a need for special education exists.\textsuperscript{277} It was expressly rejected in \textit{Avon Public Schools}, where the hearing officer noted that the child “could benefit” from special education but did not need special education because she has been passing from grade to grade achieving A’s and B’s in all subjects, demonstrating objective progress through nearly yearly standardized tests scores consistent with her age and grade level, participating without difficulty in all classroom assignments and activities; in sum acquiring skills and knowledge in a speed and manner and consistent with her regular education peers.\textsuperscript{278}

Unless a state standard provides that a need for special education exists if the child can benefit from it, a child should only be found in need of special education when his or her educational performance falls below a certain level.

\textsuperscript{274} Timothy \textit{w. ex rel. Cynthia W. v. Rochester, N.H., Sch. Dist.}, 875 F.2d 954, 962 (1st Cir. 1989). Whether the child could benefit from (i.e. needed) special education was a hotly contested factual dispute with the trial court and First Circuit reaching opposite conclusions. The First Circuit did not engage in any discussion of what “needs special education” meant in the statute or how such a requirement may relate to the “benefit” eligibility standard the court rejected. \textit{Id.; see also Quintana ex rel. Padilla v. Dep’t of Educ.}, 30 IDELR 503, 506 (P.R. Cir. Ct. App. 1998) (“no evidence need to be shown that the child will benefit from the [special education] as a requisite to compel the government to provide such education”). \textit{But see Parks v. Pavkovic}, 753 F.2d 1397, 1405 (7th Cir. 1985) (hypothesizing that “if the child is so far handicapped as to be unconscious, and is thus wholly uneducable, he falls outside the protection of the Act even though his handicap is more rather than less severe than that of the children protected by the Act”).

\textsuperscript{275} Timothy \textit{w.}, 875 F.2d at 962.

\textsuperscript{276} The “regardless of severity” language also does not impel a finding that current performance levels are irrelevant to eligibility because it exists in the “child find” provisions, not the eligibility criteria. That a state must find and evaluate all children with disabilities regardless of severity does not require that the state classify these children as eligible regardless of the severity of their disabilities.

\textsuperscript{277} \textit{See} cases cited \textit{infra} Part IV.B.2.

\textsuperscript{278} \textit{Avon Pub. Schs.}, 25 IDELR 778, 784 (Mass. SEA 1997).
The critical question becomes what level of performance results in a need for special education.

2. The Performance Standard

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. This requires answering two questions. First, which of the child’s performance areas must need special education? Second, is performance level determined with or without the non-special education services the child may already be receiving?

As to the first issue, decision-makers often find that because a child performs well academically the child does not need special education, even though another area of the child’s educational performance may require special education. They do not deny eligibility on the grounds that “educational performance” is limited to academics, but instead because a child needs special education only to address academic performance. The issue typically arises when the child’s out-of-school behavior reduces or prevents school attendance yet the child achieves good grades. In Katherine S. v. Umbach the child’s significant emotional and behavioral problems led the parents to home-school her and later place her at a residential facility.279 The court found the child did not need special education because she “was able to make academic progress and to graduate successfully” from the residential placement.280 Similarly, in Ludington School District the child achieved As and Bs despite acute behavior problems resulting in several suspensions from school.281 The hearing officer concluded that the child did not need special education because the child, “despite his behavior problems, is able to profit from regular education and therefore is not eligible for special education programs and services.”282

These decisions are incorrect because a need for special education can exist in any area of educational performance adversely affected by the disability, not just academics. Recall that a child must by reason of the disability that adversely


280. Id. at *11. The child received Cs and above in the residential setting, id. at *3, and was a leader and role model. Id. at *6.

281. Ludington Sch. Dist., 35 IDELR 137, 138-39 (Mich. SEA 2001). The child was “unwilling to follow school directives, and ... adamant in his refusal to do the work assigned. . . . [The child] has left school without authorization, and has physically attacked adults and students in the school setting without any observable remorse. . . . This behavior has resulted in numerous suspensions.” Id. at 138.

282. Id. at 140.
affects educational performance need special education.\textsuperscript{283} Accordingly, a child is IDEA eligible if the child needs special education by reason of, or on account of, an enumerated disability that adversely affects educational performance. As explained above, attendance and behavior are educational performance that must be addressed despite good academic performance. They are not merely means to the end of academic achievement, but are themselves educational ends.\textsuperscript{284} They were treated as such in \textit{Monrovia Unified School District}, where a child that performed well academically was still found in need of special education because the student’s behavioral problems led to removals from class and multiple school suspensions.\textsuperscript{285} The hearing officer properly recognized that behavior and attendance are educational performance that may need addressing through special education. This does not mean that the results of \textit{Umbach} and \textit{Ludington} are incorrect, as the children may have needed something other than special education to solve their attendance problems.\textsuperscript{286} But the analysis the courts employed was incorrect because they precluded a finding of need based solely on academic performance.

As to the second issue, decision-makers agree that the child’s educational performance should be ascertained taking into account the non-special education services the child receives under Section 504.\textsuperscript{287} In other words, children are not

\begin{itemize}
  \item \textsuperscript{284} \textit{See supra} notes 172-79 and accompanying text.
  \item \textsuperscript{285} \textit{Monrovia Unified Sch. Dist.}, 38 IDELR 84, 87-88 (Cal. SEA 2002).
  \item \textsuperscript{286} The court in \textit{Umbach} also stated that “it is key that none of the evidence, especially including reports and testimony from the experts who evaluated Katherine, supports a finding that her emotional difficulties caused her to be . . . in need of special education or related services.” Katherine S. v. Umbach, No. CIV.A. 00-T-982-E, 2002 WL 226697, at *12 (M.D. Ala. Feb. 1, 2002).
  \item \textsuperscript{287} \textit{See, e.g.}, \textit{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); \textit{Toledo Pub. Sch. Dist.}, 401 EHLR 335, 337 (Ohio SEA 1989) (“In this case the evidence is clear that without substantial tutoring and parental help he received, he would not have passed to the next grade, for the second time. So for this child, special education is required for him to benefit from his education.”); \textit{Old Orchard Beach Sch. Dep’t}, 21 IDELR 1084, 1090 (Me. SEA 1994) (“Special education and related services are only for those children who need assistance in order to benefit from their education. AG is now in a personalized program with a low teacher/student ratio, lots of accountability, a case manager to communicate with home on a regular basis and deal with social skills issues, and taking one course at the high school by her choice. If she were labelled, nothing would change as this program is the one described by the psychologists to meet her needs and the program serves both special education and regular education students.”); \textit{In re} Laura H., 509 EHLR 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
IDEA eligible if their needs are adequately addressed through non-special education services. 288 So while non-special education services were ignored in determining the existence of a qualifying disability, they must be accounted for in determining if a need exists. Some states go further, finding children ineligible until non-special education interventions are shown to fail. 289 The reauthorized IDEA takes steps in this direction, as the House version allows local educational agencies to use up to fifteen percent of their funds for prereferral 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 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. She has been and will continue to be served under the school district's 504 program. . . . 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. As was pointed out by several witnesses, including the parent's own consultant, this is a distinction between 504 and special education eligibility that is often confused or misunderstood.").

288. 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."); Letter to Lillie/Felton, 23 IDELR 714, 719 (OSEP 1994) ("Generally, it would be appropriate for the evaluation team to consider information about outside or extra learning support provided to the child . . . as such information may indicate that the child's current educational achievement reflects the service augmentation, not what the child's achievement would be without such help.").

289. 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.").
services for students before they are identified as needing special education. It is wise policy to employ non-special education services before finding that a child needs special education, otherwise "many children who are placed into special education are essentially instructional casualties and not students with disabilities." Accordingly, the child’s level of educational performance must take into account the non-special education services the child receives.

With knowledge of how to ascertain a child’s current level of educational performance, the question of what level the child’s performance must fall below before a need exists can be examined.

a. The Problem

Decision-makers disagree as to where the child’s educational performance must fall along the continuum of performance to be considered eligible. Some set the eligibility bar high, requiring failure before a need will be found. Some set it low, finding that a mere inability to reach one’s potential establishes a need. It is easier to determine where along this continuum the need bar should rest once the common ground is traversed.

There is agreement that a failing child needs special education. There is also agreement, at least for the decision-makers who properly take current educational performance into consideration, that when a child’s educational performance is above average there is no need for special education. In Grant v. St. James Parish School Board, a dyslexic child made the honor roll in junior and senior high school with numerous non-special education services. The Fifth Circuit agreed that the school did not have to evaluate the student for IDEA eligibility because he "was performing . . . on average or above average . . ." even before the accommodations. Similarly, in Weston Public School

290. H.R. 1350, 108th Cong. § 203(f) (2003); 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.").

291. PRESIDENT’S COMMISSION, supra note 24, at 26.

292. 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 311-15 (requiring that the child fail in order to need special education).


294. Id. at *5; see also Eric H. ex rel. Gary 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”).
District, the hearing officer found the third grade child did not need special education because he was "performing above grade level expectations in math and spelling, between the third and fourth grade levels in reading and at the third grade level in writing without any modifications to the curriculum or any specialized instruction."295 The vast majority of hearing officers and courts find that above average educational performance means special education is not needed.296

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296. See e.g., 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 EHRL 264, 268 (Mass. SEA 1990) (child "performing above grade level" and who "earns very high grades" did not need special education); Dist., 35 IDELR 137, 140 (Mich. SEA 2001) (while the hearing officer improperly excluded consideration of non-academic performance, the hearing found that receiving As and Bs and scoring above average on standardized tests meant the child 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. 5091, 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
Most courts and hearing officers also agree that a child whose educational performance is average does not surpass the need hurdle. For example, in Huntsville City Public School the district declassified a child as learning disabled because she no longer needed special education.297 The hearing officer agreed because the child "successfully completed the eleventh grade" as "an average student" that was "very active in outside activities."298 Similarly, in Northshore School District, a child with ADHD performing in the average range in kindergarten was denied eligibility because "the educational challenges the Student does have are not sufficiently affecting her educational performance such as to keep her from staying within the range of her [ ] peers such that she needs specially designed instruction."299 In In re Pasos Robles Union Elementary School District, the child was not IDEA eligible despite "having difficulties in school" and receiving Cs, because his performance was "insufficient to support a finding that [he] currently requires special education and resulted services to succeed in the regular classroom."300

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 K.M., 29 IDELR 1027, 1036 (Vt. SEA 1999) (Child receiving As and Bs in residential setting without special education "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 . . . .").

298. Id. at 971.
300. In re Pasos Robles Union Elementary Sch. Dist., 21 IDELR 1197, 1194 (Cal. SEA 1994); see also Greenfield Pub. Sch., 21 IDELR 345, 349 (Mass. SEA 1994) (applying Massachusetts definition of need, the hearing officer found the student ineligible as learning disabled because he "is a student capable of doing average level work at his appropriate grade level, and . . . he has in fact been doing this during at least his second and third grade years"); In re Laura H., 509 EHLR 242, 245 (Mass. SEA 1988) (child with environmental illness that prevented her from attending chemistry lab did not "need" special education of a closed circuit television for chemistry lab under Section 504 because her average performance established that she "is capable of learning satisfactorily with the supplementary aids and services available to her [an alternative biology class] within the regular education program"); Arlington Cent. Sch. Dist., 35 IDELR 205, 213 (N.Y. SEA 2001) (child with discrepancy between verbal and performance IQ scores did not need special education because the "student’s performance
OSEP apparently supports the position that a child performing average in regular education does not need special education.\textsuperscript{301} OSEP had a chance to clarify itself when it was asked whether it was appropriate to deny learning disabled children eligibility “because they are receiving As, Bs and Cs on their report cards and are passing from grade to grade at the same rate as their peers.”\textsuperscript{302} OSEP ducked the question, however, and merely cited the regulations defining LD without ever reaching the “need” question posed.\textsuperscript{303}

While there is general agreement among decision-makers that failing children need special education and children performing average to above average do not, there is sharp disagreement when the child performs poorly yet passes from grade to grade. Some states legislate that children must fail in the regular classroom before finding a need for special education.\textsuperscript{304} 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

in school [satisfactory or above] was generally commensurate with the results of his cognitive testing”); 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. . . . Based upon the record before me, I am unable to find that the child’s medical condition adversely impacted his academic performance to the extent that he required special education and/or related services.”); Pennsbury Sch. Dist., 26 IDELR 1208, 1212 (Pa. SEA 1997) (child with vision problem whose academic functioning was commensurate with his age was “neither an eligible student as a disabled child for Chapter 14/IDEA special education nor is he in need of visual therapy as a related service to his gifted education program because the Record does not support a conclusion that his optometrist-identified visual problem requires specialized instruction for Michael to benefit from either his regular or gifted education program”).

Hearing officers also find that a school does not violate its “child find” obligation, \textit{see supra} note 23, when it fails to assess children performing in the average range for disabilities. \textit{See, e.g.,} Craven County Bd. of Educ., 27 IDELR 235, 250 (N.C. SEA 1997) (district did not fail to timely identify child as disabled because child’s average school performance meant that “there were no indications that [the child] was in need of special education”); Ashland Sch. Dist., 28 IDELR 630, 639 (Or. SEA 1998) (district did not fail to timely identify child as disabled in ninth grade because of his “significant success in classroom behavior and academically,” but once child had “academic failure” in tenth grade, the “[d]istrict should have suspected a disability and a potential need for special education and related services”).

\textsuperscript{301} Letter to Hartman, 213 EHLR 252, 254 (OSEP 1989); \textit{see supra} notes 264-66 and accompanying text (fully discussing the \textit{Letter to Hartman}).

\textsuperscript{302} Letter to Lillie/Felton, 23 IDELR 714, 716 (OSEP 1994).

\textsuperscript{303} \textit{Id.} at 721.

\textsuperscript{304} \textit{See, e.g.,} Metro. Nashville Pub. Sch. Sys., 27 IDELR 756, 766 (Tenn. SEA 1997) (noting that Tennessee defines “eligible child” as a child that is “unable . . . to be educated appropriately in the regular school program without the provision of special education”).
example, in *Kelby v. Morgan Hill Unified School District* a child with “poor grades, behavior problems and inconsistent work habits” sought IDEA eligibility as learning disabled.  

The Ninth Circuit denied eligibility because the child’s “learning difficulties are not so severe that he cannot benefit adequately from the regular educational program.” It applied similar reasoning in denying eligibility to a child with ADD who tested high on “numerous psychological and achievement tests” but performed only “adequately in the regular classroom” even with modification of the regular school program. It held that the child did not require special education because his adequate performance established that he was “benefitting from his regular classroom environment.” The Ninth Circuit, therefore, requires less than “adequate” performance or “poor grades” before it will find that a child needs special education.

The Ninth Circuit is not the only court to set the eligibility bar high. In *Katherine S. v. Umbach*, an Alabama federal district court applied the stringent standard that a child does not need special education unless the child demonstrates “an inability to learn in the public school context.” The child’s above average performance established her ability to learn, but the standard employed apparently requires failure before eligibility will attach.

Many hearing officers also require failure in regular education before finding a need for special education. In *Academy School District #20*, for example, the hearing officer denied eligibility applying Colorado’s requirement that a child only needs special education if the child is not “receiving reasonable benefit from regular education.” The hearing officer found that a child with “unremarkable grades [and] a substantial number of truancies, tardies, and disciplinary notices” was receiving “reasonable benefit from regular


306. *Id.* at *3.

307. *Norton v. Orinda Union Sch. Dist.*, 168 F.3d 500 (9th Cir. 1999) (unpublished table opinion), *available at* 1999 WL 97288, at *1. “[T]he school district modified Allan’s regular education program to include preferential seating near the front of the classroom, use of word processor, handwriting assistance, and other assistance.” *Id.*

308. The court did not elaborate on the child’s adequate performance by providing grades or report cards but from the discussion it appears that the child was merely passing.

309. *Norton*, 1999 WL 97288, at *2. It concluded that there was no error “in holding that Allan received an appropriate public education in the school district’s regular education program ... and that he was ineligible for IDEA protection at that time.” *Id.* at *3.


311. *Academy Sch. Dist. #20*, 21 IDELR 965, 970 (Colo. SEA 1994).

312. *Id.* at 969.
education” and therefore did not need special education.\textsuperscript{313} In Bellflower Unified School District, the hearing officer similarly held that a student earning merely passing grades in first through third grade did not need special education because his “academic progress indicates that, at this point, he remains able to learn and to remEDIATE his severe discrepancy within the regular education system.”\textsuperscript{314} Also, in Berkeley Unified School District, the hearing officer held that a child with poor school attendance who received Cs, Ds and Fs in seventh grade and two Fs in eighth grade was not eligible because “modifications in the regular school program are feasible and have a good chance of ameliorating her difficulties.”\textsuperscript{315} However, these modifications were already attempted and the child still received poor grades.

On the other hand, numerous decision-makers find that children passing yet performing poorly need special education. 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{316} In Petaluma

\textsuperscript{313} Id. at 973.

\textsuperscript{314} Bellflower Unified Sch. Dist., 33 IDELR 262, 271 (Cal. SEA 2000); see also Los Alamitos Unified Sch. Dist., 26 IDELR 1053, 1059-60 (Cal. SEA 1997) (third grader reading at first grade level did not need special education because use of regular education supports led to improvement); Toledo Pub. Sch. Dist., 401 EHLR 335, 337 (Ohio SEA 1989) (“The child should sufficiently benefit from his education so as to be able to pass from grade to grade. In this case the evidence is clear that without substantial tutoring and parental help he received, he would not have passed to the next grade, for the second time. So for this child, special education is required for him to benefit from his education.”); Bristol Township Sch. Dist., 28 IDELR 330, 336 (Pa. 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”). But see 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 students would be eligible for special education.”); Portland Pub. Schs., 25 IDELR 1247 (Me. SEA 1997) (Hearing officer held that child failing majority of classes was not behaviorally impaired and also held, with no discussion, that child did not require special education. In short, a child, even though failing, did not “need” special education.).

\textsuperscript{315} Berkeley Unified Sch. Dist., 507 EHLR 435, 438 (Cal. SEA 1986).

\textsuperscript{316} Blazejewski ex rel. Blazejewski v. Bd. of Educ., 560 F. Supp. 701, 705 (W.D.N.Y. 1983); 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).
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 needed special education because "despite attempts at modification of the regular instructional program, student continued to perform poorly" and failed two subjects. If the state standards are silent, the issue becomes whether children merely performing poorly need special education or whether only children failing need special education.

b. The Solution

The facial solution to this disagreement is to defer to state standards as was done for the meaning of "educational performance." The problem is that in states that do not specifically define "need" there are no general state educational standards that inform decision-makers as to when special education is needed. There is also no available fallback onto federal standards because the express meaning of "need" only dictates against the benefit standard but does not inform decision-makers as to what level of performance indicates a need for special education. Accordingly, states are free to define need without running the risk of excluding children that are otherwise eligible under IDEA. The issue, therefore, is not where IDEA does mandate that the performance bar be set for eligibility, but rather, where it should be set by decision-makers. Policy reasons and cases defining the free appropriate public education to be provided eligible children support finding that a child needs special education when any area of the child's performance is poor, or falls below average.

The most apparent state standards to define when a need exists are the states' minimum education standards. Employing the minimum education standards is attractive because it incorporates clear state standards into the meaning of need. Because these standards typically specify the content and skills students are expected to know for each grade, they provide an easy benchmark to determine need. However, a state's minimum educational standards cannot define a student's need for special education because they are minimum educational standards. Certainly children falling below the minimum requirements need services. But even children performing barely above the minimum standards still need services. 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. Indeed, educators intend and expect that students not only meet the minimum state standards, but also exceed them. Therefore, educators find that a child needs assistance even when passing from grade to grade and seek to be proactive with interventions before failure occurs. 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."

Of course, states are free to legislate that a need exists only when the child falls below state minimum standards, but to infer such a requirement from the mere existence of the states' minimum education standards is inappropriate. Without any certain state standards, sound educational policy dictates that a need for special education be found before failure occurs.

There is also no indication in IDEA as to when a need for special education exists. While the express meaning of need indicates that the child's current level of educational performance should be considered, it does not help identify what level of performance results in a need. Many courts and hearing officers that require failure before eligibility attaches refer to the free appropriate public education standard in Rowley. They reason that because IDEA requires only "some educational benefit" to eligible children, any child already receiving some educational benefit, i.e. passing from grade to grade, is ineligible. For example, in Hoffman v. East Troy Community School District, the court held that the school district did not have reasonable cause to believe the child needed special education. 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."


321. See, e.g., GA. CODE ANN. § 20-2-140 (2001) (Georgia establishes "competencies that each student is expected to master" and also "competencies for which each student should be provided opportunities . . . to master.").

322. Id.; see also Callegary, supra note 25, at 197.

323. PRESIDENT'S COMMISSION, supra note 24, at 22-23.


325. Id. at 764 (citing Bd. of Educ. v. Rowley, 458 U.S. 176, 203 (1982)); see also 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 1993) (though not citing Rowley, the hearing officer found the child ineligible because "the law requires only
While referencing Rowley’s “some educational benefit” standard when defining educational performance is possible because of the shared term “educational,” there is no such justification for reverse engineering Rowley’s “some educational benefit” standard into the need analysis. The facile explanation is that 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 reasoned, 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.”326 OSEP employs the same analysis.327 The First Circuit summarized the position eloquently: “The 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.”328

However, the fact that Rowley dealt exclusively with services to eligible children does not render it entirely useless in eligibility questions. As explained enough attention to the emotional problems to insure that the Child will receive some educational benefit”).

326. 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).

327. Letter to Pawlisch, 24 IDELR 959, 963 (OSEP 1995). While OSEP held that a child passing from grade to grade might be eligible, it failed to identify the circumstances under which eligibility arises. In the first example of an eligible learning disabled child passing from grade to grade, OSEP found that such a child may be passing only because he receives some type of services augmentation or “special education” outside of the classroom and therefore may still need special education despite passing grades. Id. at 965. In addressing the example provided by the inquirer—a child with a physical impairment that does not require modification to the regular educational program to perform well academically—OSEP instead chose to question whether the “modifications” were in fact “special education” and therefore the child needed special education. Id. at 966. By assuming that the child needed special education to pass from grade to grade in both examples, OSEP ducked the critical question of whether a child passing from grade to grade without special education may still need special education. Finally, OSEP cited two cases where it was determined that “a student placed in the regular educational environment and making progress in that environment still needs special education or related services.” Id. However, the issue in the cited cases was not whether the child “needed” services, that issue was stipulated, but rather whether such services were in fact “special education.” See discussion of Yankton supra notes 190-93, 222-25 and accompanying text.

above, the Court’s use of “educational benefit” to define a free appropriate public education gave clues to the meaning of educational performance for eligibility.\footnote{329} However, requiring districts to provide “some educational benefit” to eligible students yields no similar clues as to when a “need” for special education exists.

The first reason is that the Rowley Court relied on the express language of the statute to find a minimum benefit standard for eligible children. Because IDEA’s definition of “related services” expressed that the child must “benefit” from special education, the Court reasoned that IDEA requires benefit to eligible children.\footnote{330} Without similar benefit language in the eligibility standards, the “some benefit” standard cannot be grafted onto the need requirement and children receiving “some benefit” from regular education may be eligible.

Furthermore, the Court in Rowley limited this to merely “some benefit” because the purpose of IDEA was to “make public education available” and to “open the door of public education to handicapped children [on appropriate terms rather] than to guarantee any particular substantive level of education once inside.”\footnote{331} With equal access and not equal opportunity as the goal of IDEA, a low “some benefit” standard for eligible children was justified.\footnote{332} In contrast, the purpose of equal access is obstructed, if not totally subverted, by requiring that children fail in regular education before eligibility attaches. While the “some benefit” standard for the services required by IDEA was justified by the purpose of equal access, the same purpose counsels against finding that children receiving some benefit from regular education are ineligible.\footnote{333} Indeed, the low level of services required by IDEA for eligible children justifies pushing the eligibility door open. If schools were required to maximize eligible children’s potential, cost alone would warrant leaving the eligibility door only ajar.

Finally, the Court in Rowley expressly identified a class of eligible children that was passing from grade to grade yet was not being appropriately served. This implies a class of children who are eligible because they are not performing as well as Amy Rowley, who received As and Bs, or because they have educational needs not reflected in grades.\footnote{334} In other words, the class of eligible children identified in Rowley that pass from grade to grade yet still need special education may very well be children passing from grade to grade but performing below average, i.e. getting Ds. This reasoning was employed in West Chester Area School District v. Bruce C., where the court, relying on Rowley, rejected

\footnotesize{329. See supra notes 154-60 and accompanying text.}
\footnotesize{330. Rowley, 458 U.S. at 188-89.}
\footnotesize{331. Id. at 177.}
\footnotesize{332. Id. at 200; see also Daniel & Coriell, supra note 20, at 582.}
\footnotesize{333. President’s Commission, supra note 24, at 22 (eligibility teams should err on side of provision of services).}
\footnotesize{334. See supra Part III.A.2.}
the "determination that Chad is ineligible for an IEP [because] his grades have never dipped below the passing level." 335 Similarly, the court in *Mary P. v. Illinois State Board of Education* rejected the school district's argument that a child passing from grade to grade does not need special education "[b]ecause the Supreme Court explicitly rejected the notion that the sole test for an appropriate education was advancement from grade to grade . . . [T]he court finds no authority from *Rowley* to impose such a requirement on the test for eligibility in the present case." 336

In summary, the free appropriate public education standard applied to eligible children supports finding that children passing yet performing poorly need special education. This standard appropriately eliminates average and above average performers from eligibility, an outcome that already finds virtually unanimous support from courts and hearing officers. Children able to compensate for their disability so that their educational performance (e.g. grades, attendance, behavior) is average to above average should not be eligible. After all, we are all talented and handicapped to a certain extent, and if our talents overcome our handicaps we should not be IDEA eligible. 337 The proposed standard also includes certain children who are not failing but are performing poorly. Including these children "opens the door of public education" and 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. Several states incorporate a less precise but similar definition of need, requiring that the child be unable to receive "reasonable benefit" 338 or "progress effectively" 339 before a need is found.

Based on the above standard, a child should be deemed to need special education when any area of her educational performance is poor or below

335. W. Chester Area Sch. Dist. v. Bruce C., 194 F. Supp. 2d 417, 421 (E.D. Pa. 2002). While the court was correct in rejecting the "some benefit" FAPE standard as the need standard, it improperly reasoned that a need exists and eligibility attaches whenever the child is not meeting his potential. *See supra* notes 259-60 and accompanying text.


337. Krass, *supra* note 28, at 1017 ("Classifying children as either handicapped or non-handicapped is not more accurate than labeling them talented or non-talented, because all people are both talented and handicapped to a certain extent.") (citation omitted).

338. COLO. REV. STAT. § 22-20-103(1.5) (2000).

average. For example, if a child’s attendance is below the average of his peers, the child should clear the need hurdle, though the child must still establish that special education is necessary to address the attendance problem and that the problem is caused by the disability and not other factors. The same is true for any area of educational performance. The team of professionals charged with determining eligibility will best be able to ascertain when a child’s educational performance is poor or below average such that special education is needed.

V. CONCLUSION

A child is eligible under IDEA if the child’s 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, and the child’s performance in that area is poor or below average. With this straightforward definition in mind, the primary question posed in the introduction is answered. A child passing from grade to grade may still be IDEA eligible if either the child’s disability adversely affects non-graded areas of educational performance or the child’s educational performance is poor but passing.

This answer, however, is merely a byproduct of this Article’s primary attempt to ascertain the scope and reach of IDEA by untangling IDEA’s web of eligibility requirements. Unfurling the “adversely affects educational performance” requirement established that IDEA addresses more than just academic problems. Acknowledging the broad range of problems IDEA seeks to address merely recognizes the broad range of skills that parents have empowered educators to teach their children. Whether for good or ill, modern schools are responsible for teaching much more than academics. Accordingly, educational performance under IDEA should include all areas of instruction identified in the state curriculum and all areas of performance tracked by the state’s schools, and not merely graded performance.

With the problems IDEA seeks to address identified, untangling the “needs special education” requirement established how severe the problem should be before IDEA is implicated. IDEA provides states great latitude in this regard. With all school resources and instruction designed not only to prevent failure but also to allow children to exceed minimum educational standards, a disability should not have to result in failure before eligibility attaches. IDEA, therefore, should address students’ disabilities when the child’s educational performance is poor, and before failure occurs.