

**Wisconsin Council of Administrators of Special Services
Spring Conference 2009**

**Eligibility and Functional Performance Problems:
An Alice in Wonderland Approach?**

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“When I use a word,” Humpty Dumpty said in a rather scornful tone, “it means just what I choose it to mean—neither more nor less.” “The question is,” said Alice, “whether you can make words mean so many different things.” “The question is,” said Humpty Dumpty, “which is to be master—that’s all.”
Alice in Wonderland by Lewis Carroll

I. Introduction

Eligibility is the gateway to special education services and extensive parent and child rights to participate in shaping a child’s public education. At the same time, definitional limits to eligibility can ensure that children are not stigmatized by mislabeling them as disabled, that minority children are not disproportionately represented in the special education system, that children have access to the general education curriculum and are educated with their peers in the regular classroom, and that limited special education funds are used for the legislative purpose of ensuring that all children with disabilities benefit from their education. However, one legal commentator has referred to the interpretation of eligibility under the Individuals with Disabilities Education Improvement Act (IDEA) as a “mess.”¹ This “mess” may only become obvious when an individualized education program (IEP) team concludes that a student is not a “student with a disability,” and is, therefore, not eligible for services—and that decision is challenged by the student’s parent.

Not only does the IDEA provide a cryptic definition of the student who qualifies for special education and related services as a “child with a disability,” administrative state agencies and the courts have interpreted the various eligibility factors in divergent ways, with mixed outcomes. Complicating a school district’s effort to comply with its IDEA mandate to provide IDEA services to all children with disabilities is the fact that many judicial decisions fail to explain their definitional interpretations, skip analysis of part of the definitional requirement, and issue decisions about eligibility with incomplete analysis, reasoning, and explanation. Therefore, when a school district’s ineligibility decision is challenged by a parent, the school district enters into unknown territory in terms of how to defend its decision that a student is not eligible for special education when in front of a particular administrative law judge or in a specific court because the current state of the caselaw on eligibility decisions leads to inconsistency and unpredictability. The Seventh Circuit Court of Appeals, the federal appellate court governing issues arising out of Wisconsin, has not yet ruled on an eligibility dispute.

Understanding a school district’s obligations under the IDEA with regard to identifying the students who are “disabled” under the law is further complicated by the fact that an assessment of a student’s current “educational performance” during the process of evaluation, as required under the federal and state regulations, has expanded beyond simple measurement of academic performance with an emphasis on passing grades and annual grade advancement to assessment of functional performance problems.

Functional performance problems include consideration of such student characteristics as

behavioral, social, and emotional functioning, which may be due to underlying mental health problems or environmental influences, and present themselves in the school environment in areas such as getting along with peers and adults, following the school rules, complying with regular school attendance, and completing homework assignments. It also suggests consideration of health problems and the adverse effects of a health condition on such functional performance areas as attention, motor skills, physical fitness, and fatigue. The categories of disability that appear to be more prominently featured in the caselaw related to eligibility disputes are emotional behavioral disability, autism, and other health impairment. These three categories of eligibility also represent categories with a growing number of students in today's public schools. It also includes, however, the category of learning disabilities, especially as school districts implement the response-to-intervention (RTI) prereferral strategies and the lines distinguishing regular education and special education become increasingly blurred, and schools are effective in reducing the number of students needing special education services.

As a broad disclaimer to the outline that follows, the reader is reminded of the intensive, fact-specific analysis that is required at the individual level when applying the definition of eligibility to students' evaluation information. Also, because a student is not eligible as a "child with a disability" under the IDEA based solely on a need for related services, this outline does not include discussion of a determination of a student's related services needs. Finally, this outline does not include judicial interpretations of a student's "educational need" after the eligibility decision has been made, where the appropriateness of an IEP is challenged.²

II. Statutory and Regulatory Authority

A. IDEA Statutory Definition

1. A child qualifies for special education and related services if the child has one of the enumerated categories of impairments and needs special education and related services as a result of that impairment.
2. The term "child with a disability," under federal law, 20 U.S.C. § 1401(3)(A), is defined as a child—
 - a. with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairment, autism, traumatic brain injury, other health impairment, or specific learning disabilities; and
 - b. who, by reason thereof, needs special education and related services.

- B. During a reevaluation process, the team must consider improved educational performance, which is specifically defined as academic achievement and functional performance. 20 U.S.C. § 1414(a)(2)(A)(i).
1. The term “academic achievement” is further defined by incorporating (by reference) the definition of “core academic subjects” from the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. § 7801, now commonly known as the No Child Left Behind Act.
 2. Core academic subjects are: English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography.
- C. The federal regulatory scheme may be considered by the courts in their analysis of a student’s eligibility. *Rowley*, 458 U.S. at 187. The U.S. Congress provided that “[i]n carrying out the provisions of this chapter, the Secretary [of the Department of Education] shall issue regulations under this chapter only to the extent that such regulations are necessary to ensure that there is compliance with the specific requirements of this chapter.” 20 U.S.C. § 1406(a). The federal regulations define eligibility by describing in more detail the categories of impairment. 34 C.F.R. Part 300.
1. Some courts have relied on the federal regulations when interpreting eligibility. *See, e.g., Alvin Independent Sch. Dist. v. A.D.*, 503 F.3d 378 (5th Cir. 2007) (acknowledging that consideration of a child’s educational performance is proper because it is part of the federal regulations); and *Marshall Joint School District No. 2 v. C.D.*, 592 F. Supp. 2d 1059 (W.D. Wis. 2009) (*citing* 34 C.F.R. § 300(8)(c)(9) when interpreting a student’s eligibility under the other health impairment category and proceeding to interpret the regulatory term “adverse effect”).
 2. Additionally, some courts have turned to the State regulations as an additional source of authority for understanding and determining a child’s eligibility under the IDEA. *See, e.g., Mr. and Mrs. I v. Maine Sch. Administrative Dist. No. 55*, 480 F.3d 1 (1st Cir. 2007) (*citing* 34 C.F.R. § 300.8 and explaining that each state is free to calibrate its own educational standards, provided it does not set them below the minimum level prescribed by the statute. The court, in ruling against the school district’s determination that the student was not eligible for services, explained that Maine’s regulations had an “expansive notion of educational performance,” which specifically included the non-academic area of “daily life activities,” an area of functional performance that affected the student at issue in the case); *J.D. v. Pawlet Sch. Dist.*, 24 F.3d 60 (2nd Cir. 2000) (finding a student not eligible for services where Vermont had an expansive definition of “adverse effect” that required a finding that the student’s educational performance be significantly below expected age or grade norms, usually defined as 1.0 standard deviation or

its equivalent, in one or more of the basic skills, defined as oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, mathematics calculation, mathematics reasoning, and motor skills); and *Marshall Joint School District No. 2 v. C.D.*, 592 F. Supp. 2d 1059 (W.D. Wis. 2009) (concluding that Wisconsin’s regulation defining other health impairment does not modify the term “adverse effect,” and declining to add a restrictive qualifier to the term, although the school district’s IEP team had relied on consideration of whether the student’s educational performance fell outside the average range for his same-age peers to conclude that his health condition did not adversely affected performance).

- D. A “child with a disability” under Wisconsin law, Wis. Stat. § 115.76(5), and regulations, Wis. Admin. Code PI § 11.35-11.36, is generally similar to its federal regulatory cousin and “apes” its federal counterpart, but the Wisconsin regulations provide additional detailed descriptions of each impairment to guide eligibility decisions. A child in Wisconsin shall be identified as having a disability if the IEP team has determined from a properly conducted evaluation that the child—
1. has one of the following impairments: cognitive disability, orthopedic impairment, visual impairment, hearing impairment, speech or language impairment, specific learning disability, emotional behavioral disability, autism, traumatic brain injury, other health impairment, and significant developmental delay; that
 2. adversely affects the child’s educational performance; and
 3. the child, as a result thereof, needs special education and related services.
- E. The Wisconsin regulations narrow eligibility for some of the categories when compared to the federal regulations by adding a modifier to the term “adversely affects” (e.g., “significantly adversely affects educational performance” or “significantly affects educational performance”) or a modifier for the degree of impairment (e.g., “significant impairment” or “severe learning problem”) to the following categories: visual impairment; hearing impairment; speech and language impairment, specific learning disability, and emotional behavioral disability (i.e., “exhibits characteristic to a marked degree” versus “demonstrates severe, chronic, and frequent behavior in school and at least one other setting”).
- F. IEP teams rely on the Department of Public Instruction (DPI) eligibility checklists, which can be found at DPI’s Internet website, to determine whether a student has one of the enumerated impairments and, therefore, fulfills the requirements for eligibility under the first prong of the IDEA eligibility definition. Nevertheless, ambiguity may exist when applying the descriptions of the characteristics of the various impairments to the specific facts generated by an evaluation of a particular student.

- G. Determine whether the student’s impairment has an adverse effect on educational performance by considering—
1. What the child knows and can do academically, developmentally, and functionally, 20 U.S.C. § 1414(b)(2)(A), the broad areas of educational need, 20 U.S.C. § 1414(b)(3)(C), in the general education curriculum, 20 U.S.C. § 1414(b)(2)(A);
 2. What needs cannot be met through the regular education program as structured at the time the evaluation is conducted, § PI 11.35(3)(a);
 3. Modifications, if any, that can be made in the regular education program, such as adaptation of content, methodology or delivery of instruction to meet the child’s needs (identified in #2 above) that will allow the child to access the general education curriculum and meet the educational standards that apply to all children, § PI 11.35(3)(b); and
 4. Additions or modifications, if any, that the child needs which are not provided through the general education curriculum, including replacement content, expanded core curriculum, or other supports, § PI 11.35(3)(c).

H. Here are two notable aspects of the federal regulatory guidance related to other health impairments (OHI). First, the commentary to the regulation emphasizes the fact that this is an educational diagnosis, not a medical diagnosis, and requires that an eligible child under the listed category of “other health impairment” must have a health condition that manifests certain characteristics in the context of his educational environment, and to such an extent that the health problems “adversely affect” the child’s educational performance. The commentary clarifies that a medical diagnosis alone of a health problem is not sufficient to render a child eligible for services under the IDEA; there must be a finding that the impairment “adversely affects” the child’s educational performance.

Second, the federal regulations do not further expand on the definition of the term “adversely effect” in the regulatory OHI definition. Instead, in responding to a commenter’s statement that the OHI definition is vague, confusing, and redundant, the Department of Education (DOE) declined to further define the OHI category, expressing confidence in the fact that a “group of qualified professionals and the parent responsible for determining whether a child is a child with a disability are able to use the criteria in the definition and appropriately identify children who need special education and related services.” 71 Fed. Reg. 46,551 (August 14, 2006) (Analysis of Comments and Changes). The DOE’s comment expresses reliance on the comprehensive statutory scheme Congress provided in delineating a school district’s obligations under the Act, with its extensive evaluation procedural requirements, to identify children eligible for IDEA services.

- I. The second eligibility factor, a child “who, by reason thereof, [has a] need for special education and related services,” requires consideration of the three internal terms (1) “need,” (2) “special education,” and (3) “by reason thereof.”
1. A determination of eligibility does not require an analysis of the term “related services” because of the use of the conjunctive “and” in the term “special education and related services.” When a child does not require special education services, they are not eligible as a child with a disability if they need only “related services.” The statutory definition of “related services” lists the numerous types of related services, such as physical or occupational therapy, but ends by stating a service is a related service “as may be required to assist a child with a disability *to benefit from special education . . .*” 20 U.S.C. § 1401(26) (emphasis added); *see also* 34 C.F.R. § 300.8(a)(2)(i) (when a child has one of the impairments identified in the IDEA, but only needs a related service and not special education, the child is not a child with a disability under the IDEA).
 2. “Special education,” as referred to in this definition, has been further defined by statute as “specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and instruction in physical education.” 20 U.S.C. § 1401(29); *see also* Wis. Stat. § 115.76(15); 34 C.F.R. § 300.39.
 - a. Specially designed instruction is also defined in the federal regulations as adapting, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child’s disability. 34 C.F.R. § 300.39(3).
 - b. Specially designed instruction is instruction provided or supervised by a licensed, qualified special education teacher. *See* 20 U.S.C. § 1401(10)(A)-(B) (special education teachers must be “highly qualified” and have obtained full State certification as a special education teacher); § 1412(a)(14) (personnel qualifications).
 - c. Specially designed instruction is not supplementary aids and services that need to be provided to the child or on behalf of the child. 20 U.S.C. § 1414(d); 34 C.F.R. § 320(a)(4). Rather, “supplementary aids and services” is defined as aids, services, and other supports that are provided in regular education classrooms, other education-related settings, and in extracurricular and nonacademic settings. 20 U.S.C. § 1401(33). Consideration of a student’s need for supplementary aids and services in the regular classroom occurs after the student has been determined to be a

“student with a disability”; hence, an IEP team that has determined that a student is a “child with a disability” in need of special education (i.e., specialized instruction) must consider what aids and services are needed in order to enable a student with a disability to be educated with nondisabled children to the maximum extent appropriate in accordance with the IDEA’s least restrictive environment (“LRE”) requirements. 20 U.S.C. § 1401(33); 34 C.F.R. § 300.42.

3. Interpreting a student’s “need” for special education is dependent upon both an understanding and determination of what “special education” is and what the substantive standard of the IDEA is with regard to ensuring children with disabilities have “access to” a free appropriate public education. This has been left to the courts to interpret.
 4. The term “by reason thereof,” introduces “causation” into the eligibility definition.³ The IDEA requires that there be a causal link between a qualifying enumerated impairment and the need for special education services. Difficulties in applying this term to a determination of a student’s eligibility has become more frequent as school districts are faced with collateral student problems such as drug use, an acrimonious divorce, or parental mental health problems, or is complicated by the onset of problems due to a tragic episodic event, such as the death of a family member.
- J. It is well-settled that a school district is not obligated to “maximize the potential of each handicapped child” *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 200 (1982). The U.S. Supreme Court, relying on the definitions contained in the IDEA, has explained that a child’s right to specially designed instruction that meets his unique needs consists of services necessary to permit the child “to benefit” from the instruction. The Court rejected an interpretation of the IDEA that would require States and LEAs to “maximize the potential” of children with disabilities.
1. The *Rowley* Court explained that “the goal of achieving some degree of self-sufficiency in most cases is a good deal more modest than the potential-maximizing goal adopted by the lower courts.” Therefore, a student who fulfills the first prong of the definition of eligibility, that is, has a “listed category of impairment,” needs special education services when “personalized instruction with sufficient support services [is required] to permit the child to benefit educationally from that instruction.” The Court endorsed an interpretation of a child’s “benefiting” from education as measurement using performance on regular examinations, grades, yearly advancement to higher grade levels, although the Court explained (in a footnote) that grade to grade advancement alone may not be dispositive.

2. *Hartmann by Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997) (the IDEA requires that “[s]tates must provide specialized instruction and related services sufficient to confer some educational benefit upon the handicapped child,” but it “does not require the furnishing of every special service necessary to maximize each handicapped child’s potential.”).
3. *Alvin Independent Sch. Dist. v. A.D.*, 503 F.3d 378, 384 (5th Cir. 2007) (declining to rely on the testimony offered by the parents from A.D.’s physicians, where, although A.D. undisputedly had ADHD, the physicians measured his need according to whether or not his potential could be maximized via special education services, and explaining that this was too high a standard for measuring the issue where a free appropriate public education does not require maximizing a student’s potential; concluding that A.D. did not need special education services).

III. Extensive Evaluation Procedural Requirements

- A. The IDEA “imposes extensive procedural requirements upon States receiving federal funds under its provisions.” *Rowley*, 458 U.S. at 182. The IDEA’s extensive evaluation procedural requirements are important because the local educational agency (“LEA”) must evaluate a child in accordance with the evaluation procedures before determining that the child is no longer a child with a disability. 20 U.S.C. 1414(a)(2), (b); Wis. Stat. § 115.782(4).
 1. “It seems to us that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process” *Rowley*, 458 U.S. at 205-06; *see also Schaffer v. Weast*, 546 U.S. 49, 53 (2005) (“Parents and guardians play a significant role in the IEP process).
 2. Parents must be informed about and consent to evaluations of their child under the Act. § 1414(c)(3). Parents are included as members of ‘IEP teams.’ § 1414(d)(1)(B). They have the right to examine any records relating to their child, and to obtain an ‘independent educational evaluation of the[ir] child.’ § 1415(b)(1).”.
- B. The IDEA sets forth extensive procedures by which the school district is to conduct a student evaluation. 20 U.S.C. §§ 1414(b), 1415; 34 C.F.R. §§ 300.304-300.311; Wis. Stat. § 115.782. A school district must conduct an individual evaluation following statutorily prescribed standards. 20 U.S.C. § 1414. Citing the alphanumeric parentheticals as found in the statute, the IDEA citation is as follows:

(b) Evaluation procedures.

- (1) Notice. The local educational agency shall provide notice to the parents of a child with a disability . . .
- (2) Conduct of evaluation. In conducting the evaluation, the local educational agency shall—
 - (A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining—
 - (i) whether the child is a child with a disability; . . .
 - (ii) the content of the child’s individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;
 - (B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and
 - (C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.
- (3) Additional requirements. Each local educational agency shall ensure that—
 - (A) assessments and other evaluation materials used to assess a child under this section—
 - (i) are selected and administered so as not to be discriminatory on a racial or cultural basis;
 - (ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not-feasible to so provide or administer;
 - (iii) are used for purposes for which the assessments or measures are valid and reliable;
 - (iv) are administered by trained and knowledgeable personnel; and
 - (v) are administered in accordance with any instructions provided by the producer of such assessments;
 - (B) the child is assessed in all areas of suspected disability;
 - (C) assessment tools and strategies that provide relevant information that directly assists persons in

determining the educational needs of the child are provided; and

(D) assessments of children with disabilities who transfer from 1 school district to another school district in the same academic year are coordinated with such children's prior and subsequent schools, as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations.

(4) Determination of eligibility and educational need.

Upon completion of the administration of assessments and other evaluation measures—

(A) the determination of whether the child is a child with a disability as defined in section 1401(3) of this title and the educational needs of the child shall be made by a team of qualified professionals and the parent of the child in accordance with paragraph (5); and
(B) a copy of the evaluation report and the documentation of determination of eligibility shall be given to the parent.

(5) Special rule for eligibility determination. In making a determination of eligibility under paragraph (4)(A), a child shall not be determined to be a child with a disability if the determinant factor for such determination is—

(A) lack of appropriate instruction in reading, including in the essential components of reading instruction (as defined in section 6368(3) of this title);
(B) lack of instruction in math; or
(C) limited English proficiency.

(6) Specific learning disabilities.

(A) In general. Notwithstanding section 1406(b) of this title, when determining whether a child has a specific learning disability as defined in section 1401 of this title, a local educational agency shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning.

(B) Additional authority. In determining whether a child has a specific learning 'disability, a local educational agency may use a process that determines if the' child responds to scientific, research-based intervention as a part of the evaluation procedures described in paragraphs (2) and (3).

- (c) Additional requirements for evaluation and reevaluations
- (1) Review of existing evaluation data. As part of an initial evaluation (if appropriate) and as part of any reevaluation under this section, the IEP Team and other qualified professionals, as appropriate, shall—
 - (A) review existing evaluation data on the child, including—
 - (i) evaluations and information provided by the parents of the child;
 - (ii) current classroom based, local, or State assessments, and classroom-based observations; and
 - (iii) observations by teachers and related services providers; and
 - (B) on the basis of that review, and input from the child’s parents, identify what additional data, if any, are needed to determine—
 - (i) whether the Child is a child with a disability as defined in section 1401(3) of this title, and the educational needs of the child, or, in case of a reevaluation of a child, whether the child continues to have such a disability and such educational needs;
 - (ii) the present levels of academic achievement and related developmental needs of the child;
 - (iii) whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and
 - (iv) whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the individualized education program of the child and to participate, as appropriate, in the general education curriculum.
 - (2) Source of data. The local educational agency shall administer such assessments and other evaluation measures as may be needed to produce the data identified by the IEP Team under paragraph (1)(B).
 - (3) Parental consent. Each local educational agency shall obtain informed parental consent, in accordance with subsection (a)(1)(D) of this section, prior to conducting any reevaluation of a child with a disability, except that such informed parental consent need not be obtained if the local educational agency can demonstrate that it had taken reasonable measures to obtain such consent and the child’s parent has failed to respond.

(4) Requirements if additional data are not needed. If the IEP Team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability and to determine the child's educational needs, the local educational agency—

(A) shall notify the child's parents of—

(i) that determination and the reasons for the determination; and

(ii) the right of such parents to request an assessment to determine whether the child continues to be a child with a disability and to determine the child's education needs; and

(B) shall not be required to conduct such an assessment unless requested to by the child's parents.

- C. The assessments and other evaluation materials are to be administered by trained and knowledgeable personnel who are highly qualified to determine whether the child meets the minimum criteria set by state law for eligibility under any IDEA impairment category. 20 U.S.C. § 1401(10).

These extensive procedures, when complied with by the School District, are intended to result in the IEP team's ability to determine whether the characteristics of the student place him within one of the listed categories of impairments and, if so, whether the student needs special education and related services. "[The Act] imposes significant requirements to be followed in the discharge of [its] responsibility." *Rowley*.

IV. Additional Judicial Interpretations of the Eligibility Definition Under the IDEA

A. Adverse Effect on Educational Performance

***Mr. I and Mrs. I v. Maine School Administrative District No. 55*, 480 F.3d 1 (1st Cir. 2007)**

The First Circuit Court of Appeals was presented with the issue of a student's eligibility for services under the IDEA, and focused specifically on a disputed aspect of the first factor of the IDEA eligibility criteria, the definition of whether the child's impairment "adversely affected" her "educational performance." In ruling against the school district, the court concluded that the student was eligible as a "child with a disability." The court noted that "such issues can require a 'difficult and sensitive' analysis."

The student excelled academically and received high honors in her early grades. However, by fourth grade she began experiencing sadness, anxiety, and difficulty with peer relationships. The problems persisted in fifth grade, and by sixth grade she was

taking an anti-depressant, refusing to complete assignments, regularly missing school, and attempted suicide. Her grades dropped from “high honors” to “honors.” Although her communication skills tested at average or above, she was described by a private neuropsychologist, secured by her parents, as having poor pragmatic or social language skills, resulting in problems with her peers. The neuropsychologist diagnosed the student as having Asperger’s syndrome and an adjustment disorder with depressed mood, with significant limitations in many areas of adaptive skills and executive skills, contributing to behavioral and emotional difficulties. The school district convened an evaluation team, but the district team members concluded that the student was not eligible under the IDEA categories of autism, emotional disability, and other health impairment because her educational performance was not adversely affected by her conditions. The district did, however, determine she was eligible under Section 504 and offered her speech and language services to address her communication skills and provided tutoring as necessary to help her return to school.

The parents requested a due process hearing and the hearing officer ruled for the school district. On appeal by the parents, the federal district court reversed the administrative agency decision, and found the student eligible under the IDEA. The school district appealed the decision to the First Circuit Court of Appeals. The school district argued, in relevant part, that the district court, ruling in favor of the parents, “improperly extend[ed] the breadth of § 1401(3)(A)(ii)” by misreading the federal regulatory terms “adversely affects” and “educational performance.”

The appellate court focused its analysis and discussion of the first factor of the eligibility determination, set forth in the IDEA at 20 U.S.C. § 1401(3)(A)(i), by relying on the federal regulatory addition to the statutory definition of an “impairment,” that is, that an enumerated condition must “adversely affect a child’s educational performance,” and by analyzing Maine’s related regulatory definition. First, the court broadly interpreted the term “adverse effect,” giving the term “adverse” its “ordinary” dictionary meaning, that is, “acting against or in a contrary direction.” It adopted the district court’s conclusion that “*any* negative impact” should be sufficient to constitute a disability under the IDEA, regardless of degree, and qualifies as an “adverse effect,” concluding that the term “has no qualifier such as ‘substantial,’ ‘significant,’ or ‘marked.’” The court also reasoned that “the regulation sensibly demands that a disability cannot qualify a child for IDEA benefits unless it has a negative effect on educational performance; no effect or a positive one, will not do.”

Importantly, the court’s conclusion was based in part on its interpretation of Maine’s regulatory definition of “educational performance,” which had an “expansive notion of educational performance,” specifically including the “non-academic area of daily life activities.” The court concluded that the student had difficulty in the non-academic areas of socialization and communication. Therefore, the court of appeals upheld the district court’s conclusion that the student was eligible for services under the IDEA.

Finally, although the court acknowledged that the child must “need special education” as a result of her impairment in order to qualify for special education services, it did not analyze what that term means in this case. The school district unsuccessfully challenged a determination by the district court that it had waived the opportunity to dispute the student’s “need for special education,” where the district court treated “need” as an uncontested issue, and the Court of Appeals declined to “compose a standard of ‘need,’” foreclosing the school district from defending its decision based on the second prong of the IDEA eligibility definition. (The issue of the school district’s compliance with the extensive procedural requirements on the court’s interpretation of the student’s eligibility was apparently not raised by the school district in its defense of its eligibility decision).

***J.D. ex rel. J.D. v. Pawlet School Dist.*, 224 F.3d 60 (2nd Cir. 2000)**

The Second Circuit Court of Appeals concluded that the IDEA leaves it to each state to define both “adverse affect” and “educational performance.” The court denied eligibility to a child having “difficulty with interpersonal relationships and negative feelings,” but achieving As and Bs and performing well above grade level, because Vermont’s regulations, which expressly defined educational performance, did not include these terms. Its regulations included a definition of educational performance as performance significantly below expected age or grade norms in one or more of the basic skills: oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, mathematics calculation, mathematics reasoning, and motor skills. (This approach does not solve the interpretive problem where the state has not expressly defined “educational performance.”)

B. Needs Special Education

***Yankton School Dist. v. Schramm*, 93 F.3d 1369 (8th Cir. 1996)**

An eighteen year old student with cerebral palsy had received special education services since preschool. She writes and types slowly and uses a walker for short distances and a wheelchair for longer ones. She earned “A” grades by studying four to five hours a night, participated in the school band, newspaper, and a public speaking program, and planned to attend college and study engineering. Her last IEP, however, included only adaptive physical education services, physical therapy, and transportation. She did receive assistance moving between classes, getting on and off the school bus, going up and down stairs in the school building, and carrying a lunch tray. She also received shortened writing assignments, copies of teachers’ notes, special instruction on how to type with one hand, and text books for her home so that she need not carry books from one location to another.

When the student was in ninth grade, the district determined that she was no longer eligible for IDEA services because the only special education services she received was adaptive physical education and physical education was not provided beyond ninth grade. The parents challenged the district’s decision at a due process hearing because they

wanted their child to receive transition services, including training in daily living skills, community experiences, etc. The hearing examiner found that the type of services the student received that were not written into her IEP was specially designed instruction and necessary as a result of her orthopedic impairment, and that transition services also constituted a type of special education. When the school district appealed the decision, the federal district court upheld the hearing examiner's decision. The school district, then, appealed to the Eighth Circuit Court of Appeals.

First, the court noted the type of services the school district had been providing the student (in addition to the adaptive physical education) and identified the issue in the case as "whether those services constitute 'special education and related services' under the IDEA." It concluded that these services were "specialized instruction." Applying a "but for" test to the question of eligibility, the court found that "[n]one of this individualized instruction would have been necessary but for [the student's] orthopedic impairment." The court explained that the federal regulation does not elaborate on what is meant by an adverse effect on performance, but it reasoned that "[t]he record here established that 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 court rejected the school district's argument that the nature of the services it provided the student was properly provided under Section 504 of the Rehabilitation Act, not under IDEA. Applying a very broad definition to the meaning of "special education," the court reasoned that *any* modification to general education constitutes "special education" for purposes of IDEA.

A dissent was written and the judge characterized the student as a bright, academically gifted student who requires no special education programs to excel in her course work. The judge identified the issue in the case as "whether a student who is capable of achieving academic success without special education programs is nevertheless entitled to transition services under the IDEA." The judge reasoned that Tracy's "educational performance clearly has not been adversely affected by her impairment, and she does not require special education programs." The judge chided the majority for its assumption that that if the school district denied Tracy every reasonable accommodation to her disability, her academic performance would be adversely affected by her impairment. "I note that all of the accommodations provided to Ms. Schramm are mandated by § 504. Because Ms. Schramm will continue to receive these reasonable accommodations regardless of her status under the IDEA, I perceive no reason to disregard their existence and to speculate on what impact Ms. Schramm's impairment could have on her academic performance without them." The judge argued that states are not required to provide each handicapped child with the best possible education at public expense. The dissenting judge also cited the *Rowley* Court for the proposition that "courts must be careful to avoid imposing their view of preferable educational methods upon the States[,]" and "the majority now second-guesses the Yankton School District's assessment of Ms. Schramm's educational needs."

***Alvin Independent School District v. A.D.*, 503 F.3d 378 (5th Cir. 2007)**

The Fifth Circuit Court of Appeals has recently addressed a child's eligibility for services, focusing on the IDEA's second factor of the eligibility determination (the first factor of the eligibility definition was not in dispute). In *A.D.*, the court was asked to consider the eligibility of a student under the IDEA who was diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"). The student had qualified for special education services through third grade, but was terminated from services by mutual agreement of the school personnel and his mother at that time. When he started to have difficulty in eighth grade, the mother sought re-eligibility for special education services.

The school personnel concluded that the student was not eligible for special education services because his cognitive abilities and academic performance were in the average range, he met the standards for the Texas Assessment of Knowledge and Skills, and he was making age-appropriate academic and social progress. The student's mother sought review through the due process hearing procedure, and the Hearing Officer agreed with the mother, concluding that A.D. was a "child with a disability" entitled to special education services because of behavior problems. On appeal, the district court held in favor of the school district.

The mother appealed, and the appellate court affirmed the decision of the district court. It did not address the first factor of the eligibility determination, stating that there was no dispute that A.D. satisfied the first factor of the definition of the eligibility category of an "other health impairment." Addressing the "central dispute" in the case, the appellate court focused on the second factor of the eligibility determination. It concluded that the district court properly considered evidence of A.D.'s academic, behavioral, and social progress in determining that A.D. does not need special education services by reason of his ADHD (although rejecting the district court's description of the need for special education as requiring that the child need special education in order to "benefit from regular education"). Acknowledging the importance of compliance with the procedural requirements of the IDEA when conducting an evaluation, the court noted that the district court did not just focus on passing grades and achievement scores, but "also considered a variety of sources, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior" in reaching its decision.

It is notable that the court rejected A.D.'s reliance on primarily reports and testimony of the student's doctors, his past behavioral issues, and his failing grades on exams and progress reports. The court noted that school personnel had observed the educational progress of the student first-hand, and the court found it more reliable than much of the testimony from A.D.'s physicians—and, the court explained, the teachers testified that A.D. did not need special education and was achieving success in school. The court found that A.D.'s physicians had based their opinions on faulty information culled from isolated visits, select documents provided by A.D.'s mother, and a statement from A.D.'s mother about what she believed was happening in school. The district court had noted that the experts testifying for the family had said that the student needed special education to maximize his school performance, but rejected that as too high a standard for measuring the issue.

The appellate court both recognized that the student demonstrated clear academic success and that he did not need special education despite his behavioral issues since he was achieving behavioral and social progress in school. The court agreed with the school district that the student's behavioral problems were not "by reason" of his ADHD, but, rather derived from non-ADHD occurrences, such as alcohol abuse and the tragic death of his brother.

Ashli and Gordon C. v. Hawaii, No. 05-00429 UP (D. Hawaii 2007)

The parents of Sidney C. filed a claim in federal district court against the Department of Education (DOE), State of Hawaii, when an administrative law judge determined that Sidney was ineligible for special education and related services under the IDEA. Sidney was a third grader with ADHD. Her mother took her off ADHD medication because of concerns about its long term effects. The eligibility team considered whether Sidney qualified for special education and related services under the categories of specific learning disability (SLD) or speech/language impairment. They conducted a questionnaire with personal background information, a classroom observation, and three evaluations/assessments.

Based on her assessment scores, Sidney did not qualify as having SLD. The team also concluded that she did not exhibit a significant problem in comprehension and/or production of an oral communication system. Subsequently, the team reconsidered Sidney's eligibility under the categories of mental retardation (MR), other health impairment (OHI), and SLD by considering test results obtained by her mother. Again, the team found that Sidney's assessment results failed to qualify her for special education services under MR or SLD. With regard to OHI, the team found that Sidney was able to keep up with his peers and his ability level, was performing at or close to grade level in his educational performance with differentiated instruction, and he was not going to fail his class. The team concluded that Sidney's diagnosis of ADHD did not adversely affect his educational performance. Sidney's parents challenged the team's decision.

The hearing officer upheld the school district's conclusion that Sidney was not eligible for special education services. It concluded that Sidney "was in the average range in his cognitive and achievement scores" and that he "was approaching or meeting proficiency in all relevant content areas identified by Hawaii Content and Performance Standards requirements." The issue on review at the federal district court was whether the hearing officer properly determined that Sidney's ADHD did not adversely affect his educational performance.

The court recognized that Sidney received differentiated instruction, including individual attention in the classroom, such as 1-on-1 work with her classroom teacher and the development of an intervention plan. The parents argued that the DOE should have considered the effects of Sidney's ADHD on her educational performance without taking into account the changes Sidney's classroom teacher made in the regular classroom. They also argued that even with the differentiated instruction, Sidney's educational performance is adversely affected because she suffers some negative impact from her

ADHD, such that if there is any evidence, even if minimal, that the health impairment impacts her educational performance, she is eligible for services.

The court adopted the interpretation of “adversely affect educational performance” urged by the DOE, that is, consideration of the student’s ability to perform in a regular classroom designed for non-handicapped students. “If a student is able to learn and perform in the regular classroom taking into account his particular learning style without specially designed instruction, the fact that his health impairment may have a minimal adverse effect does not render him eligible for special education services.” The court also relied on a dictionary definition of “adverse,” as “causing harm” or “harmful.” “Where a student such as Sidney is able to learn and function at an average level in the regular classroom and experiences only a slight impact on [her] educational performance, it cannot be said that the student is harmed.” “A school may ensure that a student benefits from the educational program by modifying the regular classroom setting such as by providing differentiated instruction. As Sidney’s classroom teacher testified, she would have made similar changes to assist any other student in the class.” The hearing officer identified Sidney as receiving additional time highlighting and taking tests, being moved closer to the teacher during tests, and having the teacher read the test directions to him, but that these were available to all children and “is not an accommodation or different method” of teaching, as special education would be. “Differentiated instruction is a strategy used by the Third Grade Teacher to help students focus, perform and clue in better on the important parts of the lesson. Differentiated instruction is used because each student learns in a different way.”

The court specifically rejected the approach of the Eighth Circuit Court of Appeals, *Yankton School District v. Schramm*, and the Second Circuit Court of Appeals, *Weixel v. Board of Education*, 287 F.3d 138 (2nd Cir. 2002), which found the adverse effect on educational performance requirement was satisfied “if the child’s educational performance would have been adversely affected *but for* specialized instruction that the child was receiving[,]” (but for home services due to chronic fatigue syndrome, the student would not have received an education). The *Ashli* court explained that there was no evidence in the present case that Sidney received specialized instruction to access the general curriculum.

V. Practical Implications

A. Conduct Comprehensive Evaluations

1. Give careful consideration to sole reliance on existing data for reevaluations. Remember that reevaluations serve two purposes:
 - a. Determining continued eligibility; and
 - b. Determining educational need.

2. Although continued eligibility may not be at issue, additional assessments at the point of reevaluation may be necessary to fully understand the student's current educational needs, including both academic and functional performance needs.

For example, a review of existing data may show that the student's poor academic performance is due to the failure to comply with completing homework assignments. Developing an intervention to improve homework completion may require a current assessment of the issues underlying this functional performance problem, leading to an effective intervention strategy to improve the student's success in this area.

3. If ineligibility may be an outcome of the process, the second prong of the eligibility definition requires consideration of whether the student needs special education *because of* an (enumerated) impairment. Current assessments may be needed to understand underlying problems that can be distinguished between the existence of an enumerated impairment, such as emotional behavioral disturbance, and problems such as social maladjustment, drug use, environmental influences, etc.
4. Comply with all the procedural requirements for eligibility decisions. It is important to be able to defend a team's determination of ineligibility by providing evidence of compliance with the procedural requirements, including a comprehensive evaluation with multiple sources of information, relying not only formal assessments, but also interviews and observations, when it is likely to result in a dispute. Assign the most qualified and experienced personnel to the evaluation team based on the student characteristics and suspected disability categories that are under consideration.
5. Remember that when a student has a health condition, including a mental health condition, consider his or her eligibility under the category of "other health impairment."

B. Consider Need for Consultative Services and Third Party Assessments at Time of IEP Team Eligibility Determinations

This suggestion is offered with some hesitation (or trepidation). On the one hand, the IDEA clearly identifies the minimum type of personnel who must be involved in the evaluation process, and they are educational personnel with DPI certifications, representing educational training and experience. On the other hand, in disputed eligibility cases, parents are more likely to rely on experts with doctoral level training in medicine and psychology. Some courts have made it clear that educational personnel are considered "experts" when it comes to the court's discretion to rely on their testimony at hearings, and that the testimony of non-educational, medical experts does not automatically receive more weight when

considered in light of educational testimony. Nevertheless, on very difficult ineligibility cases, a school district may need a level of expertise not currently available on staff and it is advisable to obtain third party assistance with the eligibility determination at the time it is being made to buttress the overall findings

[This is not an Independent Educational Evaluation (IEE). This is a decision by the school district to add a third party evaluator to the student's evaluation team to obtain information needed to make an evaluation or reevaluation decision. An IEE is an evaluation requested by the parents in response to their dissatisfaction with the evaluations conducted and completed by the school district.]

Third party consultation and assessments obtained by the school district may be needed (on a case-by-case basis) in areas such as: serious behavioral problems, social skills deficits and peer relationship problems, social/communication deficits such as those demonstrated by children with autism, mental health issues, medically-based impairments, students with underlying substance abuse problems, and students negatively affected by non-school, family-based problems.

C. Discuss Both Prongs of the Eligibility Definition at Every Evaluation Determination Meeting

The text of the IDEA 2-prong eligibility definition was written by Congress with the use of the conjunctive term, i.e., “and,” which is to be interpreted to mean that a student must both (a) have an enumerated impairment, *and* (b) need special education and related services by reason thereof. The DPI has provided a “checklist” for IEP teams to follow when determining a student's eligibility and, for example, under the other health impairment category the checklist provides that the team terminate its discussion of eligibility if the team concludes that the student fails to have an enumerated impairment; that is, that the team need not consider whether the student needs special education and related services.

This would seem appropriate on its face when a student *must* have an enumerated impairment in order to be considered for services. However, if it is a contested eligibility or re-eligibility case, a school district could lose on its conclusion that that student does not have an enumerated impairment, but prevail on its determination that the student does not need special education services because an adjudicator can proceed (given that he or she concludes that the student has an impairment) to an analysis of whether the student “needs special education and related services” because of the impairment. If the IEP team has had some discussion and consideration of the student's eligibility under the second prong of the eligibility definition and documents its findings, the school district may successfully defend its ineligibility decision based on its finding that the student does not need special education services (even if it loses on an analysis of the first prong of eligibility). The State regulation requires that the evaluation team consider what student needs cannot be met through the regular education program as structured at the time the evaluation.

D. Consider Educational Performance on Local and State Standards

Neither State law nor State regulations define “educational performance.” The State regulations provide a more or less detailed definition of the characteristics of eligibility that an evaluation team must consider depending on the category of disability. In addition to reviewing the student’s formal, norm-referenced assessment scores, classroom observations, teacher interview data, course grades and annual grade advancement when considering whether a student’s impairment adversely affects his or her educational performance, consider the student’s performance in the general curriculum and age-appropriate local/state standards.

¹ Mark Weber, THE IDEA ELIGIBILITY MESS, 57 Buffalo L. Rev. 83 (2009).

² It is worth noting, however, that parental disputes over the appropriateness of an IEP offered by a school district include disputes about the school district’s obligation to provide services beyond the school day because of a student’s alleged functional performance problems in the non-school environment, such as the home and community. *See, e.g., A.S. v. Madison Metropolitan Sch. Dist.*, 477 F. Supp. 969 (W.D. Wis. 2007).

³ Katherine May, BY REASON THEREOF, CAUSATION AND ELIGIBILITY UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, 2009 BYU Educ. & L.J. 173.