

Full Text

Letter of Guidance from OSEP Director Alexa Posny

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Dear Ms. Clarke:

This is in response to your letter of November 25, 2006 in which you request guidance and/or clarification of the final Part B regulations, implementing the Individuals with Disabilities Education Act (IDEA), as amended by the IDEA Improvement Act of 2004. I apologize for the delay in responding.

First, you request clarification that the policy on when a speech or language impairment "adversely affects educational performance" as described in a May 30, 1980 letter from the Department of Health, Education and Welfare to Diiblinke remains the policy of the U.S. Department of Education, Office of Special Education Programs (OSEP). Under 34 CFR § 300.8(c)(11), "speech or language impairment means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance." It remains the Department's position that the term "educational performance" as used in the IDEA and its implementing regulations is not limited to academic performance. Whether a speech and language impairment adversely affects a child's educational performance must be determined on a case-by-case basis, depending on the unique needs of a particular child and not based only on discrepancies in age or grade performance in academic subject areas. Section 614(b)(2)(A) of IDEA and the final regulations at 34 CFR § 300.304(b) state that in conducting an evaluation, the public agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information. Therefore, IDEA and the regulations clearly establish that the determination about whether a child is a child with a disability is not limited to information about the child's academic performance. Furthermore, 34 CFR § 300.101(c) states that each State must ensure that a free appropriate public education (FAPE) is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.

It is important to note that under 34 CFR § 300.8, a child must meet a two-prong test to be considered a child with a disability: (1) have one of the specified impairments (disabilities); and (2) because of the impairment, need special education and related services. If a child has one of the impairments, but needs only related services and does not need special education the child is not a child with a disability (see 34 CFR § 300.8(a)(2)(i)). However, 34 CFR § 300.8(a)(2)(ii) provides that if, consistent with 34 CFR § 300.39(a)(2), the related services required by the child, are considered special education rather than a related service under State standards, the child would be considered to be a child with a disability.

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Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

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More information:

excerpts from "Special Education Rights and Responsibilities" (SERR):

SERR Chapter 1 Question 2(A):

How does the school district determine whether my child has a learning disability?

If a student has a severe discrepancy between his ability (as measured by intelligence testing) and his achievement (as measured by standardized tests of academic achievement), it can be assumed that something is getting in the way of the learning that would otherwise be expected for that student and that he has a learning disability. School districts no longer have to use this model, which is referred to as the "discrepancy model" in determining whether a child has a learning disability.

School districts may use, if they choose, "a process that determines if the child responds to scientific, research-based intervention as part of the evaluation procedures" instead of the discrepancy model. [20 U.S.C. Sec. 1414(b)(6).] This is the so-called RTI (response to interventions) model. The rules regarding what this process may involve, its effect on time lines, and how it will be implemented are being developed and will likely continue to evolve for a period of time. The authors of this manual will continue to monitor these developments and update readers when these processes are established.

SERR Chapter 1 Question 2(B):

Some categories of disability that qualify a student for special education require that the condition adversely affect educational performance.

What does that mean?

Many schools evaluate whether a child's condition has an adverse affect on his educational performance strictly on the basis of grades or the child's scores on standardized tests. Although grades and, perhaps, standardized test scores may be one measure of educational performance, the law and the courts take a broader view. Especially when determining whether a child's educational performance was adversely affected by the child's emotional condition, the federal appellate court governing California requires that consideration also be given to a student's need for behavioral and emotional growth. [County of San Diego v. California Special Education Hearing Office, et al., 93 F.3d 1458, 1467 (9th Cir. 1996).] Although some students test well when taking standardized tests, the law does not require poor standardized test scores in order to find an adverse affect on educational performance. The courts have established that a child's educational needs include academic, social, health, emotional, communicative, physical, and vocational needs. [Seattle School Dist. No. 1 v. B.S., 82 F.3d 1493, 1500 (9th Cir. 1996).]

Federal special education law also distinguishes between “educational” performance and “academic” performance and establishes that “educational” performance is a broad concept.

For example, children must be assessed by schools in all areas of suspected disability. [20 U.S.C. Sec. 1414(b)(3)(B).] Those areas are defined by federal regulations to include: health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. [34C.F.R. Sec. 300.304(c)4.] Academic performance is only one of the areas in which children must be assessed.

Congress and the California Legislature could have used the narrower term “academic performance” when writing the definitions of conditions which would qualify a child under eligibility categories such as Emotionally Disturbed, Other Health Impaired, Orthopedic Impairment, Mental Retardation, Speech or Language Impairment, Visually Impaired, Hearing Impaired, Deaf. However, they did not. Congress and the California Legislature used the broader term “educational performance” in these eligibility definitions. In addition to grades and standardized tests scores, schools must consider how a child’s emotional, health or other conditions adversely affect his non-academic performance in social, behavioral and other domains as well.