

Adverse Effect: The Origins

- Federal Law 34 C.F.R. 300 (IDEA) requires a student meet two gates in order to be found eligible for special education.
 - 1: A student must have a qualifying disability,
 - 2: There must be demonstrated need for specially designed instruction.

Adverse Effect: The Origins

- Vermont's third gate of Adverse Effect is based on the IDEA disability eligibility criteria (Gate 1). These criteria consistently state that the disability must, "adversely affect[] a child's educational performance"

<https://sites.ed.gov/idea/regs/b/a/300.8>

Adverse Effect: Vermont's Rule

- Established in the 1990s
- Intended to ensure consistent application of eligibility standards
- Response to *OCR v. VT Department of Education, 257 IDELR 547 (1984)* which held that Vermont's rules violated section 504 due to:
 - lack of rules around test selection, testing procedures, and
 - “misclassifying slow learners as handicapped” because of lenient eligibility requirements.

Adverse Effect: Vermont Special Education Rule 2362(d)

(d) Adverse Effect.

(1) To conclude that a disability has an adverse effect on the student's educational performance, the EPT shall determine and document that, as a result of his or her disability, the student is functioning significantly below grade norms compared to grade peers in one or more of the basic skills defined in Rule 2362(g).

(2) "Significantly below grade norms" means the 15[th] percentile or below, or a 1.0 standard deviation or more below the mean, or the equivalent, as reflected by performance on at least three of the six following measures of school performance, generally over a period of time...(continued)...

Adverse Effect: Adverse Effect Committee

- In 2015 the Committee responded to concerns of inconsistent application of the rule statewide
- Created a training and training plan statewide to increase consistency
- Focused on functional performance as well as academic performance

Adverse Effect: Controversy

- Advocates for removal argue the rule;
 - Is confusing, difficult for teachers to apply and understand, and inconsistently administered across the state
 - Creates a system that requires failure
 - Denies potentially eligible students access to IEP services
 - Violates IDEA because a state agency, “cannot implement "adverse effect" in a manner that excludes otherwise eligible children.”

([OSEP Letter to Anonymous](#), January 7, 2002)

Adverse Effect: Controversy

- Legal Opinions:
 - There is no strong established federal standard for adverse effect. States are generally left to define their own terms.
 - National court cases have been inconclusive with adverse effect definitions ranging from narrow and restricted¹. to broad and inclusive².

[Doe ex rel. Doe v. Board of Education, Gregory M. ex rel. Ernest M. v. State Board of Education, Ashli C. ex rel. Sidney C. v. Hawaii](#)

[Mr. I ex rel. L.I. v. Maine School Administrative District No. 55, A.J. ex rel. C.L.J. v. Board of Education](#)

Adverse Effect: Controversy

- Legal Opinions In Vermont:
 - [J.D. ex rel. J.D. v. Pawlet School District](#) generally upheld Vermont's definition in a case where a gifted student with a disability was found ineligible due to strong academic performance in basic skill areas.

Adverse Effect: Controversy

- Historical Agency of Education (AOE) Position
 - Provide all students the support they need when they need it, whether that is through a Multi-Tiered System of Supports (MTSS) or an IEP.
 - Vermont's eligible student numbers are not out of line with the national averages, and in some cases even exceed those averages
 - The AOE does not have data on the direct impact of the Adverse Effect gate
 - Denial of eligibility due to Adverse Effect is not a consistent topic of Administrative Complaints or Due Process proceedings submitted to the Agency.

Adverse Effect and MTSS

- Increased services and interventions available through MTSS and Act 173 could lead to fewer students being found eligible for special education as more students will have their needs met outside of IEP services and will therefore not meet the failure threshold required under Adverse Effect.
- Failure to qualify for an IEP should not mean a failure to receive the interventions required for student success. They should happen in another context (
- The eligibility and evaluation process are protected by law MTSS cannot be used to delay an evaluation.

Adverse Effect and MTSS: Concerns

- Only students on an IEP receive entitlements and have their services protected, which leaves more room for variation in service provision and delivery if a student is not on an IEP.
- The quality of MTSS varies widely across the state, which will impact the services that students have access to.