

**17 IDELR 54**

**17 LRP 867**

**Letter to Lybarger**

**Office of Special Education Programs**

**September 14, 1990**

**Related Index Numbers**

**135.015 Definitions/IDEA, Other Terms Generally**

**185.015 Evaluations, Evaluation Generally**

**168. EDUCATION FOR ALL HANDICAPPED CHILDREN ACT (EHA)**

**Judge / Administrative Officer**

**Judy A. Schrag, Ed.D., Director**

**Case Summary**

What is an operational definition of "educational performance"?

As discussed in Appendix C of the IDEA's implementing regulations, in response to Question 36, "educational performance" of a child with disabilities is an assessment of performance in both academic and nonacademic areas. Educational performance should be determined on a case-by-case basis and must extend beyond academic standards determined by standardized measures.

**Full Text**

**Appearances:**

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**Text of Inquiry**

Eight of the eleven handicapping conditions defined in the 34 CFR 300.5 incorporate the phrase "adversely affects educational performance," or a variant of the phrase. Two of the remaining

conditions reference "educational problems;" the third (specific learning disability) implies educational difficulty by excluding, ". . . children who have learning problems which are primarily the result of . . . (other conditions)." The regulations go on to define terms such as "Include," "Native Language," "Parent," "Related Services," but fails to define the term "Educational Performance." Few argue that the term "educational performance" is central in establishing eligibility criteria. In fact, it 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. One might readily assume "educational performance" means academic achievement as determined by standardized measures or other systematic procedures which measure "classroom progress."

However, this interpretation, while parsimonious, apparently fails to include other parameters which might be legitimately considered. To further confound understanding, educational performance is interpreted in legal literature, including OSEP policy, as being "whatever is on the report card," "survival skills," "interpersonal or social development," ". . . a child's mastery of the basic skill of effective oral communication . . .," and "academic achievement as determined by standardized measures." From a purely subjective perspective, one has the impression that educational performance is defined as being whatever one chooses it to be at the time it is being considered!

This plethora of meanings can and does lead to: (1) inconsistency in implementing policy; (2) significant confusion; and (3) interpretation that appears to press legislative intent to the extreme. In the 1980 OSEP policy clarification letter drafted by Ed Martin, it was asserted that, ". . . The meaning of 'educational performance' cannot be limited to showing of discrepancies in age/grade performance in academic subject matter areas." This statement was made within the context of services to infants and preschoolers for whom academic achievement is clearly an inappropriate standard. Basing her

concluding argument partially on the OSEP policy letter, a hearing officer found these same standards to be equally applicable to *school aged* SED/BD students (*In the Matter of Long Beach Unified School District* (1984-85, EHLR Dec. 506:274, :280 (SEA CA, 1984).

There are marked weaknesses inherent in the above illustrations. First, to define an entity by stating what it is not, is reasonable only when a substantial portion of all possibilities have been similarly ruled out. Secondly, to extrapolate from a policy statement argued on the basis of one set of conditions (preschoolers) to support an opinion based on a not-so-similar set of other conditions (school aged SED/BD students) is questionable at best---intellectually dishonest at its worst. One cannot help but wonder if legislation or regulations, which permit such latitude in interpretation, are not flawed.

To enhance States' effectiveness in identifying handicapped students under EAHCA using a relatively consistent standard and reduce waste of resources in litigating eligibility issues, would you please provide us with an *operational* definition of "educational performance," or direct us to a source which provides consistent guidance in deriving such a definition.

Thank you for your consideration and effort.

### **Text of Response**

This is in response to your letter requesting an operational definition of the term "educational performance" as it is used in the regulations for Part B of the Education of the Handicapped Act (EHA-B). You are specifically concerned about the meaning of that term as it is used in 34 CFR § 300.5(b).

One criterion for establishing eligibility for services under EHA-B is the determination that a child has a disabling condition. Each child suspected of having a disabling condition must be evaluated in accordance with the criteria described at 34 CFR §§ 300.530-300.534. These evaluation procedures require that before the initial placement of a child with a handicapping condition may occur, "a full and

individual evaluation of the child's educational needs must be conducted in accordance with 34 CFR § 300.532."See 34 CFR § 300.531 (emphasis added). Thus, each child's educational needs are determined on a case-by-case basis using the evaluation procedures at 34 CFR § 300.532.

The educational performance of a child with a disabling condition is discussed in Appendix C to EHA-B in question and response 36. Item 36 provides the following information:

36. What should be included in the statement of the child's present levels of educational performance?

The statement of present levels of educational performance will be different for each handicapped child. Thus, determinations about the content of the statement for an individual child are matters that are left to the discretion of participants in the [individualized education program] IEP meetings. However, the following are some points which should be taken into account in writing this part of the IEP.

a. The statement should accurately describe the effect of the child's handicap on the child's performance in any area of education that is affected, including (1) academic areas (reading, math, communication, etc.) and (2) non-academic areas (daily life activities, mobility, etc.).

Thus, a child's educational performance must be determined on an individual basis and should include non-academic as well as academic areas.

Since the educational needs of a child with a disabling condition include non-academic as well as academic areas, the term "educational performance" as used in the EHA-B means more than academic standards as determined by standardized measures.

The measurement of "educational performance" for children with IEPs will be different for each child and must be limited to each child's unique educational needs. Therefore, this Office, as of this time, has not developed a single definition of the term "educational performance."

I hope that this information is helpful. Please let us know if you have any additional concerns.

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