

# **SPECIAL EDUCATION RIGHTS AND RESPONSIBILITIES**

## **Chapter 3**

### **Information on Eligibility Criteria**

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# **SPECIAL EDUCATION RIGHTS AND RESPONSIBILITIES**

## **Chapter 3**

### **Information on Eligibility Criteria**

#### **1. Who is eligible for special education under federal and state law?**

You will find the California special education eligibility criteria in regulations adopted by the State Board of Education. See Title 5 California Code of Regulations (C.C.R.) Sec. 3030. These regulations went into effect March 2, 1983. This is the first time California has had a uniform statewide policy for determining eligibility for special education. The criteria generally parallel the federal guidelines in defining “children with disabilities.” [34 Code of Federal Regulations (C.F.R.) Sec. 300.8.] **Eligibility criteria under state law cannot be narrower than eligibility criteria under federal guidelines.**

Together, the federal and state regulations establish eligibility criteria for all students seeking special education services. In order to qualify as an individual with exceptional needs under the eligibility criteria, the assessment must demonstrate that the student’s impairment adversely affects her educational performance and requires special education. The qualifying areas of impairment set out in state eligibility regulations are:

- (1) Hearing impaired;
- (2) Both hearing and visually impaired;
- (3) Speech or language impaired;

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- (4) Visually impaired;
- (5) Severely orthopedically impaired;
- (6) Impaired in strength, vitality, or alertness due to chronic or acute health problems (other health impaired);
- (7) Exhibiting autistic-like behaviors;
- (8) Mentally retarded;
- (9) Seriously emotionally disturbed;
- (10) Learning disabled;
- (11) Multiple disabilities; and
- (12) Traumatic brain injury.

[34 C.F.R. Sec. 300.8; 5 C.C.R. Sec. 3030.]

The IEP team (made up of qualified professionals and the parents) makes the actual determination of eligibility for special education and related services, based upon the assessment reports. A copy of the report must be given to the parent. [20 U.S.C. Sec. 1414(b)(4) & (5); 34 C.F.R. Secs. 300.306(a)(1) & 300.322(f).] The District must ensure that the parents are equal participants of the IEP team who are allowed to fully participate in making decisions about placement. [Cal. Ed. Code Sec. 56342.5.]

In terms of **minimum age**, a child may be eligible for special education services, in the form of early intervention services, from birth. See Chapter 13, *Information on Early Intervention Services*. After age three and until school age, a child may be eligible for preschool special education. See Chapter 12, *Information on Preschool Education Services*.

In terms of **maximum age** (and assuming the student has not yet graduated from high school with a regular diploma), a student may continue to be eligible for special education past her 18th year [Cal. Ed. Code Sec. 56026(c)(4)]. A student between the ages of 19 and 21 may continue in special education when the following conditions exist:

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- (1) She must have been in special education at the time she turned 19;
- (2) She has not met her “proficiency standards”
- (3) She has not completed her “prescribed course of study” or
- (4) She has not graduated from high school with a regular high school diploma.

[34 C.F.R. Sec. 300.102; Cal. Ed. Code Sec. 56026(c)(4) & 56026.1.]

The “prescribed course of study” is set of standards adopted by the local board of education for granting a diploma or certificate. [Cal. Ed. Code Sec. 56026.1.] The course of study could include the school district’s required subjects and credits in English, math, reading, etc. “Proficiency standards” are a measure of student competence in basic skills, such as reading, writing, and mathematics. Proficiency standards are demonstrated by passing the California High School Exit Exam (CAHSEE) as a condition of receiving a diploma of graduation from a high school. [Cal. Ed. Code Sec. 60851(a).] A student with an IEP may obtain a waiver of “successful passage” of the CAHSEE if she can show evidence of completing sufficient high school level coursework to complete a high school curriculum of sufficient rigor to have gained the skills and knowledge otherwise needed to pass the CAHSEE, and have also attained the equivalent of a passing score upon completing either the language and/or mathematics sections of the CAHSEE test using modifications that are not allowed because they “fundamentally alter what the test seeks to measure.” [State Board of Education Policy #01-07; Cal. Ed. Code Sec. 56101.] If a student is not eligible for a waiver, the law provides intensive instruction and services for up to two consecutive academic years to all California students (having completed grade 12) who do not pass the exit exam. [Cal. Ed. Code Sec. 1240 (E)]

How long a student may continue in special education after her 22nd birthday depends, for the most part, on the month in which she turns 22. If the student was born between January 1 and June 30, she may only remain in the program for the rest of the fiscal year ending June 30, plus any extended school year program. If she was born in July, August or September and is on a traditional school-year calendar, she is treated similarly and may continue in the program through the end

of the previous fiscal year that ended June 30. However, if the student was born in July, August or September and is on a year-round school calendar, she can finish the current term, even if the term extends into the next fiscal year. A student who was born in October, November or December may continue in special education only until December 31 of the year she turns 22, unless she would otherwise complete her IEP at the end of that current fiscal year. [Cal. Ed. Code Sec. 56026(c)(4)]

**2. Does my child have to be deaf in order to be eligible for special education as a hearing impaired student?**

No. Your child is eligible if she has either a permanent or fluctuating hearing loss that impairs her ability to process information presented through amplified hearing channels and which also adversely affects educational performance. [34 C.F.R. Sec. 300.8(c) (5); 5 C.C.R. Sec. 3030(a).]

**3. The county (or district) has a program for deaf/blind children. Does my child really have to be both deaf and blind to be eligible for the program?**

No. If your child has both hearing and visual impairments which, in combination, cause such severe communication, developmental, and educational problems that cannot be accommodated in a program for children with only hearing impairments or only visual impairments, she is eligible for the program. [34 C.F.R. Sec. 300.8(c)(2); 5 C.C.R. Sec. 3030(b).] This means, on the other hand, that if a child with both visual and hearing impairments could be appropriately served in a program for children with either of those conditions, the child need not be placed in a program for children who have both conditions.

#### **4. How are students with speech and language disorders served? What are the eligibility criteria for service?**

A student with speech and language difficulties is eligible for special education services if she meets one or more of the following criteria:

- (1) **Articulation Disorder**, which reduces intelligibility and significantly interferes with communication and attracts adverse attention. The student's articulation competency must be below what is expected for her chronological age or developmental level and not just an abnormal swallowing pattern;
- (2) **Abnormal Voice**, which is characterized by persistent, defective voice quality, pitch, or loudness;
- (3) **Fluency Disorder**, in which the flow of verbal expression, including rate and rhythm, adversely affects communication between the student and listener;
- (4) **Language Disorder**, in which the student has an expressive or receptive language disorder when she meets one of the following criteria:
  - a. Scores at least 1.5 standard deviations below the mean, or below the seventh (7th) percentile, for her chronological or developmental level, on two or more standardized tests in one or more of the following areas of language development: morphology, syntax, semantics, or pragmatics; or
  - b. Scores at least 1.5 standard deviations below the mean, or below the seventh (7th) percentile, for her chronological or developmental level, on one or more standardized tests in one of the areas listed in subsection (A) and displays inappropriate or inadequate usage of expressive or receptive as measured on a representative spontaneous or elicited language sample of a minimum of fifty (50) utterances. The language sample must be recorded or transcribed and analyzed, and the results included in the assessment report. If the student is unable to produce this sample, the language, speech or hearing specialist must document why a 50 utterance sample was not obtainable



and the contexts in which attempts were made to elicit the sample.

(5) **Hearing Loss**, which results in a language or speech disorder.

[34 C.F.R. Sec. 300.8(c)(11); 5 C.C.R. Sec. 3030(c).]

When standardized tests are considered to be invalid for the student, the expected level of performance shall be determined by alternative means. [5 C.C.R. Sec. 3030(c).]

Once a student qualifies for special education services, she is eligible for any service required to meet her educational needs, that is, to advance toward IEP goals and to be involved and progress in the general curriculum and to participate in extracurricular and nonacademic activities. [20 U.S.C. Sec. 1414(d)(1)(A)(i).]

**5. The district provides services for “visually handicapped” students. Is that limited to students who are actually blind?**

“**Visually handicapped**” means a visual impairment that, even with correction, adversely affects a child’s educational performance. The term includes both partially sighted and blind children. [34 C.F.R. Sec. 300.8(c)(13); 5 C.C.R. Sec. 3030(d).]

**6. What are the criteria for eligibility for special education on the basis of physical disabilities?**

Under California law, a child with a “severe orthopedic impairment” is eligible for special education. A severe orthopedic impairment is one which adversely affects the pupil’s educational performance and includes those caused by congenital anomaly, impairments caused by disease, and impairments from other causes. [5 C.C.R. Sec. 3030(e).] Federal law is somewhat more explicit in terms of the kinds of orthopedic conditions that would qualify a student. Federal law defines severe orthopedic impairment to include those caused by congenital anomaly, impairments caused by disease (e.g., poliomyelitis, bone tuberculosis, etc.), and

impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures). [34 C.F.R. Sec. 300.8(c)(8).]

## **7. What are the criteria for eligibility for special education on the basis of health conditions and problems?**

Under state law, a child may be eligible for special education if she has limited strength, vitality, or alertness due to chronic or acute health problems which adversely affect a pupil's educational performance. These conditions include, but are not limited to: a heart condition, cancer, leukemia, rheumatic fever, chronic kidney disease, cystic fibrosis, severe asthma, epilepsy, lead poisoning, diabetes, tuberculosis and other communicable infectious diseases, and hematological disorders such as sickle cell anemia and hemophilia. The health impairment will not qualify the pupil for special education if it is temporary in nature. [5 C.C.R. Sec. 3030(f).] Under state law, "temporary" means a disability which will terminate at some point and which, when it terminates, will not prevent the student from returning to a general education class without the need for any special interventions. [5 C.C.R. Sec. 3001(ag)[sic].]

Federal law identifies this eligibility category as "other health impairment" and defines it as: "having limited strength, vitality or alertness, including heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment that ... is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder...nephritis, rheumatic fever...and adversely affects a child's educational performance." [34 C.F.R. Sec. 300.8(c)(9).] Federal law, therefore, adds several more examples of conditions that may qualify a child and does not add the word "severe" before asthma. Federal law establishes the floor for eligibility criteria below which state law cannot go. In other words, if a child would be eligible for special education applying the federal definition, a more restrictive state definition cannot prevent eligibility from being established. [Office of Special Education Programs, U.S. Department of Education, 22 IDELR 454 (1994).] Similarly, if a

state law provides a more expansive definition of eligibility than federal law, the more expansive state definition will apply

## **8. How do school districts determine that a child has autism or a disorder like autism?**

Under state law, school districts determine that a student has autism or a disorder like autism if she exhibits any combination of the following autistic-like behaviors that adversely affect educational performance:

- (1) An inability to use oral language for appropriate communication;
- (2) A history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood;
- (3) An obsession to maintain sameness;
- (4) Extreme preoccupation with objects or inappropriate use of objects or both;
- (5) Extreme resistance to controls;
- (6) Displays peculiar motoric mannerisms and motility; and
- (7) Self-stimulating, ritualistic behavior.

[5 C.C.R. Sec. 3030(g).]

Federal law defines autism as a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally before age three, that adversely affects educational performance. It also includes these additional characteristics that are often associated with autism: engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

[34 C.F.R. Sec. 300.8(c)(1).]

In order to qualify for special education under this category, your child does not need to meet the medical definition of autism, just the educational definition. Likewise, meeting the medical definition of autism and obtaining a medical

diagnosis does not ensure that your child will be eligible for special education services as autistic if she or she does not meet the federal or state eligibility criteria.

## **9. Are IQ scores the only basis for eligibility for special education based on mental retardation?**

No. In order for a student to be considered mentally retarded, she must show 1) deficits in adaptive behavior, and 2) significantly below average general intellectual functioning. Both must have manifested during the developmental period and adversely affect her current educational performance. [34 C.F.R. Sec. 300.8(c)(6); 5 C.C.R. Sec. 3030(h).]

Because of the *Larry P. v. Riles* case, the California State Department of Education (CDE) has prohibited school districts from using standardized IQ tests to determine special education eligibility for all African-American students. Therefore, school districts are developing alternative methods of assessment to avoid the use of IQ scores for special education eligibility determination. See Chapter 2, *Information on Evaluations/Assessments*.

## **10. What are the eligibility criteria for seriously emotionally disturbed students?**

Federal law identifies this eligibility category as “emotionally disturbed” (ED). California law continues to identify the category by the term “seriously emotionally disturbed” (SED). However, the criteria in both state and federal law have not changed. A student is considered seriously emotionally disturbed if, **because of a serious emotional disturbance,\*** she exhibits one or more of the following characteristics, over a long period of time and to a marked degree, which adversely affects educational performance:

- (1) An inability to learn which cannot be explained by intellectual, sensory, or health factors;

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- (2) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- (3) Inappropriate types of behavior or feelings under normal circumstances exhibited in several situations;
- (4) A general pervasive mood of unhappiness or depression; and
- (5) A tendency to develop physical symptoms or fears associated with personal or school problems.

[34 C.F.R. Sec. 300.8(c)(4); 5 C.C.R. Sec. 3030(i).]

\*This phrase is included in the state definition only.

Note that the disability category “emotionally disturbed” is a creation of Congress, not a recognized psychiatric diagnostic category. Thus, the term does not require a particular psychiatric diagnosis — such as schizophrenic, depression, etc. A student does not need to have a psychiatric label to be eligible under federal and state definitions of seriously emotionally disturbed.

On the other hand, the state definition does require that the characteristics enumerated above be caused by a “serious emotional disturbance.” In addition, federal regulations specifically exclude students whose behaviors are caused solely by “social maladjustment,” a term which the regulations do not define. As a result of ambiguous federal and California laws, there has been considerable debate as to what conditions qualify as a “serious emotional disturbance” and what conditions are to be considered non-qualifying “social maladjustment.”

### **11. My child has been diagnosed with a conduct/behavior disorder, such as oppositional defiant disorder. Can she qualify for special education?**

A conduct or behavior disorder or an oppositional defiant disorder is not one of the categories for special education eligibility. However, such a condition may be accompanied by an underlying undiagnosed disability, such as a learning disability, emotional disturbance, or health impairment such as an attention deficit

disorder. Therefore, an assessment should be done to determine whether the student qualifies for special education under another category. If not, a Section 504 plan should be explored. The Office for Civil Rights in California has specifically ruled that schools must convene a team of assessors to make a determination regarding eligibility under Section 504 for children with disorders such as ADD/ADHD and obsessive compulsive disorder even if the children do not qualify for special education. [*Manteca Unified School District*, 30 IDELR 544, 1998.]

**12. Can a child with attention deficit disorder (ADD) or attention deficit hyperactivity disorder (ADHD) be eligible for special education services?**

Yes. Federal law has specifically recognized ADD and ADHD as examples of conditions that may qualify under the category “other health impairment” (OHI) if the other criteria for that eligibility category are met. The definition for OHI has expanded the phrase “limited strength, vitality or alertness” to include a “heightened alertness to environmental stimuli,” and then lists ADD/ADHD as an example of a chronic illness which could qualify. However, a medical diagnosis of attention deficit disorder (ADD) or attention deficit hyperactivity disorder (ADHD) alone is not sufficient to make a student eligible for special education services. An IEP team, after the required comprehensive evaluation, must determine that the student meets a federal and/or state eligibility category - specifically that the condition adversely affects educational performance. Students with ADD/ADHD may also be eligible under the “specific learning disability” category, or the “seriously emotionally disturbed” category. [Cal. Ed. Code Sec. 56339(a).]

**13. How do the eligibility criteria apply to students with a suspected learning disability?**

To be considered learning disabled under federal eligibility criteria, a student must have a disorder in one or more of the basic psychological processes involved in understanding or using spoken or written language that may manifest itself in an

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imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. [34 C.F.R. Sec. 300.8(c)(10).] State eligibility criteria say: a student must have a disorder in one or more of the basic psychological processes involved in understanding or using spoken or written language that may manifest itself in an impaired ability to listen, think, speak, read, write, spell, or do mathematical calculations. Significantly, state criteria also requires a student to have a severe discrepancy between intellectual ability and achievement in one or more academic areas. [5 C.C.R. Sec. 3030(j).] The basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, and cognitive abilities (including association, conceptualization and expression). [5 C.C.R. Sec. 3030(j)(1).] Federal regulations say that an IEP team may determine that a student has a specific learning disability if she does not meet State-approved grade-level standards in one or more of the listed academic areas (when provided with appropriate grade-level instruction) or does not make sufficient progress towards age-based or state approved grade-level standards when using a “response to intervention” (RTI) model. (See RTI discussion below). A student may also be found eligible when she exhibits a pattern of strengths and weaknesses in performance, achievement (or both), relative to age, grade, or intellectual development, that the team determines is relevant to the identification of a specific learning disability, using appropriate assessments.

The specific academic areas include:

- (1) Oral expression.
- (2) Listening comprehension.
- (3) Written expression.
- (4) Basic reading skill.
- (5) Reading fluency skills.
- (6) Reading comprehension.
- (7) Mathematics calculation.
- (8) Mathematics problem solving.

[34 C.F.R. Secs. 300.309 (a)(1) & (2).]

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In addition to having a disorder as described above, that disorder must have an impact on the student's achievement in school. Under federal regulations, the state must adopt criteria for determining eligibility for students suspected of having a learning disability. "[T]he criteria...must not require the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability..." [34 C.F.R. Sec. 300.307.] Therefore, school districts must choose to utilize one of two models or methods, described below, to determine educational impact:

- (1) **Severe Discrepancy Model** - If a student has a severe discrepancy between her ability (as measured by intelligence testing) and her 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 she has a learning disability. However, school districts no longer have to use this model. [34 C.F.R. Secs. 300.307 & 300.309.]

If a school district uses a discrepancy model, California law also requires that the discrepancy not be capable of correction through other regular services offered in the regular instructional program. This additional state law requirement is probably not inconsistent with the federal law special education eligibility requirement that a child must need special education and related services [34 C.F.R. Sec. 300.8(a)(1)] and has been upheld by the federal courts in California. [*Norton v. Orinda Union School District*, 29 IDELR 1068 (1999), 168 F.3d 500 (9th Cir. 1999) (unpublished opinion).]

State regulations define intellectual ability as including both acquired learning and learning potential as determined by a systematic assessment of intellectual functioning. The student's level of achievement includes her level of competence in materials and subject matter explicitly taught in school as measured by standardized achievement tests. The academic areas identified in the law are: oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, mathematics calculation and mathematics reasoning. [Cal. Ed. Code Secs. 56337 & 56338; 5 C.C.R. Sec. 3030(j).]



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In determining whether or not a severe discrepancy exists, the IEP team must take into account all relevant material available on the student including aptitude and achievement tests; parent input; teacher recommendations; information about the child's physical condition, social or cultural background; and adaptive behavior. **No single score (or product of scores) test or procedure shall be used as the sole criterion for the IEP team's decision as to the student's eligibility for special education.** [34 C.F.R. Sec. 300.306; 5 C.C.R. Sec. 3030(j)(4) (emphasis added).] The IEP team makes the final determination of eligibility after considering all information presented about the student's educational needs.

When standardized tests have been deemed appropriate, the regulations set out a formula for determining whether or not a severe discrepancy between ability and performance is present. [5 C.C.R. Sec. 3030(j)(4)(A).] However, many school districts no longer allow IQ testing of any child who has been referred for special education as a result of the court order in the *Larry P. v. Riles* case, which prohibited intelligence testing of African-American children. See Chapter 2, *Information on Evaluations/Assessments*.

When standardized tests are determined to be invalid for a specific student, the discrepancy shall be measured by alternative means as specified on the assessment plan. [5 C.C.R. Sec. 3030(j)(4)(B).]

If the standardized tests do not reveal a severe discrepancy, the IEP team may still find that one does exist, **provided** that the team documents in a written report that the severe discrepancy between ability and achievement exists as a result of a disorder in one or more of the basic psychological processes. The report shall include a statement of the area, the degree, and the basis and method used in determining the discrepancy. The report shall contain information considered by the team, which shall include, but not be limited to:

- a) Data obtained from standardized assessment instruments;
- b) Information provided by the parent;
- c) Information provided by the student's present teacher;

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- d) Evidence of the student's performance in the regular and/or special education classroom obtained from observations, work samples and group test scores;
- e) Consideration of the student's age, particularly for young children; and
- f) Any additional relevant information.

[5 C.C.R. Sec. 3030(j)(4)(C).]

- (2) **Response To Intervention (RTI) Model** - School districts may use "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); 34 C.F.R. Secs. 300.307 & 309.] This so-called RTI model is primarily implemented in general education. It requires close coordination between special education and general education staffs. RTI is designed to make sure that students have received the benefit of appropriate instruction from qualified teachers. This lets school districts know that low student achievement is due to a student's disability rather than inadequate teaching. Usually, there are several levels to the RTI model: for example, stricter monitoring and assistance in general education, instruction in a small group, or individual instruction. A student is generally required to participate in all three levels of intervention unless a particular level is effective for the student. If none of the interventions is effective (or minimally effective), there is a good likelihood that the student has a learning disability and is eligible for special education. In almost all of these intervention models, RTI is a long-term process.

Even if the school district chooses to use its version of RTI, the district still must follow state assessment timelines. See Chapter 2, Information on Evaluations / Assessments. Once the school district has received a signed assessment plan, the provision of standardized testing or RTI must occur as prescribed by state timelines. [Cal. Ed. Code Sec. 56344.] The Student Study Team process is not a replacement for RTI. Parents should ask the school district which model (Discrepancy or RTI) is being used. In addition, the parent should ask for the written procedures that describe that process so you will know what to expect.

Finally, state regulations specify that eligibility under the specific learning disability criteria shall not be primarily the result of limited school experience, or poor school attendance. [5 C.C.R. Sec. 3030(j)(5).] Federal regulations also require that eligibility cannot be based on a visual, hearing, or motor disability; mental retardation; emotional disturbance; limited English proficiency; or environmental, cultural or economic disadvantage. [34 C.F.R. Secs. 300.8(c)(10)(ii) & 300.309(a)(3).]

**14. Does the IEP team have to use the full-scale IQ score to qualify my child for special education under specific learning disability when the discrepancy model is used?**

No. State regulations say that intellectual ability includes both acquired learning and learning potential. [5 C.C.R. Sec. 3030(j)(2).] Therefore, if a child's performance IQ score (or verbal IQ score) is a better indicator of her learning potential, then that score should be used to determine whether a severe discrepancy exists between ability and achievement.

**15. Are some children penalized by the learning disability eligibility criteria?**

Yes. When districts choose to use the discrepancy model, young children, between kindergarten and second grade, have a difficult time qualifying because the achievement tests for those grade levels often do not reveal the child's difficulties. Also, children who test low average in intelligence are also penalized, as it is difficult to find a "severe discrepancy" between ability and achievement. On the other hand, under these criteria, very bright children are more likely to show a discrepancy between their academic performance and their potential.

**16. Does a student have to be two years behind academically to be eligible for special education as a learning disabled student?**

No. There is no reference in either the federal or state eligibility criteria for learning disabilities or any other disability requiring that a student be two years behind academically. State eligibility criteria do require that the student have a severe discrepancy between ability and achievement. Therefore, if the school district uses the discrepancy model, the student's academic achievement must be compared to her own ability levels, not to the ability levels of other students. [34 C.F.R. Secs. 300.8(c)(10), 300.309(a)(1) & (2); 5 C.C.R. Sec. 3030(j).]

**17. Can gifted students be denied special education eligibility for specific learning disabilities based solely on intelligence?**

No. A federal Office of Special Education Programs Clarification Letter written January 14, 1992, states:

Neither Part B nor Part B regulations provide for any exclusions based on intelligence level in determining eligibility for Part B services...All children, except those specifically excluded in the regulations, regardless of IQ, are eligible to be considered as having a specific learning disability, if they meet the eligibility requirements... [18 IDELR 683.]

**18. What are the eligibility criteria for children from age three through five years of age?**

Eligibility criteria for preschool children are linked to the criteria for school-age children. To be eligible for special education, a child must have one of the following disabling conditions:

- (1) Autism;
- (2) Deaf-blindness;
- (3) Deafness;

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- (4) Emotional disturbance;
- (5) Hearing impairment;
- (6) Mental retardation;
- (7) Multiple disabilities;
- (8) Orthopedic impairment;
- (9) Other health impairment (potentially includes attention deficit disorder, attention deficit hyperactivity disorder, Tourette Syndrome, dysphagia, fetal alcohol syndrome, bipolar disorders, or other organic neurological disorders, see Fed. Reg. Vol. 71, No. 156, p. 46550);
- (10) Specific learning disability;
- (11) Speech or language impairment in one or more of voice, fluency, language, and articulation;
- (12) Traumatic brain injury;
- (13) Visual impairment; or
- (14) Established medical disability (a disabling medical condition or congenital syndrome that the IEP team determines has a high predictability of requiring special education and services).

[34 C.F.R. Sec. 300.8; 5 C.C.R. Sec. 3030; Cal. Ed. Code Sec. 56441.11(d).]

In addition to having one or more of the qualifying conditions, a child must need specially designed instruction or services to qualify for special education, and must also have needs that cannot be met with modification of a regular environment in the home or school, or both, without ongoing monitoring or support as determined by an IEP team. [Cal. Ed. Code Secs. 56441.11(b)(2) & (3).]

A child is not eligible for special education and services if she does not otherwise meet the eligibility criteria and her educational needs are due primarily to:

- (1) Unfamiliarity with the English language;
- (2) Temporary physical disabilities;
- (3) Social maladjustment; or

(4) Environmental, cultural, or economic factors.

[Cal. Ed. Code Sec. 56441.11(c); see Chapter 12, Information on Preschool Education Services.]

**19. Can my child be eligible for special education if she only needs some related services, like speech therapy, for example, but does not need special education instruction?**

Federal law states that in addition to meeting one of the disability categories, a student must need some degree of special education instruction. [34 C.F.R. Sec. 300.8(a)(2)(i).] California law recognizes that if a child meets the eligibility criteria for one of the disability categories, she is eligible for special education so long as she needs special education instruction, services, **or** both. [Cal. Ed. Code Sec. 56026(b) (*emphasis added*).] Therefore, although federal law would not extend eligibility to a child who meets disability category criteria but needs only a related service, California law defines such a child as an “individual with exceptional needs” for purposes of special education services.

**20. If my family moves to a new school district, does my child need to be found eligible again for special education by the new school district?**

No. Whenever a student transfers into a school district from **another California school district not operating under the same local plan**, the new school district must ensure that she is **immediately** provided with services comparable to those provided in the previously approved IEP from the former school district, in consultation with the parents, for a period not to exceed 30 days.

Within, 30 days, the new school district in which the student enrolled must either adopt the previously approved IEP, or develop, adopt, and implement a new IEP. The new school must take reasonable steps to promptly obtain the pupil’s records from her former school to facilitate the student’s transition. [Cal. Ed. Code Sec. 56325 (a)(1).]

Whenever a student transfers into a school district from **another California school district operating under the same local plan**, the new school district shall continue, without delay, to provide the student with services comparable to those provided in the existing approved IEP from the former school district unless the parent and the school district agree to develop, adopt, and implement a new IEP that is consistent with federal and state law. [Cal. Ed. Code Sec. 56325 (a)(2).]

Whenever a student transfers into a school district from **another school district located outside California (in the same school year)**, the new school district shall provide the student with a free, appropriate public education, including services comparable to those described in the previously approved IEP, in consultation with the parents, until the school district conducts an assessment, if determined necessary by the district, develops a new IEP, if appropriate, that is consistent with federal and state law. [Cal. Ed. Code Sec. 56325 (a)(3).]

**21. If my child does not meet special education eligibility, is there any other way to obtain some special services to address educational problems?**

A child who may have problems in learning may not be found eligible for special education services because she does not fit into one of the special education eligibility categories and/or because her learning problems are not severe enough to qualify her for special education. (This may often be the case for children identified as being hyperactive or having dyslexia, pervasive developmental disorder, Tourette Syndrome, obsessive compulsive disorder, conduct disorder, oppositional defiant disorder, or ADD/ADHD, none of which automatically qualify a student for special education under state or federal law.) Such a child, however, may be eligible for special services and program modifications under a federal antidiscrimination law designed to reasonably accommodate the student's condition so that her needs are met as adequately as the needs of non-disabled students. The law is commonly known as Section 504 of the Rehabilitation Act of 1973. [29 U.S.C. Sec. 794; implementing regulations at 34 C.F.R. 104.1 and following.]

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Section 504 eligibility is not based on a categorical analysis of disabilities (except that some conditions, such as ADD/ADHD are frequently recognized as Section 504 qualifying conditions). Rather, Section 504 protections are available to students who can be regarded as “disabled” in a functional sense. Such students:

- (1) Have a physical or mental impairment which substantially limits a major life activity (such as learning);
- (2) Have a record of such an impairment; or
- (3) Are regarded as having such an impairment.

[See 34 C.F.R. Sec 104.3(j) for further definition.]

If your child is not found to be “disabled” for purposes of Section 504 accommodations and/or services, you can appeal that determination. The local education agency is responsible for arranging the Section 504 hearing process. The hearing officer selected by the local education agency must be independent of the local agency. The hearing officer could be, for example, a special education administrator from another school district, from the county office of education or from a special education local plan area – as long as there is no conflict of interest.

The Office for Civil Rights (OCR) administers and enforces Section 504 protections in education. If you believe your child has not been afforded her rights under Section 504, you may file a complaint with the Office for Civil Rights at:

U.S. Department of Education  
Office For Civil Rights, Region IX Office  
50 Beale Street, Suite 7200  
San Francisco, CA 94105  
Telephone: 415-486-5555  
TDY: 877-521-2172  
FAX: 415-486-5570

See Chapter 6, *Information on Due Process Hearings/Compliance Complaints*.

If a student is eligible for services under Section 504, in your referral letter, you should also request that your child be assessed under Section 504 of the Rehabilitation Act of 1973 (“Section 504”) to determine whether your child might



be eligible for services under that law. If eligible, the school district may be required to provide reasonable accommodations and/or services, including special education services, to allow your child to benefit from school like children without disabilities. These accommodations and/or services may be important if your child does not qualify for special education, or if such accommodations and/or services are, for some reason, not provided under special education. [OCR Memorandum, Letter to Veir, 19 IDELR 876 (April 29, 1993).]

**22. If a student is eligible for services under section 504 only, can she receive special education services?**

Yes. An OCR Memorandum written April 29, 1993, addresses this question:

Is a child...who has a disability within the meaning of Section 504 but not under the IDEA, entitled to receive special education services?

Yes. If a child...is found to have a disability within the meaning of Section 504, she or she is entitled to receive any special education services the placement team decides are necessary. [19 IDELR 876.]

Districts generally are not aware of this OCR legal interpretation. If you believe your child needs special education services to receive FAPE, you should inform the 504 planning team of the above memo before meeting.

**23. My child is progressing from grade to grade. Can she still be eligible for special education?**

Yes. As long as the child meets one of the eligibility categories and needs special education, the fact that she has been advancing from grade to grade without special education does not mean she is not entitled to a free appropriate public special education. [34 C.F.R. Sec. 300.111(c)(1).]

**24. Can the school district limit the services that my child receives based on her disability?**

Schools cannot make assumptions that certain disabilities affect students in only certain ways, such as limiting services to orthopedically impaired students to adapted physical education only. Disabilities vary in degree and in the ways they impact individuals. Special education and related services decisions must be based on each child's unique needs. [34 C.F.R. Secs. 300.39 & 300.320(a)(2)(i)(A); Cal. Ed. Code Secs. 56031 & 56345(a)(2)(A).] The services and placement needed by each child with a disability to receive a free appropriate public education must be based on the child's unique needs and not on the child's disability. [34 C.F.R. Secs. 300.39 & 300.324(a).]

**25. My child is eligible for special education under one of the eligibility categories, but she has other problems which affect her learning. Must the district address these other learning problems too?**

Yes. Federal law requires that the district must assess in all areas related to the student's disability. The evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified." [34 C.F.R. Sec. 300.304 (c)(4), (6); Cal. Ed. Code Section 56320 (f).] For example, a student may be eligible for special education on the basis of a specific learning disability, but may also have an attention deficit disorder. The school must also evaluate the child for the nature and extent of the attention problem and for necessary interventions. [*Corona-Norco Unified School Dist.*, SN 1137-98, 30 IDELR 179.] As long as the student is qualified for special education under one of the eligibility categories, the IEP team must take the student's unique needs (such as behavioral, language or communication needs) into account in designing an IEP. [34 C.F.R. Sec. 300.39.]

**26. Several special education eligibility categories require that a student’s condition or disability “adversely affect educational performance.” What does that phrase mean?**

Neither federal nor state law defines the term “adversely affect educational performance.” Therefore, a review of the court cases interpreting this phrase is necessary to understand how it has been applied. Courts have interpreted the phrase to mean that education is adversely affected if, without certain services, the child’s condition would prevent her from performing academic and nonacademic tasks and/or from being educated with non-disabled peers. [*Yankton School District v. Schramm*, 93 F.3d 1369 (8th Cir. 1996).] For example, for a child with an orthopedic impairment, the Court in *Schramm* identified many services (help moving between classes, getting on and off the bus, going up and down stairs, carrying a lunch tray, setting up the child’s saxophone for band, extra sets of books for home and school so that carrying them back and forth was unnecessary, shorter written assignments, instruction in typing with one hand, photocopies of teachers’ notes, and computers in certain classes) that if not provided would have resulted in the orthopedic condition having an adverse affect on educational performance. The court found this to be true because without these services the student would have had difficulty taking notes, completing assignments, getting to class on time, and getting to class with her books. The same court found that because the student was college-bound, the absence of these services, as well as special education transition services (driver’s education, self-advocacy, and independent living skills), would have allowed her orthopedic impairment to adversely affect her educational objective of post-secondary education.

In California, the administrative hearing office has found poor grades to be a primary indicator of an adverse effect on educational performance. [*Lodi Unified Sch. Dist.*, SN 371-00; *Capistrano Unified Sch. Dist.*, SN 686-99, 33 IDELR 51; *Ventura Unified Sch. Dist.*, SN 1943-99A; *Murrieta Valley Unified Sch. Dist.*, SN 180-95, 23 IDELR 997.] The hearing office has also found that a condition adversely affects educational performance if it causes poor school attendance. [*Sequoia Union High School District*, SN 1092-95.] Poor grades and falling behind academically are also examples of adverse effect on educational

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performance. [*Enterprise Elem. Sch. Dist.*, SN 1055-89.] In addition, a student's condition, which caused declining grades and conduct at school, resulted in an adverse effect on educational performance. [*Sierra Sands Unified Sch. Dist.*, SN 1367-97, 30 IDELR 306.]

Many schools evaluate whether a child's condition has an adverse affect on her 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. 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. [34 C.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

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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 her non-academic performance in social, behavioral and other domains as well.