

SPECIAL EDUCATION RIGHTS AND RESPONSIBILITIES

Chapter 3

Information on Eligibility Criteria

From a 13-Chapter Manual

Available by Chapter and in Manual Form

Written by:

Community Alliance for Special Education (CASE)

and

Protection and Advocacy, Inc. (PAI)

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Federal special education law was significantly amended by Congress in 1997 and further clarified by regulations from the U.S. Department of Education in March 1999. The California Education Code has been amended to reflect some of the federal law changes but not all. In October 1999, Governor Davis vetoed a significant piece of state legislation which would have further amended California law to be consistent with federal law. Therefore, in certain circumstances where it provides greater protections or entitlements, California law will continue to control special education pupils' rights unless it is amended to completely conform to federal law.

CASE and PAI will monitor the development of conforming state law and regulations, so that revised state laws and regulations can be incorporated into later supplements and editions of SERR.

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SPECIAL EDUCATION RIGHTS AND RESPONSIBILITIES

TABLE OF CONTENTS

- Chapter 1** Information on Basic Rights and Responsibilities
- Chapter 2** Information on Evaluations/Assessments
- Chapter 3** Information on Eligibility Criteria
- Chapter 4** Information on IEP Process
- Chapter 5** Information on Related Services
- Chapter 6** Information on Due Process Hearings/Compliance Complaints
- Chapter 7** Information on Least Restrictive Environment
- Chapter 8** Information on Discipline of Students with Disabilities
- Chapter 9** Information on Inter-Agency Responsibility for Related Services (AB 3632/882)
- Chapter 10** Information on Vocational Education
- Chapter 11** Information on Preschool Education Services
- Chapter 12** Information on Early Intervention Services
- Chapter 13** Information on the Rights of Students With Serious Health Conditions to Appropriate Educational Services

NOTE: The text in each chapter refers to specific questions in other chapters by using the titles shown above

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SPECIAL EDUCATION RIGHTS AND RESPONSIBILITIES

Chapter 3

Information on Eligibility Criteria

TABLE OF CONTENTS

Question	Page
1. SEE ALSO CHAPTER 1, QUESTION AND ANSWER 2. Who is eligible for special education under federal and state law?	1
2. Does my child have to be deaf in order to be eligible for special education as a hearing impaired student?	3
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?	3
4. How are students with speech and language disorders served? What are the eligibility criteria for service?	3
5. The district provides services for “visually handicapped” students. Is that limited to students who are actually blind?.....	5
6. What are the criteria for eligibility for special education on the basis of physical disabilities?	5
7. What are the criteria for eligibility for special education on the basis of health conditions and problems?.....	5
8. How do school districts determine that a child has autism or a disorder like autism?	6
9. Are IQ scores the only basis for eligibility for special education based on mental retardation?	6

10. What are the eligibility criteria for seriously emotionally disturbed students?	7
11. My child has been diagnosed with a conduct/behavior disorder, such as oppositional defiant disorder. Can he qualify for special education?.....	8
12. Can a child with attention deficit disorder (ADD) or attention deficit hyperactivity disorder (ADHD) be eligible for special education services?	8
13. SEE ALSO CHAPTER 1, QUESTION AND ANSWER 2(A). How do the eligibility criteria apply to students with a suspected learning disability?	9
14. Does the IEP team have to use the full-scale IQ score to qualify my child for special education under specific learning disability?.....	11
15. Are some children penalized by the learning disability eligibility criteria?	11
16. Does a student have to be two years behind academically to be eligible for special education as a learning disabled student?	11
17. Can gifted students be denied special education eligibility for specific learning disabilities based solely on intelligence?	11
18. What are the eligibility criteria for children from age three through five years of age?.....	12
19. Can my child be eligible for special education if he only needs some related services, like speech therapy, for example, but does not need special education instruction?	13
20. SEE ALSO CHAPTER 1, QUESTION AND ANSWER 33. 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?.....	14
21. If my child does not meet special education eligibility, is there any other way to obtain some special services to address educational problems?	14
22. If a student is eligible for services under section 504 only, can she receive special education services?	15
23. My child is progressing from grade to grade. Can he still be eligible for special education?	16

- 24. Can the school district limit the services that my child receives based on her disability?16
- 25. My child is eligible for special education under one of the special education eligibility categories, but he has other problems which affect his learning that, by themselves, might not have qualified him for special education. Must the school address these other learning problems too?16
- 26. SEE ALSO CHAPTER 1, QUESTION AND ANSWER 2(B). Several special education eligibility categories require that a student’s condition or disability “adversely affect educational performance.” What does that phrase mean?17

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SPECIAL EDUCATION RIGHTS AND RESPONSIBILITIES

Chapter 3

Information on Eligibility Criteria

1. **SEE ALSO CHAPTER 1, QUESTION AND ANSWER 2. 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. 300.7.] **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 his 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;
- (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. 300.7; 5 C.C.R. Sec. 3030.]

The IEP team (made up of qualified professionals and the parent) makes the actual determination of eligibility for special education and related services, based upon the assessment reports. [20 U.S.C. Sec. 1414(b)(4)(A).] A copy of the report must be given to the parent. [20 U.S.C. Sec. 1414(b)(4)(B).]

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 12, *Information on Early Intervention Services*. After age three and until school age, a child may be eligible for preschool special education. See Chapter 11, *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 continues to be eligible for special education through his 18th year [Cal. Ed. Code Sec. 56026(c)(3)]. A student between the ages of 19 and 21 may continue in special education as long as the following conditions exist:

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

[Cal. Ed. Code Sec. 56026(c)(4) and 56026.1.]

“Prescribed course of study” means the school district’s required subjects and credits in English, math, reading, etc., as set by the local board of education for granting a diploma or certificate. [Cal. Ed. Code Sec. 51000 and following.]

“Proficiency standards” are standards of student competence in basic skills, such as reading, writing, and mathematics. Proficiency standards will be demonstrated by passing the high school exit exam, if and when it goes into effect. Until the initiation of the high school exit exam, it is unclear what test or other means will be used to demonstrate minimum proficiency standards for awarding a regular high school diploma.

How long a student may continue in special education after his 22nd birthday depends, for the most part, on the month in which he turns 22. If the student was

born between January 1 and June 30, he may only remain in the program for the rest of the fiscal year ending June 30, plus any extended school year program. If he was born in July, August or September and is on a traditional school-year calendar, he 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, he 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 he turns 22, unless he would otherwise complete his IEP at the end of that current fiscal year. [Cal. Ed. Code Sec. 56026(c)(4)(A) – (C).]

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. 300.7(c) (3); 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 (see Questions 2 and 5) 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, he is eligible for the program. [34 C.F.R. Sec. 300.7(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, 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 C.C.R. Sec. 3030(c); 34 C.F.R. Sec. 300.7(c)(11).]

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)(iii).]

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. 300.7(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(f).] 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 anomalies (e.g., clubfoot, absence of some member, etc.), 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. 300.7(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 he has limited strength, vitality, or alertness due to chronic or acute health problems, including but 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 which adversely affect a pupil’s educational performance. 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(aj).]

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, and that is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder...nephritis, rheumatic fever...which adversely affects a child's educational performance." [34 C.F.R. Sec. 300.7(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 in that state. [20 U.S.C. Sec. 1401(8)(B); *Cal. School for the Blind v. Honig*, 736 F.3d 538 (9th Cir. 1984).]

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

School districts determine that a student has autism or a disorder like autism if he exhibits any combination of the following autistic-like behaviors:

- (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; and
- (5) Self-stimulating, ritualistic behavior.

[5 C.C.R. Sec. 3030(g); see also 34 C.F.R. Sec. 300.7(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.

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, he must show deficits in adaptive behavior, as well as significantly below average general intellectual

functioning, which adversely affect his educational performance. [34 C.F.R. Sec. 300.7(c)(6); 5 C.C.R. Sec. 3030(h).]

Because of the *Larry P. v. Riles* case, the California State Department of Education 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 has changed the eligibility category from “seriously emotionally disturbed” (SED) to “emotionally disturbed” (ED). California law continues to identify the category by the term 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**,* he 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;
- (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. 300.7(c)(4); 5 C.C.R. Sec. 3030(i).]

* This phrase is included in the state definition only.

Note that the disability category “seriously 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 he 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 (see Question 21). 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 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 for “other health impairment” (OHI) if the other criteria for that condition 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. 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).] Children with ADD, when the ADD is a chronic or acute health problem resulting in limited alertness, may be considered disabled under Part B solely on the basis of this disorder within the “other health impaired” category in situations where special education and related services are needed because of ADD.

**13. SEE ALSO CHAPTER 1, QUESTION AND ANSWER 2(A).
How do the eligibility criteria apply to students with a
suspected learning disability?**

To be considered learning disabled under the eligibility criteria, a student must meet three major requirements. First, he must have a disorder in one or more of the basic psychological processes involved in understanding or using spoken or written language. The basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, and cognitive abilities (including association, conceptualization and expression). Second, this disorder may manifest itself in an impaired ability to listen, think, speak, read, write, spell, or do mathematical calculations. Third, the student must have a **severe discrepancy** between intellectual ability and achievement in one or more of the academic areas referred to in the law. [34 C.F.R. Sec. 300.7(c)(10).] As to the third requirement, 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. 300.7(a)(1)] and has been upheld by the federal courts in California. [*Norton v. Orinda Union School District*, 29 IDELR 1068 (1999).]

The 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 his 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. 56337-8; 5 C.C.R. Sec. 3030(j).]

In determining whether or not a severe discrepancy exists, the IEP team must take into account all relevant material available on the student. **No single score (or product of scores) test or procedure shall be used as the sole criterion for the IEP team’s decisions as to the student’s eligibility for special education.**

[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:

- (1) Data obtained from standardized assessment instruments;
- (2) Information provided by the parent;
- (3) Information provided by the student's present teacher;
- (4) Evidence of the student's performance in the regular and/or special education classroom obtained from observations, work samples and group test scores;
- (5) Consideration of the student's age, particularly for young children; and
- (6) Any additional relevant information.

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

Finally, the regulations specify that the discrepancy 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 the discrepancy can not be based on environmental, cultural or economic disadvantage. [34 C.F.R. Sec. 300.7(c)(10)(ii).]

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

No. State regulations say that intellectual ability includes both acquired learning and learning potential. [Cal. Ed. Code 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. 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. 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 requiring that a student be two years behind academically. The criteria do require that the student have a **severe discrepancy** between ability and achievement. Therefore, the student's academic achievement must be compared to her **own** ability levels, not to other students' ability or to expected grade level performance. [34 C.F.R. Sec. 300.7(c)(10); 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?

Preschool children are eligible for special education under Cal. Ed. Code Sec. 56441.11 if the child:

- (1) Has one of the following disabling conditions:
 - (A) Autism;
 - (B) Deaf-blindness;
 - (C) Deafness;
 - (D) Hearing impairment;
 - (E) Mental retardation;
 - (F) Multiple disabilities;
 - (G) Orthopedic impairment;
 - (H) Other health impairment;
 - (I) Serious emotional disturbance;
 - (J) Specific learning disability;
 - (K) Speech or language impairment in one or more of voice, fluency, language, and articulation;
 - (L) Traumatic brain injury;
 - (M) Visual impairment; and
 - (N) Established medical disability.

Conditions A through M are defined in Section 300.7 of the Code of Federal Regulations, and further criteria regarding each condition is contained in Title 5, California Code of Regulations.

Condition N, “established medical disability,” is defined as a disabling medical condition or congenital syndrome that the individualized education program team determines has a high predictability of requiring special education and services.

- (2) She must need specially designed instruction or services as defined in Sections 56441.2 and 56441.3.

- (3) She has 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 individualized education program team pursuant to Section 56431.
- (4) When standardized tests are considered invalid for children between the ages of three and five years, alternative means, for example, scales, instruments, observations, and interviews shall be used as specified in the assessment plan.
- (5) A child is not eligible for special education and services if the child does not otherwise meet the eligibility criteria and his or her educational needs are due primarily to:
 - (A) Unfamiliarity with the English language;
 - (B) Temporary physical disabilities;
 - (C) Social maladjustment; or
 - (D) Environmental, cultural, or economic factors;

See Chapter 11, *Information on Preschool Education Services*.

19. Can my child be eligible for special education if he 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. 300.7(a)(2)(i).] California law recognizes that so long as a child meets the eligibility criteria for one of the disability categories, he/she is eligible for special education so long as he/she needs special education instruction, services, **or** both. [Cal. Ed. Code Sec. 56026(b).] 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. SEE ALSO CHAPTER 1, QUESTION AND ANSWER 33. 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 a school district not operating under the same local plan, the new school district must ensure that she is **immediately** provided an interim placement for a period not to exceed 30 days. The interim placement must be in conformity with her IEP, unless you agree otherwise. The IEP implemented during the interim placement may be either your child's existing IEP, implemented to the extent possible within existing resources, or a new IEP developed in accordance with state law.

Before the end of the 30-day interim placement, an IEP team shall review the interim placement and make a final recommendation on placement. The team may use information, records and reports from the school district or county program from which the student transferred. [Cal. Ed. Code Sec. 56325.]

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 he does not fit into one of the special education eligibility categories and/or because his learning problems are not severe enough to qualify him 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 his 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.]

Section 504 eligibility is not based on a categorical analysis of disabilities (except that some conditions, such as ADD, 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
Old Federal Building
50 United Nations Plaza, Room 239
San Francisco, CA 94102
Telephone: (415) 556-4275
TTY: (415) 437-7786
FAX: (415) 437-7783

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

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, he or she is entitled to receive any special education services the placement team decides are necessary. [19 IDELR 876.]

23. My child is progressing from grade to grade. Can he 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 he has been advancing from grade to grade without special education does not mean he is not entitled to a free appropriate public special education. [34 C.F.R. Sec. 300.121(e).]

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. Sec. 300.26(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. Sec. 300.300(a)(3)(ii).]

25. My child is eligible for special education under one of the special education eligibility categories, but he has other problems which affect his learning that, by themselves, might not have qualified him for special education. Must the school address these other learning problems too?

Yes. A student may be eligible for special education, for example, 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 attentional problem and for necessary interventions. [*Corona-Norco Unified School Dist.*, SN 1137-98, 30 IDELR 179.] A common situation is a student who qualifies for special education under a category of eligibility that typically does not involve behavior problems, but the child has behavior problems. The child's behavior problems may, in fact, not be related to his identified special education qualifying disability. Or a child may have learning problems that have nothing to do with disabilities at all, such as problems with learning due to limited English proficiency. As long as the child is otherwise qualified for special education under one of the categories, his IEP team must take these special behavioral, language or communication needs into account in designing his IEP. If, as a result of any such factor, the child needs a particular device, service, intervention, accommodation, or

modification in order to receive a free appropriate public education the IEP must contain a statement to that effect. [34 C.F.R. Sec. 300.346.]

26. SEE ALSO CHAPTER 1, QUESTION AND ANSWER 2(B). 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 nondisabled 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 Special Education Hearing Office (SEHO) 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 SEHO 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 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.]