

## MEMORANDUM

DATE: July 10, 1996 (revised August 31, 1999)  
TO: Interested People  
FROM: Disability Rights California  
RE: Special Education Rights and Responsibilities for Children with  
Attention Deficit Disorders (ADD/ADHD)

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Does your child have an attention deficit disorder? He or she may qualify for special educational services and support from your local school district.

Disability Rights California provides advocacy services to people with developmental or mental disabilities. If you have questions about your child's rights and responsibilities, please call your local Disability Rights California office or Disability Rights California's toll-free telephone number 1-800-776-5746. Our intake coordinator will send you information, provide referrals, or, if appropriate, may schedule a free telephone consultation with a Disability Rights California attorney or advocate.

This memo discusses the particular legal problems facing children with attention deficit disorders and their families in the school system. To learn more about special education in general, please consult *Special Education Rights and Responsibilities* (published jointly by Disability Rights California and the Community Alliance for Special Education), available at your local Disability Rights California office or through the toll-free number listed above.

### **Eligibility for Special Education**

Your child may qualify for special education services under one of two federal laws—the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act.

#### ***Special education and related services under IDEA.***

Schools must provide special education and related services under IDEA and state law to children with special needs. "Children with special needs" have one of 13 specific disabilities, including mental retardation, autism, traumatic brain injury,

impairments in hearing, speech, language, or vision, orthopedic or other health impairments, serious emotional disturbance, and specific learning disabilities.<sup>1</sup>

Although Congress has considered adding ADD/ADHD to the list of "special needs," it currently is not one of the disabilities covered by IDEA. However, both federal and state law state that children with ADD/ADHD may qualify for special education under any one of three existing categories: "other health impairment," "emotional disturbance," or "specific learning disability."<sup>2</sup>

- "*Other health impairment*" is a chronic or acute health problem which limits your child's strength, vitality, or alertness and affects his or her performance in school.<sup>3</sup>

- "*Emotional disturbance*" is an emotional condition which causes one or more of the following: unexplainable learning difficulties; problems in building relationships with teachers or other children; inappropriate behavior or feelings; a general mood of depression or unhappiness; or, physical symptoms or fears arising from personal or school problems. These symptoms must be severe and long-lasting and must affect your child's educational performance.<sup>4</sup>

- "Specific learning disability" is a disorder in a basic psychological process which causes your child to have language, reading, or mathematics skills that are much lower than his or her intellectual ability.<sup>5</sup>

Not all children with ADD/ADHD will qualify for special education under these categories. Your child may qualify if his or her individual condition fits one of the three categories above.

### ***Special education under Section 504.***

Even if your child does not qualify for special education and related services under IDEA, you may seek services and supports under Section 504 of the Rehabilitation Act.<sup>6</sup> Section 504 prohibits discrimination against children with qualifying disabilities and requires schools districts to provide special education services to allow

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<sup>1</sup> 20 U.S.C. § 1401(a)(1); Title 34, Code of Federal Regulations (C.F.R.) § 300.7(b). California statutes and regulations parallel the federal definition of children with special needs. California Education Code (Cal. Educ. Code) § 56100(a); Title 5, California Code of Regulations (Cal. Code Regs.) § 3030.

<sup>2</sup> Cal. Educ. Code § 56339; U.S. Department of Education, Joint Policy Memorandum, September 16, 1991. Copies of these provisions are enclosed at the end of this memorandum.

<sup>3</sup> 34 C.F.R. § 300.7(b)(8); 5 Cal. Code Regs. § 3030(f).

<sup>4</sup> 34 C.F.R. § 300.7(b)(9); 5 Cal. Code Regs. § 3030(i).

<sup>5</sup> 34 C.F.R. § 300.7(b)(10); Cal. Educ. Code § 56337; 5 Cal. Code Regs. § 3030(j).

<sup>6</sup> 29 U.S.C. § 794.

these children to have the same chance to get an education as children without disabilities.

Section 504 applies to children who have a physical or mental impairment which substantially limits a major life activity (such as learning).<sup>7</sup> Although not all children with ADD/ADHD will qualify for services under Section 504, your child may qualify if an attention deficit disorder substantially limits his or her ability to learn.

***Do I have to choose between IDEA and Section 504 when I believe my child needs special education services?***

No; you may (and should) apply for services under both programs. If your child qualifies for services under IDEA, the school district generally meets its Section 504 obligations by providing services under IDEA. If your child does not qualify under IDEA, Section 504 provides an independent basis for requesting services. (The following sections will explain how to do this.) Because school districts receive extra funds for special education students under IDEA, but not under Section 504, Disability Rights California's experience is that in close cases school districts will find your child eligible under IDEA in order to gain access to extra funding.

***What if a school district refuses to recognize ADD/ADHD as an eligible condition for special education?***

Most school districts will acknowledge that ADD/ADHD may entitle a child to special education services. If they do not, a letter to the director of special education with copies of the attachments to this memorandum might provide them with the information necessary to recognize the school district's legal obligations. You also have the right to request a due process hearing and mediation conference. You may also file a written complaint with the state Department of Education and the federal Office for Civil Rights. For more information on your formal appeal and complaint rights, please see Chapter 6 of *Special Education Rights and Responsibilities*.

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<sup>7</sup> 34 C.F.R. § 104.3(j)

## Identification, Application and Assessment

### *How do I request special education services?*

To refer your child for special education services, write a letter to your child's teacher, principal or special education administrative office.<sup>8</sup> Tell the school district that you are concerned about your child's educational progress. Say that you are making a referral for assessment for special education services and a request for evaluation under Section 504.

### *Must the school district conduct an assessment?*

Under either IDEA or Section 504, the school district has an affirmative duty to identify children with special needs, and must conduct an assessment in all suspected areas of disability to see if your child is eligible for special education services.<sup>9</sup>

California law sets forth special rules for conducting assessments when a child falls under the other health impaired, emotional disturbance, or specific learning disability categories described above. If your child is "other health impaired," the school district may review your child's condition and treatment, and their side effects, complications, educational and social implications.<sup>10</sup> If your child is emotionally disturbed, the school district may refer you to your county mental health agency for an assessment.<sup>11</sup> If your child has a specific learning disability, the identification and assessment of that disability is dictated by specific rules of analysis.<sup>12</sup>

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<sup>8</sup> It is critical that you make a written request so that the assessment and IEP timelines will begin. Cal. Educ. Code §§ 56029, 56302.

<sup>9</sup> 34 C.F.R. §§ 104.32, 104.35, 300.125. Recent decisions from the federal Office for Civil Rights have affirmed a school district's duty to identify and evaluate children with ADD/ADHD under Section 504. See, e.g., *Anaheim, CA, Union High School District* (1993) 20 INDIVIDUALS WITH DISABILITIES EDUCATION LAW REPORTS (IDELR) 185. For more information about assessments, see *Special Education Rights and Responsibilities*, Chapter 2.

<sup>10</sup> 5 Cal. Code Regs. § 3021.1.

<sup>11</sup> Cal. Government Code § 7572. For more information about mental health assessments, see *Special Education Rights and Responsibilities*, Chapter 9.

<sup>12</sup> 5 Cal. Code Regs. § 3030(j). For example, the school district may find that a child has a specific learning disability only by calculating the difference between scores on intellectual ability tests and educational achievement tests. However, the assessment team may find that a child has a specific learning disability regardless of the test score comparison if it articulates its basis for doing so and the evidence on which it relies. For more information on eligibility under the specific learning disability category, see *Special Education Rights and Responsibilities*, Chapter 3.

Disability Rights California receives a number of calls from parents of children with ADD/ADHD regarding school districts' refusal to conduct assessments. These calls fall generally into four categories:

- *School district will not assess because ADD/ADHD is not an eligible condition.* As discussed previously, children with ADD/ADHD may be eligible for special education in a variety of ways.

- *School district will not make or accept a medical diagnosis of ADD/ADHD.* A medical diagnosis of ADD/ADHD may be required to qualify your child for special education under the IDEA "other health impaired category." If the school district believes such a diagnosis is necessary, they must ensure that a proper medical assessment is made at no cost to the parents. However, the school district may offer to assess your child in other nonmedical ways if they see other ways of measuring your child's condition and properly determine his or her educational needs and the services and supports necessary to meet them.<sup>13</sup> A medical diagnosis of ADD/ADHD by itself is not sufficient to find your child eligible for special education. As explained above, your child must meet the IDEA or Section 504 criteria.

- *School district has no one qualified to make an ADD/ADHD assessment.* State law encourages school districts to learn more about ADD/ADHD.<sup>14</sup> The school district still has a responsibility to assess your child and may be responsible to pay for a private evaluator if school staff cannot conduct the proper assessment.

- *School district requires parents to provide an assessment.* The school district may not charge you for an assessment or require you to obtain one at your own expense.<sup>15</sup>

IDEA gives your child two important assessment rights not guaranteed by Section 504. IDEA requires the school district to prepare a written assessment plan for your review and approval within 15 days of your request, and must complete its assessment within 50 days after you approve the assessment plan.<sup>16</sup> (Section 504 requires that assessments be completed within a reasonable time.) IDEA also allows you to obtain an independent assessment at public expense if you do not

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<sup>13</sup> U.S. Department of Education, Office of Special Education Programs, *Letter to Parker* (Feb. 18, 1992).

<sup>14</sup> Cal. Educ. Code § 56339(d).

<sup>15</sup> 34 C.F.R. §§ 104.33(c), 300.300; Cal Educ. Code § 56000.

<sup>16</sup> Cal. Educ. Code § 56321. There are some exceptions to this rule which apply when the request for special education services is made near the end of the school year. See *Special Education Rights and Responsibilities*, Chapter 1.

agree with the school district's assessment.<sup>17</sup> (Section 504 does not provide for an assessment at public expense.)

## **Individualized Educational Planning and Services**

Once your child qualifies for special education and has been evaluated, he or she is entitled to receive services necessary to meet individually determined educational goals and objectives. If your child qualifies for services under IDEA, goals, objectives and services are set forth in a written Individualized Education Program (IEP) developed by a team. The IEP team includes you, your child's teacher, a school administrator authorized to approve services, and other people as appropriate.<sup>18</sup> The school district must make available a continuum of alternative programs and services to meet the needs in your child's IEP.<sup>19</sup>

If your child qualifies for special education services under Section 504, the school district must provide services to meet your child's individual educational needs as adequately as it does nondisabled children.<sup>20</sup> The only difference between these requirements is that IDEA requires a specific process, where Section 504 imposes more general requirements.

Each school district should have a Section 504 coordinator to make sure children's rights under that law are enforced. If your child receives services under Section 504, you should ask that the Section 504 coordinator attend any educational planning meetings, including IEP meetings, for your child. If you are not sure which program your child qualifies for, it is safe to ask the Section 504 coordinator to attend so you may talk about appropriate services for your child if he or she does not qualify under IDEA.

## **Educational Setting**

Both IDEA and Section 504 require that your child have an opportunity to receive special education services in the least restrictive environment. The school district must allow your child to attend school with nondisabled children to the maximum extent appropriate and may only place your child in a separate class or school if

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<sup>17</sup> 34 C.F.R. § 300.502; Cal. Educ. Code § 56329(b). The school district may challenge the need for an independent assessment in a due process hearing.

<sup>18</sup> 34 C.F.R. §§ 300.340 - 300.350; Cal. Educ. Code §§ 56340 - 56347. For complete information on the IEP process, see *Special Education Rights and Responsibilities*, Chapter 4.

<sup>19</sup> 34 C.F.R. §§ 300.551, 300.552; Cal. Educ. Code §§ 56360 - 56370.

<sup>20</sup> 34 C.F.R. § 104.33(b).

your child's needs cannot be met in a regular classroom, even with the use of supplementary aids and services.<sup>21</sup>

PAI receives many calls from parents of children with ADD/ADHD who either are not receiving sufficient supplementary aids and services in a regular classroom or are being placed in segregated classrooms or schools. It is difficult to state a general rule because each child's situation is different. In looking at your own child's situation, however, ask yourself the following questions:

- Is my child's current program allowing my child to make progress toward his or her IEP goals or to move forward from grade to grade? If not, the school district may not be providing an appropriate program.
- Can my child gain academic, social or other benefits from a less restrictive classroom? If so, your child may not be in the least restrictive environment.
- Has the school district tried to educate my child in a less restrictive classroom with supplementary aids and services? If not, your child may not be in the least restrictive environment.
- Would my child be disruptive, take up an inordinate amount of the teacher's time, or cost a lot of money to maintain in a regular classroom? If not, your child may not be in the least restrictive environment.<sup>22</sup>
- Is my child being offered a choice of different kinds of programs, with flexibility in supportive services? If not, the school district may not be offering you the required continuum of alternative programs and services.

### **Resolving Disputes: Procedural Safeguards**

Under IDEA, you may request a due process hearing and mediation conference if you do not agree with the school district in setting your child's education program or if you do not agree with the school district's determination that your child is not eligible for special education under IDEA.<sup>23</sup> Section 504 contains a more general requirement that gives you the right to notice of school district actions, an opportunity to examine your child's school records, and an impartial hearing with opportunity for participation and representation.<sup>24</sup> There is no established state

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<sup>21</sup> 34 C.F.R. §§ 104.34, 300.550.

<sup>22</sup> *Sacramento City Unified School District v. Rachel H.* (9<sup>th</sup> Cir. 1994) 14 F.3d 1398.

<sup>23</sup> 20 U.S.C. § 1415; 34 C.F.R. §§ 300.506-509; Cal. Educ. Code §§ 56500 - 56508. For more information on dispute resolution under both IDEA and Section 504, see *Special Education Rights and Responsibilities*, Chapter 6.

<sup>24</sup> 34 C.F.R. § 104.36.

process for conducting hearings under Section 504. Disability Rights California suggests that, if you have a dispute with a school district over a Section 504 issue, you request a due process hearing and mediation from the state **and** a hearing from the school district under Section 504.

You may also file administrative complaints if the school district violates your child's rights. If the school district fails to implement your child's IEP or otherwise violates IDEA or related state law, you may complaint to the state Department of Education's Compliance Unit. If the school district violates your child's civil rights, including those under Section 504, you may complaint to the federal Office for Civil Rights.<sup>25</sup>

### ***What about discipline?***

Children with ADD/ADHD are entitled to the same due process protections in expulsion proceedings as other children with special needs. These protections include the right to a pre-expulsion IEP meeting and assessment, and the right to request a due process hearing and mediation to challenge an IEP team's findings.<sup>26</sup> These rights extend to children who are identified as having special needs **and** children who have special needs and **should** have been identified as such.<sup>27</sup>

## **Conclusion**

Children with attention deficit disorders have rights and responsibilities under the special education law like other children with special needs. Children with ADD/ADHD encounter unique problems because of past confusion regarding school districts' obligations under federal law. Recent clarifications, however, have resolved this confusion and made explicit school districts' obligations to serve these children.

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<sup>25</sup> For more information on these complaints, see *Special Education Rights and Responsibilities*, Chapter 6. Disability Rights California has complaint packets and forms for OCR complaints. To obtain a copy, please call your local Disability Rights California office or the toll-free number listed at the beginning of this memo.

<sup>26</sup> *Honig v. Doe* (1988) 484 U.S. 305.

<sup>27</sup> *Hacienda La Puente Unified School District of Los Angeles v. Honig* (9<sup>th</sup> Cir. 1992) 976 F.2d 487. For more information on discipline of children with special needs, see *Special Education Rights and Responsibilities*, Chapter 8.

<b>Special Education Checklist for Children with ADD/ADHD</b>	
<b>IDEA</b>	<b>Section 504</b>
<b>Eligibility:</b> Other health impairment, serious emotional disturbance, specific learning disability.	<b>Eligibility:</b> Physical or mental impairment which substantially limits a major life activity.
<b>Identification and assessment:</b> Assessment in all areas of suspected disability by knowledgeable multidisciplinary team using valid, individually appropriate tests with 50 days after assessment plan signed. Right to independent assessment at public expense if school assessment is inappropriate.	<b>Identification and assessment:</b> Evaluation for Section 504 eligibility within reasonable time upon request; individualized determination of educational needs using valid, individually appropriate tests. No right to independent assessment at public expense.
<b>Planning Process:</b> Individual education program with goals and objectives identified by IEP team, including parent participation.	<b>Planning Process:</b> Individualized determination of educational needs by IEP team or other process. Participation by 504 coordinator.
<b>Services:</b> Free appropriate public education; continuum of educational programs and placements, related services.	<b>Services:</b> Free appropriate public education; regular or special education, supplemental aids and services.
<b>Setting:</b> Least restrictive environment.	<b>Setting:</b> Least restrictive environment.
<b>Resolving Disputes:</b> Due process hearing and mediation conference with rights under state law; compliance complaint to state Department of Education.	<b>Resolving Disputes:</b> Appeal process through due process hearing or other means; right to notice, access to records, impartial hearing, counsel; complaint to Office for Civil Rights.