No. 12-15743

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

E.M., a minor, by and through his parents, E.M. and E.M.,

Plaintiff-Appellant

v.

PAJARO VALLEY UNIFIED SCHOOL DISTRICT,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANT AND URGING REMAND

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LEGISLATIVE HISTORY:

MISCELLANEOUS:

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STATEMENT OF THE ISSUES

The United States will address the following issues:

1. Whether the district court erred in concluding that a child's impairment may be assessed under only one category of disability in determining whether the child satisfies the definition of a "child with a disability" under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1401(3)(A)(i).

2. Whether the district court erred in concluding that a diagnosis of Central Auditory Processing Disorder cannot qualify as an "other health impairment" under the IDEA.

INTEREST OF THE UNITED STATES

The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

This case addresses whether a child seeking to meet the IDEA's definition of a "child with a disability" can be assessed under more than one category of disability set out in 20 U.S.C. 1401(3)(A)(i). The United States Department of Education (E.D.) has a direct interest in this appeal because the district court erroneously interpreted the IDEA's statutory phrases "child with a disability" and "other health impairment," and the E.D.'s implementing regulations. See 20 U.S.C. 1401(3)(A)(i); 34 C.F.R. 300.8(c). The E.D. has issued policy letters interpreting the IDEA and its regulations, and has stated that the manifestations of a child's impairment can be assessed under more than one category of disability identified in 20 U.S.C. 1401(3)(A)(i). The E.D. has authority to issue regulations and policy guidance to implement the IDEA, withhold IDEA funds from States that fail to comply with the IDEA's requirements, and refer matters to the Department of Justice for enforcement. See 20 U.S.C. 1406, 1416(e)(2)-(3), 1417.

STATEMENT OF FACTS

1. The IDEA And Department Of Education's Regulations And Guidance

a. Congress enacted the IDEA to ensure that all children with disabilities that affect their ability to learn are provided a "free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. 1400(d)(1)(A); see 20 U.S.C. 1401(3)(A)(i)-(ii). Under the IDEA, a "child with a disability" is a child:

> (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
>
> (ii) who, by reason thereof, needs special education and related services.

20 U.S.C. 1401(3)(A); see 20 U.S.C. 1401(30) (definition of "specific learning disability").

A state education agency and local school district must evaluate any child suspected of having a disability to determine whether the child therefore is covered by the IDEA and requires special education and related services. See 20 U.S.C. 1412(a)(3), 1413(a)(1); 34 C.F.R. 300.111, 300.301, 300.304-300.306. Once a child with a disability is identified, the state or local school district must make available to the child a free appropriate public education through development and

implementation of an individualized education program (IEP). See 20 U.S.C. 1401(9), 1414(d)(1)(A).

In 2005, the IDEA's definition of "specific learning disability" stated, in part, as follows:

> (A) In general
> The term "specific learning disability" means a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.

20 U.S.C. 1401(30) (2005).[1]

E.D. regulations identify criteria for each covered disability. See 34 C.F.R. 300.7(c), 300.540-300.543 (2005). "Other health impairment" is defined as follows:

> Other health impairment means having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that-

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[1] The district court and this Court assessed the school district's potential liability based on versions of the federal and state statutes and regulations in effect in 2005 and prior to 2005 amendments. See *E.M.* v. *Pajaro Valley Unified Sch. Dist.*, 652 F.3d 999, 1003 (9th Cir. 2011)/E.R. 141, 146; *E.M.* v. *Pajaro Valley Unified Sch. Dist.*, No. C-06-4694, 2012 WL 909514, at *4 (N.D. Cal. Mar. 16, 2012)/E.R. 1, 6. For consistency with the courts' analysis and citations, we also rely upon the pre-amendment 2005 versions.

"E.R. __" refers to the page of Appellant's Excerpts of Record. "Doc. __" refers to the number of the document recorded on the district court docket sheet.

> (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia; and
>
> (ii) Adversely affects a child's educational performance.

34 C.F.R. 300.7(c)(9) (2005).

b. In 1991, the E.D. issued a Joint Policy Memorandum that addressed how a child with attention deficit disorder (ADD) or attention deficit hyperactivity disorder (ADHD) may be determined to be eligible for services under the IDEA or Section 504 of the Rehabilitation Act. See 18 IDELR 116 (Sept. 16, 1991) (Addendum 1-6).[2] The E.D. explained that, for a child diagnosed with either of these disorders, the various manifestations of the disorder may fall within one of three categories of the IDEA's definition of "child with a disability" -- "other health impair[ment]," "specific learning disability," or "seriously emotionally disturbed." Addendum 2-3. In 1999, ADD and ADHD were added to the definition of "other health impairment," and the E.D. stated that these impairments

[2] At the time of the Joint Policy Memorandum, the disability categories were referred to as "other health impaired" and "seriously emotionally disturbed" rather than the current phrases "other health impairment" and "emotional disturbance." Compare 34 C.F.R. 300.5(b)(7)-(8) (1991) and 34 C.F.R. 300.8(c)(4), (9). In 1991, attention deficit disorder or attention deficit hyperactivity disorder were not identified as examples of a medical condition that qualify as "other health impaired," see 34 C.F.R. 300.5(b)(7) (1991), although they are included now. See 34 C.F.R. 300.8(c)(9)(i).

may also qualify under other categories of disability. See Final Rule, *Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities*, 64 Fed. Reg. 12,406, 12,542-12,543 (Mar. 12, 1999).

The Office of Special Education Programs (OSEP) within the E.D. is the "principal agency in the Department for administering and carrying out" implementation of the IDEA. 20 U.S.C. 1402(a). In 1994, OSEP issued guidance regarding the IDEA assessment of a child diagnosed with chronic fatigue syndrome. See Letter to Fazio, 21 IDELR 572 (Apr. 26, 1994) (Addendum 7-8). The E.D. stated that the list of specific medical illnesses identified as "other health impairments" was illustrative and not exclusive or exhaustive. See Addendum 8; see also Addendum 2. Thus, the E.D. stated, a medical condition or impairment need not be specifically listed in the regulation to qualify as an "other health impairment." See Addendum 2, 8. Significantly, the E.D. also advised that the manifestations of chronic fatigue syndrome could satisfy the criteria of "other health impairment" or another category. See Addendum 8.

2. 2005 California Code And Regulations Implementing The IDEA

The IDEA sets forth a framework and specific obligations to ensure that state education agencies and local school districts make available to a child with a disability a free appropriate public education and to provide children and parents

procedural safeguards to enforce the requirements of the IDEA. See, *e.g.*, 20 U.S.C. 1414, 1415. In order to receive federal funding for educational programs for children with disabilities, States and local school districts must establish programs and services that comply with the IDEA, yet have flexibility to determine how such programs and services will be delivered. See generally, 20 U.S.C. 1412, 1413; 34 C.F.R. Pt. 300, Subpt. B and C. Thus, an assessment of a local school district's compliance with the IDEA requires consideration of the IDEA, E.D. regulations and policies, and the State's implementing statutes and regulations.

In 2005, California defined "specific learning disability," see Cal. Educ. Code §56337 (West 2005), and the scope of "other health impairment," see Cal. Code Regs. Tit. 5, §3030(f) (2005).[3] California used terms very similar to the federal definitions. See 34 C.F.R. 300.7(c)(9)-(10), 300.541, 300.543 (2005). The California Code stated that a child has a "specific learning disability" when the following three criteria are established:

> a) A severe discrepancy exists between the intellectual ability and achievements in one or more of the following academic areas: (1) Oral expression. (2) Listening comprehension. (3) Written expression.
> * * *

[3] While California does not use the phrase "other health impairment," it addressed this category of disability in Cal. Code Regs. Tit. 5, §3030(f) (2005). See E.R. 16.

> b) The discrepancy is due to a disorder in one or more of the basic psychological processes and is not the result of environmental, cultural, or economic disadvantages.
>
> (c) The discrepancy cannot be corrected through other regular or categorical services offered within the regular instructional program.

Cal. Educ. Code §56337 (West 2005). California regulations refer to "[b]asic psychological processes [that] include attention, visual processing, auditory processing, sensory-motor skills, cognitive abilities including association, conceptualization and expression." Cal. Code Regs. Tit. 5, §3030(j)(1) (2005). The "severe discrepancy" between ability and achievement is based on the child's test scores. See Cal. Code Regs. Tit. 5, §3030(j)(4)(A) (2005).

The California regulations addressing "other health impairment" include the federal regulatory language that defines the term as a "chronic or acute health problem" that results in a pupil's "limited strength, vitality, or alertness" and "adversely affects a pupil's educational performance." Cal. Code Regs. Tit. 5, §3030(f) (2005). California also identifies impairments beyond those examples in the federal regulation for "other health impairment," including cancer, chronic kidney disease, cystic fibrosis, tuberculosis and other communicable infectious diseases. See *ibid.*

3. Factual Background And Procedural History

In January 2006, when E.M. was in sixth grade, E.M. and his parents filed an amended administrative complaint against Pajaro Valley Unified School District

alleging that the school district failed to identify and properly evaluate E.M. as a child with a disability as early as 2002 through 2005. See E.R. 2, 4-5, 144, 273. While E.M. has at least average intelligence, he also has been diagnosed with an auditory processing disorder. See E.R. 7-8, 142, 503. An auditory processing disorder (APD), or central auditory processing disorder, is a deficiency in neurological processing that adversely affects an individual's ability to identify and distinguish similar sounds and understand oral communication. See E.R. 361, 537-538, 552-553, 557. E.M.'s APD makes it difficult for him to follow oral instructions, retain and understand information expressed orally, and pay attention in a classroom even with specific accommodations. See E.R. 501-504; see also E.R. 422, 425-427, 437-440. When he was in third and fourth grade (2002-2003, 2003-2004), which is the time frame at issue in this litigation, E.M. "struggled" in school. E.R. 143, 274-275. E.M.'s academic performance "declined considerably" in fourth grade to the extent that he was at risk of not progressing to the next grade, although ultimately he was promoted. See E.R. 275. E.M. alleged that because of his APD, he qualified as a child with a disability based on two categories of disability: a "specific learning disability" and "other health impairment." See E.R. 2-3.[4] The school district argued, *inter alia*, that E.M. did not prove a severe discrepancy in achievement and ability to establish he had a "specific learning

[4] E.M. raised other claims that are not on appeal.

disability," that APD does not qualify as an "other health impairment," and that E.M. did not have APD. See Doc. 155 at 1-12.

The state hearing officer held that E.M. did not establish that he had a "specific learning disability" but did not address E.M.'s claim that he qualified for IDEA services under the category of "other health impairment." See E.R. 2. E.M. then filed suit to secure IDEA services. The district court remanded the matter to the hearing officer for additional findings. See E.R. 3. The hearing officer made additional findings but still did not address E.M.'s "other health impairment" claim. See E.R. 3, 152-153. The district court granted summary judgment in favor of the school district by ruling that E.M. failed to establish he had a "specific learning disorder." See E.R. 3.

E.M. appealed the district court's ruling. This Court affirmed in part and reversed and remanded in part. See E.R. 141-154. This Court held that E.M. established he had an auditory processing disorder and remanded for the district court to assess (1) whether certain post-assessment evidence was admissible in light of the court's decision, (2) if this evidence was admissible, whether E.M. established that he had a "specific learning disability," and (3) whether problems associated with E.M.'s auditory processing disorder qualified as an "other health impairment." See E.R. 146, 151-153.

4. The District Court Opinion

On remand, the district court held that the post-assessment evidence was admissible and that E.M. had APD during the time at issue. See E.R. 6, 8. The district court again held, however, that E.M. failed to meet California's 2005 standard for a "specific learning disability" because E.M. had not established a "severe discrepancy" between his ability and achievement as measured by various test scores. E.R. 6-15.

The district court held, as a matter of statutory interpretation, that a condition that falls within one category of disability cannot also be assessed under a second category of disability. See E.R. 17-20. In reaching this conclusion, the district court considered the federal and California regulatory definitions of "specific learning disability" and "other health impairment." See E.R. 15-18. Citing the California regulations, the district court stated that an auditory processing disorder is one of the psychological processes that the State has determined is covered by the definition of "specific learning disability." See E.R. 8; see pp. 7-8, *supra*. The district court cited the collective list of examples of health conditions set forth in the federal and state regulations that could be an "other health impairment," including "asthma, attention deficit disorder or attention deficit hyperactive disorder, [and] cancer." See E.R. 18. The court concluded that the common element for all of these medical conditions is the

"potential to limit a child's strength, vitality or alertness as a matter of general health." See E.R. 18 (alterations and internal quotation marks omitted). The district court further held that the E.D. regulations defining "specific learning disability" and "other health impairment" "pertain to two different categories of impairments." See E.R. 19. The court concluded (E.R. 19),

> [c]onsequently, the category "other health impairments" necessarily consists of impairments not otherwise included in the categories identified in [20 U.S.C.] 1401(3)(A). Because a qualifying auditory processing disorder [of the kind the plaintiff has] is a specific learning disability, it necessarily follows that an auditory processing disorder cannot at the same time be an "other health impairment."

(citations omitted).

The court held that an interpretation that permitted a condition to qualify under more than one category of disability would render the elements of another category "superfluous." See E.R. 19. The district court reasoned that if a child with a particular condition could satisfy the criterion for "other health impairment" because the medical problem had an "adverse[] [a]ffect on academic performance," a child need not satisfy the standards identified for a "specific learning disability" in 2005, which required a "severe discrepancy" between ability and achievement. See E.R. 19.

SUMMARY OF ARGUMENT

1. The IDEA defines a "child with a disability" by reference to ten covered categories of disability. See 20 U.S.C. 1401(3)(A)(i) and (30). The IDEA is silent on whether a particular impairment or condition may fall within more than one category of disability. The E.D. has interpreted the IDEA to mean that manifestations of a child's impairment may be assessed under different categories of disability when determining whether the child has a covered disability. Addendum 2-3, 8. This interpretation warrants substantial deference because the E.D. has implementing authority for the IDEA, and this interpretation is reasonable and "fill[s] any gap left" by the IDEA's ambiguous terms. *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (internal citation omitted); 20 U.S.C. 1406(a). Moreover, the E.D.'s inclusive approach is fully consistent with the IDEA's history and remedial purposes, a school district's duty under "child find," E.D. regulations, and E.D. policy guidance. See 20 U.S.C. 1412(a)(3); 34 C.F.R. 300.7(c) (2005); Addendum 1-8. Considering whether a child's impairment meets the criteria of more than one category may make the difference between a child qualifying or not qualifying for needed services under the IDEA and receiving the special education and related services that are appropriate.

2. The E.D.'s position that the list of medical conditions set forth in the definition of "other health impairment" is not exclusive is consistent with the IDEA's purpose, the E.D.'s regulation and the agency's prior guidance. See 34 C.F.R. 300.7(c)(9) (2005); Addendum 2, 8. The regulation's phrase, "chronic or acute health problems *such as* asthma, attention deficit disorder or attention deficit hyperactivity disorder" makes clear that the list of specific impairments is not exhaustive and identifies only examples. 34 C.F.R. 300.7(c)(9) (2005) (emphasis added).

3. The criteria that define an "other health impairment" are (1) a "chronic or acute health problem[]" (2) that "results in limited alertness with respect to the educational environment" and (3) that "adversely affects a child's educational performance." 34 C.F.R. 300.7(c)(9) (2005). The symptoms, characteristics, and diagnosis of a central auditory processing disorder include a chronic, medical condition; difficulty in processing sound; and a child's limited attention to oral communication that can adversely affect a student's ability to perform in a classroom. Some of these symptoms and characteristics fall under the term "learning disability" and others may fall within the category of "other health impairment." A remand is appropriate to permit the district court to determine whether E.M.'s auditory processing disorder qualifies as an "other health impairment." See 34 C.F.R. 300.7(c)(9) (2005).

ARGUMENT

I

THE DISTRICT COURT ERRED BY NOT ASSESSING E.M.'S IMPAIRMENT UNDER MORE THAN ONE CATEGORY OF DISABILITY

A. Principles Of Judicial Deference And Deference To E.D. Policy Guidance

Where a statute speaks clearly "to the precise question at issue," a court "must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984). If, however, "the statute is silent or ambiguous with respect to the specific issue," the court must sustain an implementing agency's interpretation if it is "based on a permissible construction of the statute." *Id.* at 843; see *Barnhart* v. *Walton*, 535 U.S. 212, 219 (2002); *Irving Indep. Sch. Dist.* v. *Tatro*, 468 U.S. 883, 892-894 (1984) (deference given to an E.D. regulation interpreting the IDEA).

Deference is due not only when an agency exercises its rulemaking authority, see *Chevron*, 467 U.S. at 843, but also when an agency authorized to administer a statute interprets the statute by other means. See *NationsBank* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 254, 256-257 (1995) (*Chevron* deference given Comptroller of Currency's letter that provides a "reasonable" interpretation of the National Bank Act, which the Comptroller is charged to administer); *Honig* v. *Doe*, 484 U.S. 305, 325 n.8 (1988). In *Honig*, the Court held that, as the E.D. has authority to "monitor[] and enforce[]" the IDEA, deference is

owed to the E.D.'s policy letter interpreting the IDEA, particularly when the E.D.'s approach "comports fully with the purposes of the statute." *Ibid.*

A court must defer to an agency's interpretation of its implementing regulations as long as that interpretation is not "plainly erroneous or inconsistent with the regulations." *Chase Bank USA, N.A.* v. *McCoy*, 131 S. Ct. 871, 880 (2011) (quoting *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997)). This deference also applies to an agency's interpretation that is advanced for the first time in judicial proceedings. See *id.* at 881.

This Court has given substantial deference to and specifically adopted positions set forth in the E.D.'s IDEA policy letters. See *Ms. S.* v. *Vashon Island Sch. Dist.*, 337 F.3d 1115, 1133-1134 (9th Cir. 2003), cert. denied, 544 U.S. 928 (2005); *Capistrano Unified Sch. Dist.* v. *Wartenberg*, 59 F.3d 884, 894 (9th Cir. 1995). In *Ms. S.*, this Court specifically adopted OSEP's policy guidance regarding a new school district's obligation to implement another school district's IEP under the IDEA's "stay-put" provision. This Court stated that such deference was owed because OSEP was charged with "monitoring and administering the IDEA" and OSEP's guidance "comports with the purposes of the IDEA." *Ms. S.*, 337 F.3d at 1134. In *Wartenberg*, this Court upheld the district court's reliance on the E.D.'s 1991 Joint Policy Memorandum addressing attention deficit disorder. See 59 F.3d at 894; p. 5, *supra*. This Court explained that deference to the E.D.'s

policy was warranted "because the [E.D.'s] interpretation is based on a permissible construction of the existing statutory language." *Wartenberg*, 59 F.3d at 894.

Similarly, other circuits have deferred to E.D. policy statements and letters interpreting the IDEA and E.D. regulations. See *Taylor* v. *Vermont Dep't of Educ.*, 313 F.3d 768, 780 (2d Cir. 2002) (deference given to OSEP policy letter interpreting the E.D.'s IDEA regulation that is, *inter alia*, "perfectly consistent with * * * the gap left in the regulations"); *Michael C.* v. *Radnor Twp. Sch. Dist.*, 202 F.3d 642, 649-650 (3d Cir.) (deference given to OSEP policy memorandum that "comports with the IDEA's statutory and regulatory scheme and with precedent interpreting that scheme"), cert. denied, 531 U.S. 813 (2000); *Rodiriecus L.* v. *Waukegan Sch. Dist. No. 60*, 90 F.3d 249, 254 (7th Cir. 1996). In sum, a court should give substantial deference to E.D. policy letters that are consistent with the purposes and text of the IDEA and E.D. regulations. See, *e.g.*, *Ms. S.*, 337 F.3d at 1133-1134; *Taylor*, 313 F.3d at 780; *Michael C.*, 202 F.3d at 649-650.

B. The E.D.'s Interpretation Of "Child With A Disability" And "Other Health Impairment"

In 2005 (and now), the IDEA's definition of a "child with a disability" identifies ten covered disabilities. 20 U.S.C. 1401(3)(A)(i) (2005). The IDEA also defines "specific learning disability." 20 U.S.C. 1401(30) (2005). The E.D.'s implementing regulations address the types of difficulties that satisfy each category of disability. See 34 C.F.R. 300.7(c), 300.540-300.543 (2005). Significantly, the

statute does not address whether a particular impairment may fall within more than one category of disability by meeting the specific criteria for that disability, or if each disability is exclusive and therefore a condition may be assessed only under one disability category. The IDEA does not "sp[eak] to the precise question at issue" here and deference is appropriate. *Chevron*, 467 U.S. at 842; see *Honig*, 484 U.S. at 325 n.8; *Michael C.*, 202 F.3d at 649.

The E.D.'s considered position is that a child's impairment can fall within more than one category of covered disability as long as any of the manifestations of that condition satisfy criteria for that category. Thus, a school district must consider whether a child's impairment may satisfy more than one covered disability. See Addendum 2-3, 8. With this approach, and consistent with Congress's intent in identifying all children who are eligible under the IDEA, a child who may be in need of special education and related services can be assured he receives full consideration for eligibility for such education and services. See 20 U.S.C. 1412(a)(3). In addition, the E.D. has stated repeatedly that the specific conditions identified in its regulations defining "other health impairment" are examples and not a complete list of all such conditions. See Final Rule, *Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities*, 71 Fed. Reg. 46,540, 46,550 (Aug. 14, 2006); Addendum 2, 8.

A specific impairment may be assessed under more than one category. Each category has several and differing criteria. A child's condition, for example, may prevent the child from fully and accurately processing auditory information, and also may cause physical weakness or fatigue. The condition might be a basic psychological disorder involved in using language that so impairs the ability to listen and comprehend that it falls within "specific learning disability," or might limit the child's alertness enough to fall within "other health impairment." See 34 C.F.R. 300.7(c)(9)-(10) (2005). A single condition may or may not have manifestations that meet different criteria for different categories of disability. Specific learning disabilities do not always limit strength, vitality, and alertness, and not every "other health impairment" will involve a disorder in a basic psychological process.

The spectrum of diagnosis and resulting behaviors of certain impairments, such as ADD and ADHD, further support the importance of considering whether a child's disability may place him or her under more than one category of disability for purposes of determining eligibility for IDEA services. See 64 Fed. Reg. at 12,542-12,543. Disorders, depending on the manifestations, may qualify under the disability categories of "emotion[al] disturb[ance]," "specific learning disability," and/or "other health impair[ment]." See Addendum 2-3. The applicable category of disability may vary depending on the scope, severity, and manifestations of a

child's impairment. A diagnosis for an impairment that is not as severe as commonly occurs therefore may not satisfy the elements of the disability category usually considered, but other manifestations may meet the different criteria for a second category.

C. This Court Should Defer To The E.D.'s Interpretations

This Court's analysis should begin by assessing the deference warranted to the E.D.'s interpretation of the phrases "child with a disability" and "other health impairment." See *National Cable & Telecomm. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982-983 (2005). Substantial deference is warranted to the E.D.'s interpretation due to the ambiguous statutory text, the E.D.'s statutory authority to issue implementing regulations and guidance, and because the E.D.'s interpretation is reasonable and consistent with the purposes and text of the IDEA, the E.D.'s regulations, and its guidance. See *Honig*, 484 U.S. at 325 n.8; *Tatro*, 468 U.S. at 892; *Ms. S.*, 337 F.3d at 1133-1134; *Wartenberg*, 59 F.3d at 994; 20 U.S.C. 1406. The E.D.'s expertise in addressing the educational needs of children with disabilities led it reasonably to conclude that an expansive approach to determining a child's eligibility under the IDEA is appropriate and, therefore, a child's particular impairment can be assessed under more than one category of disability. See *Tatro*, 468 U.S. at 891-892 (E.D.'s regulation that broadly defines "related

services" was a "reasonable interpretation of congressional intent" because the definition ensured, *inter alia*, that a child had "meaningful access to education").

1. The E.D.'s interpretation of a "child with a disability" is consistent with the history and purpose of the IDEA. Congress enacted the IDEA to reverse "this history of neglect" of providing an appropriate education to children with disabilities. *Schaffer* v. *Weast*, 546 U.S. 49, 52 (2005); see 20 U.S.C. 1400(c)(2). Congress enacted a precursor to the IDEA (the Education of the Handicapped Act of 1975), to address the fact that "1.75 million handicapped children do not receive any educational services, and 2.5 million handicapped children are not receiving an appropriate education." *Board of Educ.* v. *Rowley*, 458 U.S. 176, 179, 191 (1982) (internal citation omitted).

Congress expanded the definition of "children with disabilities" to add "specific learning disability" in 1975, and "autism" and "traumatic brain injury" in 1990. See Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, §101, 104 Stat. 1103; Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, §4(1), 89 Stat. 773, 775. In both instances, Congress recognized that children with these particular impairments were not receiving the special education services to which they were entitled under the Act, and the specific statutory inclusion was intended to ensure and increase the opportunity for children with these impairments to receive a free and appropriate public education.

See S. Rep. No. 204, 101st Cong., 1st Sess. 8-9 (1989); S. Rep. No. 168, 94th Cong., 1st Sess. 9-10 (1975).

In 1997, Congress expanded the definition of a "child with a disability" to include children between age three and nine who are "experiencing developmental delays." 20 U.S.C. 1401(3)(B); See Individuals with Disabilities Education Act Amendments for 1997, Pub. L. No. 101-105, §602(3)(B), 111 Stat 37, 42-43. Congress specifically chose this broad category of disability during a child's early years to ensure services "directly related to the child's needs and prevent locking the child into an eligibility category which may be inappropriate or incorrect." H.R. Rep. No. 95, 105th Cong., 1st Sess. 86 (1997).

The IDEA's overarching substantive goal is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. 1400(d)(1)(A); see *School Comm. of Burlington* v. *Department of Educ. of Mass.*, 471 U.S. 359, 369 (1985). Congress intended that "the term 'unique educational needs' be broadly construed to include the * * * academic, social, health[,] emotional, communicative, physical and vocational needs" of a child with disabilities. H.R. Rep. No. 410, 98th Cong., 1st Sess. 19 (1983). The term "related services" is also broadly interpreted to encompass the medical and other services that provide a child with a disability "the meaningful access to

education that Congress envisioned." *Tatro*, 468 U.S. at 891. Thus, it is consistent with IDEA's "remedial" mandate, and congressional intent and judicial interpretations of related terms, that the phrase "child with a disability" be interpreted broadly such that a child's impairment can be considered under any relevant category of disability. *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 244-245 (2009); see *S-1* v. *Turlington*, 635 F.2d 342, 347 (5th Cir.) (as a statute aimed at remedying a pervasive national problem, the IDEA "should be broadly applied and liberally construed in favor of providing a free and appropriate education to handicapped students"), cert. denied, 454 U.S. 1030 (1981), abrogated on other grounds by *Honig* v. *Doe*, 484 U.S. 305 (1988).

In addition, evaluating whether the manifestations of a child's impairment meet the criteria for any relevant category of disability is fully consistent with a State and local school district's duty under "child find." See 20 U.S.C. 1412(a)(3). The "child find" provisions of the IDEA require local school districts to seek to identify children with a disability, and then ensure that each child is evaluated and provided appropriate special education services. See *ibid.*; see also *Forest Grove*, 557 U.S. at 244-245 (a school district's interpretation of the IDEA's reimbursement provisions that did "not comport with Congress' acknowledgment of the paramount importance of properly identifying each child eligible for services"). In contrast, considering a child's condition only under one possible

category of disability when more than one category may apply is inconsistent with determining whether a child needs services and not focusing myopically on the child's specific classification. See *Heather S.* v. *Wisconsin*, 125 F.3d 1045, 1055 (7th Cir. 1997) ("The IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education."); 20 U.S.C. 1412(a)(3)(B) ("Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability listed in section 1401 of this title and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this subchapter.").

The fact that an impairment may satisfy more than one category of disability does not alter or negate any statutory or regulatory criterion for a category of disability. School officials always must determine whether a child's impairment satisfies the criteria for any relevant category of disability. See Addendum 2-3, 8.[5] Thus, considering more than one category of disability when the different manifestations may fall within different categories is consistent with E.D.'s

[5] In 1997 and 2004, Congress addressed the E.D.'s authority to issue policy letters, including requirements for content, restrictions on scope, and quarterly public notice in the Federal Register. See 20 U.S.C. 1406(c)-(f) (1997) and (2004). The fact that the E.D.'s current policy letters are not "legally binding," 20 U.S.C. 1406(e)(1), does not foreclose our assertion that deference is warranted to E.D.'s letters. See *Michael C.*, 202 F.3d at 650 n.6 (Former Section 1406(f) [now 20 U.S.C. 1406(e)] "does not prevent [the court] from considering [E.D.] policy statements to be persuasive and therefore worthy of deference.").

regulations and policy guidance, and therefore deference is warranted. See *Chase Bank*, 131 S. Ct. at 881; *Taylor*, 313 F.3d at 780 (E.D.'s policy letter filled the gap of ambiguity in the IDEA and the regulatory definition of "parent"); *Michael C.*, 202 F.3d at 649-650.

2. The E.D.'s guidance that a medical problem that is not specifically identified in the regulation for "other health impairment" may still qualify if the condition meets the regulatory criteria and is fully consistent with the purposes of the IDEA and the text of E.D. regulations and guidance. See *Chase Bank*, 131 S. Ct. at 880-881; *Taylor*, 313 F.3d at 780; Addendum 3, 8. One criterion for "other health impairment" is "chronic or acute health problems *such as* asthma, attention deficit disorder or attention deficit hyperactivity disorder, [and] diabetes." 34 C.F.R. 300.7(c)(9) (2005) (emphasis added). The phrase "such as" makes clear that this list of medical conditions sets forth *examples*, and therefore is only illustrative, and not exclusive. See 34 C.F.R. 300.7(c)(9) (2005). This interpretation is fully consistent with the E.D.'s Joint Policy Memorandum and Letter to Fazio. See Addendum 3, 7-8. These policy letters state that a child's diagnosis of ADD, ADHD, or chronic fatigue syndrome can qualify as an "other health impairment" if it meets the regulatory criteria, even though these impairments were not specifically identified in the regulation (at the time of the guidance). See Addendum 3, 8; see also p. 5, n.2, *supra*.

E.M., in his district court pleadings, briefly discussed the Joint Policy Memorandum but did not cite to the Letter to Fazio. See Doc. 156 at 10. Thus, it is understandable that the district court did not address the E.D.'s interpretation of a "child with a disability" or "other health impairment." Instead, the district court determined that the term "other" can be defined only as a distinct alternative to the other named categories of disability and a particular condition, therefore, may not be considered under more than one category of disability. See E.R. 19. The statutory text does not unequivocally demand this conclusion, and therefore substantial deference is warranted to the E.D.'s contrary view. A court must not substitute or impose its own views when, as here, the agency with authority to administer the statute has set forth a reasonable interpretation of an ambiguous statute. See *Chase Bank*, 131 S. Ct. at 880; *National Cable*, 545 U.S. at 982-983 (a court's interpretation may substitute an implementing agency's interpretation only when the statutory text is unambiguous, not because the court disagrees with the agency's interpretation).

Because the E.D.'s carefully considered interpretation of the interplay of the categories of disability, including the category of "other health impairment," and its interpretation of the category "other health impairment" are reasonable and consistent with the purposes and text of the IDEA, E.D. regulations and policy guidance, substantial deference is warranted. See *Honig*, 484 U.S. at 325 n.8;

Tatro, 468 U.S. at 892; *Ms. S.*, 337 F.3d at 1133-1134; *Taylor*, 313. F.3d at 780; *Michael C.*, 202 F.3d at 649-650.

II

A DIAGNOSIS OF CENTRAL AUDITORY PROCESSING DISORDER CAN BE AN "OTHER HEALTH IMPAIRMENT"

The three criteria for an "other health impairment" are (1) a "chronic or acute health problem[]" (2) that "results in limited alertness with respect to the educational environment" and (3) that "adversely affects a child's educational performance." 34 C.F.R. 300.7(c)(9) (2005). The record contains sufficient evidence to conclude that a central auditory processing disorder (CAPD) may qualify as an "other health impairment" or "specific learning disability" depending on a child's diagnosis and the manifestations of the disability. Whether E.M.'s condition falls within "other health impairment" should be determined on remand.

CAPD is a deficiency in an individual's neural processing capacity to understand or identify certain sounds. See E.R. 361, 537-538, 552-553, 557. More specifically, CAPD encompasses an individual's inability or difficulty to: (1) identify the source of a sound, (2) discriminate between sounds (*e.g.*, an inability to distinguish the sound of the letters 'p' and 'b'), (3) determine similarities or differences in patterns of sound, (4) sequence sounds into words, (5) understand speech when other sounds are present, or (6) understand sounds when part of the signal is missing or degraded due to low frequency. See E.R. 537; see also E.R.

362, 558. In an educational or home setting, common symptoms of CAPD are a child's difficulty following oral instructions or directions, difficulty hearing when there is background noise, poor listening skills, distractibility, and inattention. See E.R. 538, 540, 543-544.

While the diagnoses are different, many of the symptoms of CAPD are the same as or similar to symptoms of ADD or ADHD, including "poor auditory attention," "difficulty following oral instructions[,], often asks for repetition[,] slow or delayed response[s]," "difficulty listening with background noise[,] easily distracted," and "weak auditory memory." E.R. 364; see also E.R. 449, 539-540, 553-554. CAPD has been considered "one of the primary deficits that comprises learning disability." See E.R. 541. Research has indicated that "some language disorders and dyslexia may be secondary to deficits in the central auditory processes." See E.R. 539. Other research has shown a "high occurrence of CAPD with other disorders of language and learning, such as attention deficit disorder." E.R. 539. CAPD requires a diagnosis by an audiologist. See E.R. 451-452, 538, 540. While a teacher, parent, or an IEP team may identify symptoms or behaviors that are indicative of the medical condition, a licensed audiologist must conduct an examination to make a medical diagnosis. See E.R. 370, 538, 540, 557.

School districts and courts have addressed IDEA claims by children with multiple diagnoses, including auditory processing disorder or CAPD, but these

opinions have not analyzed the category of disability under which CAPD is recognized. See, *e.g.*, *C.B.* v. *Special Sch. Dist. No. 1, Minneapolis, MN*, 636 F.3d 981, 986 (8th Cir. 2011); *Houston Indep. Sch. Dist.* v. *V.P.*, 582 F.3d 576, 581-582, 584-585 (5th Cir. 2009), cert. denied, 130 S. Ct. 1892 (2010); *C.B.* v. *Garden Grove Unified Sch. Dist.*, 655 F. Supp. 2d 1088, 1095 (C.D. Cal. 2009), aff'd on other grounds, 635 F.3d 1155 (9th Cir. 2011); *B.B.* v. *Perry Twp. Sch. Corp.*, Nos. 1:07cv0323, 1:07cv0731, 2008 WL 2745094, at *4-5, *7 (S.D. Ind. July 11, 2008).

In *C.M.* v. *Department of Educ., Haw.*, No. 10-16240, 2012 WL 662197, at *1-3 (9th Cir. Mar. 1, 2012), this Court upheld the district court's (and administrative judge's) conclusion that a child diagnosed with CAPD and ADHD did not meet the criteria for a "child with a disability" under the IDEA. This opinion, however, is distinguishable from the issues here. See *ibid.* First, this Court found that the district court did not violate its "child find" obligations because, in part, C.M. "was able to perform and compete successfully in the general education classes" and she "was benefitting in the regular classroom" where she received services under her Section 504 plan. *Id.* at *2. In addition, C.M. waived her claim that she was "eligible for special education and related services under the category of 'other health impairment.'" *Id.* at *3. This Court also held, in the alternative, that C.M. did not show that the hearing officer committed clear error by finding that she did not satisfy two of the "other health

impairment" criteria for ADHD (limited alertness or adverse affect on educational performance), but did not address CAPD. See *ibid.* Thus, this Court's affirmance in *C.M.* based on factual findings that the child did not establish that she was a "child with a disability" is substantially different than the district court's erroneous, statutory interpretation of the IDEA that E.M.'s CAPD cannot as a matter of law be an "other health impairment."

In 2005, the federal definition of "other health impairment" included a lengthy list of covered illnesses, including ADD and ADHD. See 34 C.F.R. 300.7(c)(9) (2005); Cal. Code Regs. Tit. 5, §3030(f) (2005); see pp. 4-5, *supra*. As discussed above, the specific conditions are illustrative, and not comprehensive. See pp. 25-27, *supra*. Given the similarity of symptoms caused by CAPD and ADD, CAPD clearly falls within the scope of identified illnesses that could be covered by "other health impairment." CAPD can satisfy the three elements of an "other health impairment": a chronic medical condition that impacts a child's alertness in a classroom and adversely affects the child's ability to learn. See 34 C.F.R. 300.7(c)(9) (2005). Accordingly, a remand is appropriate to determine whether E.M.'s physical problems meet the criteria for "other health impairment."

CONCLUSION

The district court's summary judgment ruling should be vacated and the case remanded for consideration in light of the principles addressed above.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the foregoing Brief Of The United States As Amicus Curiae Supporting Appellant And Urging Remand:

(1) complies with Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B), because it contains 6,841 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font.

s/ Jennifer Levin Eichhorn
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Dated: August 2, 2012

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2012, I electronically filed the foregoing Brief Of The United States As Amicus Curiae Supporting Appellant And Urging Remand with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, which will send notice of the foregoing brief to the following registered CM/ECF users:

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Judge / Administrative Officer

Robert R. Davila Assistant Secretary, Office of Special Education and Rehabilitative Services. Michael L. Williams, Assistant Secretary, Office for Civil Rights. John T. MacDonald, Assistant Secretary, Office of Elementary and Secondary Education.

Case Summary

Children with attention deficit disorder (ADD) who require special education or related services are presently eligible under the IDEA categories of "other health impairment," "specific learning disability," or "serious emotional disturbance." Therefore, a separate category under the IDEA is not necessary for ADD conditions.

The Assistant Secretaries for the Office of Special Education and Rehabilitative Services, the Office for Civil Rights, and the Office of Elementary and Secondary Education issued a joint memorandum on the provision of educational services to children with attention deficit disorder (ADD). According to the memorandum, children with ADD who require special education or related services are presently eligible under the IDEA categories of "other health impairment," "specific learning disability," or "serious emotional disturbance." Therefore, a separate category for ADD conditions is not necessary under the IDEA. In addition, children with ADD who do not require special education or related services may nevertheless be covered by the Section 504 regulations if their ADD substantially limits a major life activity, such as learning. Under Section 504, school districts are obligated to provide regular or special education programs, including necessary modifications and supplementary aids and services, to qualified children with ADD based on their individual needs.

Full Text

Appearances:

I. Introduction

There is a growing awareness in the education community that attention deficit disorder (ADD) and attention deficit hyperactive disorder (ADHD) can result in significant learning problems for children with those conditions.[1] While estimates of the prevalence of ADD vary widely, we believe that three to five percent of school-aged children may have significant educational problems related to this disorder. Because ADD has broad implications for education as a whole, the Department believes it should clarify State and local responsibility under Federal law for addressing the needs of children with ADD in the schools. Ensuring that these students are able to reach their fullest potential is an inherent part of the National education goals and AMERICA 2000. The National goals, and the strategy for achieving them, are based on the assumptions that: (1) all children can learn and benefit from their education; and (2) the educational community must work to improve the learning opportunities for all children.

This memorandum clarifies the circumstances under which children with ADD are eligible for special education services under Part B of the Individuals with Disabilities Education Act (Part B), as well as the Part B requirements for evaluation of such children's unique educational needs. This memorandum will also clarify the responsibility of State and local educational agencies (SEAs and

LEAs) to provide special education and related services to eligible children with ADD under part B. Finally, this memorandum clarifies the responsibilities of LEAs to provide regular or special education and related aids and services to those children with ADD who are not eligible under Part B, but who fall within the definition of "handicapped person" under Section 504 of the Rehabilitation Act of 1973. Because of the overall educational responsibility to provide services for these children, it is important that general and special education coordinate their efforts.

II. Eligibility for Special Education and Related Services under Part B

Last year during the reauthorization of the Education of the Handicapped Act [now the Individuals with Disabilities Education Act, Congress gave serious consideration to including ADD in the definition of "children with disabilities" in the statute. The Department took the position that ADD does not need to be added as a separate disability category in the statutory definition since children with ADD who require special education and related services can meet the eligibility criteria for services under Part B. This continues to be the Department's position.

No change with respect to ADD was made by Congress in the statutory definition of "children with disabilities"; however, language was included in Section 102(a) of the Education of the Handicapped Act Amendments of 1990 that required the Secretary to issue a Notice of Inquiry (NOI) soliciting public comment on special education for children with ADD under Part B. In response to the NOI (published November 29, 1990 in the *Federal Register*,) the Department received over 2000 written comments, which have been transmitted to the Congress. Our review of these written comments indicates that there is confusion in the field regarding the extent to which children with ADD may be served in special education programs conducted under Part B.

A. Description of Part B

Part B requires SEAs and LEAs to make a free appropriate public education (FAPE) available to all eligible children with disabilities and to ensure that the rights and protections of Part B are extended to those children and their parents. 20 U.S.C. 1412(2); 34 CFR §§ 300.121 and 300.2. Under Part B, FAPE, among other elements, includes the provision of special education and related services, at no cost to parents, in conformity with an individualized education program (IEP). 34 CFR § 300.4.

In order to be eligible under Part B, a child must be evaluated in accordance with 34 CFR §§ 300.530-300.534 as having one or more specified physical or mental impairments, and must be found to require special education and related services by reason of one or more of these impairments.[2] 20 U.S.C. 1401(a)(1); 34 CFR § 300.5. SEAs and LEAs must ensure that children with ADD who are determined eligible for services under Part B receive special education and related services designed to meet their unique needs, including special education and related services needs arising from the ADD. A full continuum of placement alternatives, including the regular classroom, must be available for providing special education and related services required in the IEP.

B. Eligibility for Part B services under the "Other Health Impaired" Category

The list of chronic or acute health problems included within the definition of "other health impaired" in the Part B regulations is not exhaustive. The term "other health impaired" includes chronic or acute impairments that result in limited alertness, which adversely affects educational performance. Thus, children with ADD should be classified as eligible for services under the "other health impaired" category in instances where the ADD is a chronic or acute health problem that results in limited alertness, which adversely affects educational performance. In other words, children with ADD, where 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 the ADD.

C. Eligibility for Part B services under other Disability Categories

Children with ADD are also eligible for services under Part B if the children satisfy the criteria applicable to other disability categories. For example, children with ADD are also eligible for services under the "specific learning disability" category of Part B if they meet the criteria stated in §§ 300.5(b)(9) and 300.541 or under the "seriously emotionally disturbed" category of Part B if they meet the criteria stated in § 300.5(b)(8).

III. Evaluations under Part B

A. Requirements

SEAs and LEAs have an affirmative obligation to evaluate a child who is suspected of having a disability to determine the child's need for special education and related services. Under Part B, SEAs and LEAs are required to have procedures for locating, identifying and evaluating all children who have a disability or are suspected of having a disability and are in need of special education and related services. 34 CFR §§ 300.128 and 300.220. This responsibility, known as "child find," is applicable to all children from birth through 21, regardless of the severity of their disability.

Consistent with this responsibility and the obligation to make FAPE available to all eligible children with disabilities, SEAs and LEAs must ensure that evaluations of children who are suspected of needing special education and related services are conducted without undue delay. 20 U.S.C. 1412(2). Because of its responsibility resulting from the FAPE and child find requirements of Part B, an LEA may not refuse to evaluate the possible need for special education and related services of a child with a prior medical diagnosis of ADD solely by reason of that medical diagnosis. However, a medical diagnosis of ADD alone is not sufficient to render a child eligible for services under Part B.

Under Part B, before any action is taken with respect to the initial placement of a child with a disability in a program providing special education and related services, "a full and individual evaluation of the child's educational needs must be conducted in accordance with requirements of § 300.532." 34 CFR § 300.531. Section 300.532(a) requires that a child's evaluation must be conducted by a multidisciplinary team, including at least one teacher or other specialist with knowledge in the area of suspected disability.

B. Disagreements over Evaluations

Any proposal or refusal of an agency to initiate or change the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child is subject to the written prior notice requirements of 34 CFR §§ 300.504-300.505.[3] If a parent disagrees with the LEA's refusal to evaluate a child or the LEA's evaluation and determination that a child does not have a disability for which the child is eligible for services under Part B, the parent may request a due process hearing pursuant to 34 CFR §§ 300.506-300.513 of the Part B regulations.

IV. Obligations Under Section 504 of SEAs and LEAs to Children with ADD Found Not To Require Special Education and Related Services under Part B

Even if a child with ADD is found not to be eligible for services under Part B, the requirements of Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation at 34 CFR Part 104 may be applicable. Section 504 prohibits discrimination on the basis of handicap by recipients of Federal funds. Since Section 504 is a civil rights law, rather than a funding law, its requirements are framed in different terms than those of Part B. While the Section 504 regulation was written with an eye to consistency with Part B, it is more general, and there are some differences arising from the differing natures of the two laws. For instance, the protections of Section 504 extend to some children who do not fall within the disability categories specified in Part B.

A. Definition

Section 504 requires every recipient that operates a public elementary or secondary education program to address the needs of children who are considered "handicapped persons" under Section 504 as adequately as the needs of nonhandicapped persons are met. "Handicapped person" is defined in the Section 504 regulation as any person who has a physical or mental impairment which substantially limits a major life activity (*e.g.*, learning). 34 CFR § 104.3(j). Thus, depending on the severity of their condition, children with ADD *may* fit within that definition.

B. Programs and Services Under Section 504

Under Section 504, an LEA must provide a free appropriate public education to each qualified handicapped child. A free appropriate public education, under Section 504, consists of regular or special education and related aids and services that are designed to meet the individual student's needs and based on adherence to the regulatory requirements on educational setting, evaluation, placement, and procedural safeguards. 34 CFR §§ 104.33, 104.34, 104.35, and 104.36. A student may be handicapped within the meaning of Section 504, and therefore entitled to regular or special education and related aids and services under the Section 504 regulation, even though the student may not be eligible for special education and related services under Part B.

Under Section 504, if parents believe that their child is handicapped by ADD, the LEA must evaluate the child to determine whether he or she is handicapped as defined by Section 504. If an LEA determines that a child is not handicapped under Section 504, the parent has the right to contest that determination. If the child is determined to be handicapped under Section 504, the LEA must make an individualized determination of the child's educational needs for regular or special education or related aids and services. 34 CFR § 104.35. For children determined to be handicapped under Section 504, implementation of an individualized education program developed in accordance with Part B, although not required, is one means of meeting the free appropriate public education requirements of Section 504.[4] The child's education must be provided in the regular education classroom unless it is demonstrated that education in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR § 104.34.

Should it be determined that the child with ADD is handicapped for purposes of Section 504 and needs only adjustments in the regular classroom, rather than special education, those adjustments are required by Section 504. A range of strategies is available to meet the educational needs of children with ADD. Regular classroom teachers are important in identifying the appropriate educational adaptations and interventions for many children with ADD.

SEAs and LEAs should take the necessary steps to promote coordination between special and regular education programs. Steps also should be taken to train regular education teachers and other personnel to develop their awareness about ADD and its manifestations and the adaptations that can be implemented in regular education programs to address the instructional needs of these children. Examples of adaptations in regular education programs could include the following:

providing a structured learning environment; repeating and simplifying instructions about in-class and homework assignments; supplementing verbal instructions with visual instructions; using behavioral management techniques; adjusting class schedules; modifying test delivery; using tape recorders, computer-aided instruction, and other audio-visual equipment; selecting modified textbooks or workbooks; and tailoring homework assignments.

Other provisions range from consultation to special resources and may include reducing class size; use of one-on-one tutorials; classroom aides and note takers; involvement of a "services coordinator" to

oversee implementation of special programs and services, and possible modification of nonacademic times such as lunchroom, recess, and physical education.

Through the use of appropriate adaptations and interventions in regular classes, many of which may be required by Section 504, the Department believes that LEAs will be able to effectively address the instructional needs of many children with ADD.

C. Procedural Safeguards Under Section 504

Procedural safeguards under the Section 504 regulation are stated more generally than in Part B. The Section 504 regulation requires the LEA to make available a system of procedural safeguards that permits parents to challenge actions regarding the identification, evaluation, or educational placement of their handicapped child whom they believe needs special education or related services. 34 CFR § 104.36. The Section 504 regulation requires that the system of procedural safeguards include notice, an opportunity for the parents or guardians to examine relevant records, an impartial hearing with opportunity for participation by the parents or guardian and representation by counsel, and a review procedure. Compliance with procedural safeguards of Part B is one means of fulfilling the Section 504 requirement.[5] However, in an impartial due process hearing raising issues under the Section 504 regulation, the impartial hearing officer must make a determination based upon that regulation.

V. Conclusion

Congress and the Department have recognized the need to provide information and assistance to teachers, administrators, parents and other interested persons regarding the identification, evaluation, and instructional needs of children with ADD. The Department has formed a work group to explore strategies across principal offices to address this issue. The work group also plans to identify some ways that the Department can work with the education associations to cooperatively consider the programs and services needed by children with ADD across special and regular education.

In fiscal year 1991, the Congress appropriated funds for the Department to synthesize and disseminate current knowledge related to ADD. Four centers will be established in Fall, 1991 to analyze and synthesize the current research literature on ADD relating to identification, assessment, and interventions. Research syntheses will be prepared in formats suitable for educators, parents and researchers. Existing clearinghouses and networks, as well as Federal, State and local organizations will be utilized to disseminate these research syntheses to parents, educators and administrators, and other interested persons.

In addition, the Federal Resource Center will work with SEAs and the six regional resource centers authorized under the Individuals with Disabilities Education Act to identify effective identification and assessment procedures, as well as intervention strategies being implemented across the country for children with ADD. A document describing current practice will be developed and disseminated to parents, educators and administrators, and other interested persons through the regional resource centers network, as well as by parent training centers, other parent and consumer organizations, and professional organizations. Also, the Office for Civil Rights' ten regional offices stand ready to provide technical assistance to parents and educators.

It is our hope that the above information will be of assistance to your State as you plan for the needs of children with ADD who require special education and related services under Part B, as well as for the needs of the broader group of children with ADD who do not qualify for special education and related services under Part B, but for whom special education or adaptations in regular education programs are needed. If you have any questions, please contact Jean Peelen, Office for Civil Rights; (Phone: 202/732-1635), Judy Schrag, Office of Special Education Programs (Phone: 202/732-1007); or Dan Bonner, Office of Elementary and Secondary Education (Phone:

202/401-0984).

[1] While we recognize that the disorders ADD and ADHD vary, the term ADD is being used to encompass children with both disorders.

[2] The Part B regulations define 11 specified disabilities. 34 CFR § 300.5(b)(1)-(11). The Education of the Handicapped Act Amendments of 1990 amended the Individuals with Disabilities Education Act [formerly the Education of the Handicapped Act] to specify that autism and traumatic brain injury are separate disability categories. *See* section 602(a)(1) of the Act, to be codified at 20 U.S.C. 1401(a)(1).

[3] Section 300.505 of the Part B regulations sets out the elements that must be contained in the prior written notice to parents:

(1) A full explanation of all of the procedural safeguards available to the parents under Subpart E;

(2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take action, and a description of any options the agency considered and the reasons why those options were rejected;

(3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and

(4) A description of any other factors which are relevant to the agency's proposal or refusal.

34 CFR § 300.505(a)(1)-(4).

[4] Many LEAs use the same process for determining the needs of students under Section 504 that they use for implementing Part B.

[5] Again, many LEAs and some SEAs are conserving time and resources by using the same due process procedures for resolving disputes under both laws.

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21 IDELR 572

21 LRP 2759

Letter to Fazio

Office of Special Education Programs

April 26, 1994

Related Index Numbers

175.040 Eligibility Criteria, Other Health Impairment

345.015 Other Health Impairment, Other Conditions

Judge / Administrative Officer

Thomas Hehir, Director

Case Summary

Are children who have Chronic Fatigue Syndrome (CFS), also known as Chronic Fatigue and Immune Dysfunction Syndrome (CFIDS), eligible for special education and related services under Part B of the IDEA under "other health impaired", or another category of disability?

A child with Chronic Fatigue Syndrome (CFS), also known as Chronic Fatigue and Immune Dysfunction Syndrome (CFIDS), will be eligible for special education and related services as other health impaired (OHI) if the participants of a multidisciplinary team determine the following: that the child has "limited strength, vitality or alertness, due to a chronic or acute health problem," such as CFS; the child's educational performance is adversely affected because of the limited strength, vitality or alertness; and the child requires special education and related services. A child with CFS could also be eligible under another category of disability within Part B if the child is determined to meet the criteria for that disability.

Full Text

Appearances:

Honorable Vic Fazio

House of Representatives

Washington, DC 20515

Text of Inquiry

I am writing on behalf of a constituent who has a child diagnosed with Chronic Fatigue Syndrome (CFS) and who is working with [ ]. local school district to develop a plan for home instruction and educational accommodation of [ ] child's disabilities.

My constituent has requested that I ask the Department of Education to *clarify whether children who have CFS are eligible for special education services.* Specifically:

Would a child diagnosed with Chronic Fatigue Syndrome (CFS), also known as Chronic Fatigue and Immune Disfunction Syndrome (CFIDS) be eligible for special education and related services under Part B of the Individuals with Disabilities Education Act under "other health impaired," as defined by 34 CFR 300.7(b)(8), or under another category of disability?

Any assistance that you can provide in responding to my constituent will be greatly appreciated. Thank you, in advance, for your help with this matter.

Text of Response

This is in response to your letter to Assistant Secretary for Legislation and Congressional Affairs Kay Casstevens concerning children with Chronic Fatigue Immune Dysfunction Syndrome (CFIDS) or Chronic Fatigue Syndrome (CFS). Your letter has been referred to the Office of Special Education Programs for my response. Specifically, you ask the following question:

Would a child diagnosed with [CFIDS] be eligible for special education and related services under Part B of the Individuals with Disabilities Education Act [Part B] under "other health impaired" as defined by 34 CFR [§] 300.7(b)(8), or under another category of disability?

As you know, in order to be eligible for services under Part B, a child must be evaluated as having one or more of thirteen disabilities, and because of those disabilities need special education and related

services. 34 CFR § 300.7(a). The disability "other health impairment" (OHI) is defined as:

. . . having limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes that adversely affects a child's educational performance.

34 CFR § 300.7(b)(8).

The list of chronic or acute health problems included within the definition of "other health impairment" in the Part B regulations is not exhaustive. The term includes chronic or acute impairments that result in limited strength, vitality, or alertness and adversely affect educational performance. In evaluating a child with CFIDS to determine eligibility for special education and related services as OHI, the participants on the multidisciplinary team must determine (1) whether the child has "limited strength, vitality or alertness, due to a chronic or acute health problem," such as CFIDS; (2) whether the child's educational performance is adversely affected because of the limited strength, vitality or alertness; and (3) whether the child requires special education and related services. *See* 34 CFR §§ 300.7(b)(8) and 300.532.

A child with CFIDS or CFS could also be eligible for services under Part B if the child is evaluated and determined to meet the eligibility criteria for any of the other disability categories under Part B, as defined at 34 CFR § 300.7(b)(1)-(13). This determination must be made by the participants on the child's multidisciplinary team, which must include at least one teacher or other specialist with knowledge in the area of suspected disability. 34 CFR § 300.532(e).

Please note that under Part B, a child's entitlement is not to a specific disability classification or label, but to a free appropriate public education. Thus, if a child with CFIDS or CFS is determined eligible for special education and related services, the responsible public agency must ensure that the child receives a program of instruction and support services appropriate to meet his or her special education and related services needs.

I hope that this information is helpful to you. If I may be of further assistance, please let me know.

Thomas Hehir

Director

Office of Special Education Programs

Regulations Cited

34 CFR 300.7(b)(8)
34 CFR 300.7(a)
34 CFR 300.532
34 CFR 300.7(b)(1)-(13)
34 CFR 300.532(e)

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