

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 207, 3208, 3209, 3214, 3602-c, 3713, 4002, 4308, 4355, 4401, 4402, 4403, 4404, 4404-a and 4410

1. Subparagraph (iv) of paragraph (4) and subparagraphs (i), (v) and (vi) of paragraph (7) of subdivision (x) of section 100.2 are amended, effective September 29, 2005, as follows:

(iv) immediately contact the school district where the child's records are located for a copy of such records and coordinate the transmittal of records for students with disabilities consistent with section 200.4(e)(8)(iii) of this Title;

(i) Enrollment. Each school district shall:

(a) ensure that homeless children and youth are not segregated in a separate school, or in a separate program within a school, based on their status as homeless; [and]

(b) to the extent feasible and consistent with the requirements of paragraphs (2) and (4) of this subdivision, keep a homeless child or youth in the school of origin except when doing so is contrary to the wishes of the child's or youth's parent or guardian; and

(c) a student with a disability as defined in section 200.1(zz) of this Title, who transfers school districts within the same academic year, is provided with a free appropriate public education, including services comparable to those described in the previously held individualized education program (IEP) pursuant to section 200.4(e)(8) of this Title.

(v) Local education agency liaison. Each school district shall:

(a)

(b) in the case of an unaccompanied youth, ensure that the local educational agency liaison assists in placement or enrollment decisions under this paragraph, including coordination with the committee on special education for students with disabilities pursuant to section 200.4 of this Title, considers the views of such unaccompanied youth, and provides notice to such youth of the right to appeal pursuant to 42 U.S.C. section 11432(g)(3)(E)(ii) (Public Law 107-110, title X, section 1032, 115 STAT. 1998: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402-9328; 2002; available at the Office of Counsel, State Education Building, Room 148, Albany, NY 12234); and

(c)

(vi) Coordination. Each school district shall coordinate:

(a) the provision of services provided pursuant to subtitle B of title VII of the Mc-Kinney-Vento Homeless Education Assistance Act, as amended, (42 U.S.C. sections 11431 et. seq.) with local social services agencies and other agencies or programs providing services to homeless children and youths and their families, including services and programs funded under the Runaway and Homeless Youth Act (42 U.S.C. sections 5701 et. seq.); [and]

(b) [coordinate] with other school districts on interdistrict issues, such as transportation or transfer of school records; and

(c) implementation of this subdivision with the requirements of the Individuals with Disabilities Education Act (20 U.S.C. 1400 et. seq.).

2. Subparagraph (iii) of paragraph (1) of subdivision (dd) of section 100.2 of the Regulations of the Commissioner of Education is amended, effective September 29, 2005, as follows:

(iii) A school district or BOCES [may] shall include [the local special education comprehensive system of personnel development (CSPD) plan, developed pursuant to 34 CFR 300.221,] as part of its professional development plan a description of the professional development activities provided to all professional staff and supplementary school personnel who work with students with disabilities to assure that they have the skills and knowledge necessary to meet the needs of students with disabilities], provided that such professional development plan meets all requirements set forth in this subdivision and provided that such local CSPD plan meets all other requirements of Federal or State statute, regulation or policy].

3. Part 101 of the Regulations of the Commissioner of Education is repealed, effective September 29, 2005.

4. Subdivisions (e), (s), (t),(x), (dd), (ii), (oo), (qq), (ss), (ww), (zz), (ccc) and (fff) of section 200.1 of the Regulations of the Commissioner of Education are amended, and new subdivisions (hhh), (iii) (jjj) and (kkk) of section 200.1 of the Regulations of the Commissioner of Education are added, effective September 29, 2005, as follows:

(e) Assistive technology device means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a

student with a disability. Such term does not include a medical device that is surgically implanted, or the replacement of such a device.

(s) Guardian ad litem means a person familiar with the provisions of this Part who is appointed from the list of surrogate parents or who is a pro bono attorney appointed to represent the interests of a student in an impartial hearing pursuant to section [200.5(i)(3)(vii)] 200.5(j)(3)(vii) of this Part and, where appropriate, to join in an appeal to the State Review Officer initiated by the parent or board of education pursuant to section [200.5(j)] 200.5(k) of this Part. A guardian ad litem shall have the right to fully participate in the impartial hearing to the extent indicated in section [200.5(i)(3)(ix)] 200.5(j)(3)(ix) of this Part.

(t) General curriculum means the same general education curriculum as for students without disabilities.

(x) Impartial hearing officer means an individual assigned by a board of education pursuant to Education Law, section 4404(1), or by the commissioner in accordance with section 200.7(d)(1)(i) of this Part, to conduct a hearing and render a decision. [Commencing July 1, 1996, no] No individual employed by a school district, school or program serving students with disabilities placed there by a school district committee on special education may serve as an impartial hearing officer and no individual employed by such schools or programs may serve as an impartial hearing officer for two years following the termination of such employment, provided that a person who otherwise qualifies to conduct a hearing under this section shall not be deemed an employee of the school district, school or program serving students with

disabilities solely because he or she is paid by such schools or programs to serve as an impartial hearing officer. An impartial hearing officer shall:

(1)

(2)

(3)

(4) be certified by the commissioner as an impartial hearing officer eligible to conduct hearings pursuant to Education Law, section 4404(1) and subject to suspension or revocation of such certification by the commissioner for good cause in accordance with the provisions of section 200.21 of this Part. In order to obtain and retain such a certificate, an individual shall:

(i)

(ii) attend such periodic update programs as may be scheduled by the commissioner; [and]

(iii) [commencing July 1, 2002,] annually submit, in a format and by a date prescribed by the commissioner, a certification that the impartial hearing officer meets the requirements of paragraphs (1), (2) and (3) of this subdivision[.];

(iv) possess knowledge of, and the ability to understand, the provisions of federal and State law and regulations pertaining to the Individuals with Disabilities Education Act and legal interpretations of such law and regulations by federal and State courts; and

(v) possess knowledge of, and the ability to conduct hearings in accordance with appropriate, standard legal practice and to render and write decisions in accordance with appropriate standard legal practice.

(dd) Mediator means a qualified and impartial individual who is trained in effective mediation techniques to resolve disputes in accordance with Education Law, section 4404-a and 200.5(h) of this Part and who is knowledgeable in laws and regulations relating to the provision of special education services. An individual who serves as a mediator may not have a personal or professional interest which would conflict with his or her objectivity in the mediation process and may not be an employee of a State educational agency that is providing direct services to a student who is the subject of the mediation process or a school district or program serving students with disabilities, provided that a person who otherwise qualifies to conduct mediation under section 200.5(h) of this Part shall not be deemed an employee of the State, a school district, school or a program serving students with disabilities solely because he or she is paid by a community dispute resolution center through grant funds provided by the State Education Department to serve as a mediator.

(ii) Parent means a natural or adoptive parent, a guardian, a person in parental relationship to the child as defined in Education Law section 3212, an individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative with whom the child resides), or a surrogate parent who has been appointed in accordance with section [200.5(m)] 200.5(n) of this Part. The term does not include the State if the student is a ward of the State. A foster parent may act as a parent if the natural or adoptive parent's authority to make educational decisions on the student's behalf has been extinguished under State law; and the foster parent has an ongoing, long-term parental relationship with the student; is willing to make the

educational decisions required of parents; and has no interest that would conflict with the interests of the student.

(oo) Prior written notice means written statements developed in accordance with section 200.5(a) of this Part, and provided to the parents of a student with a disability a reasonable time before the school district proposes to or refuses to initiate or change the identification, evaluation, or educational placement of the student or the provision of a free appropriate public education to the student.

(qq) Related services means developmental, corrective, and other supportive services as are required to assist a student with a disability and includes speech-language pathology, audiology services, interpreting services, psychological services, physical therapy, occupational therapy, counseling services, including rehabilitation counseling services, orientation and mobility services, medical services as defined in this section, parent counseling and training, school health services, school social work, assistive technology services, appropriate access to recreation, including therapeutic recreation, other appropriate developmental or corrective support services, [appropriate access to recreation] and other appropriate support services and includes the early identification and assessment of disabling conditions in students.

(ss) School health services means nursing services provided by a qualified school nurse or other health services provided by a qualified person designed to enable a student with a disability to receive a free appropriate public education as described in the individualized education program of the student.

(ww) Special education means specially designed individualized or group instruction or special services or programs, as defined in subdivision 2 of section 4401 of the Education Law, and special transportation, provided at no cost to the parent, to meet the unique needs of students with disabilities.

(1)

(2)

(3) For purposes of this definition:

(i) The individual needs of a student shall be determined by a committee on special education in accordance with the provisions of section 200.4 of this Part upon consideration of the present levels of performance and expected learning outcomes of the student. Such individual-need determinations shall provide the basis for written annual goals, direction for the provision of appropriate educational programs and services and development of an individualized education program for the student.

The areas to be considered shall include:

(a) academic [or educational] achievement, functional performance and learning characteristics which shall mean the levels of knowledge and development in subject and skill areas, including activities of daily living, level of intellectual functioning, adaptive behavior, expected rate of progress in acquiring skills and information, and learning style;

(b)

(c)

(d)

(ii)

(zz) Student with a disability means a student with a disability as defined in section 4401(1) of the Education Law, who has not attained the age of 21 prior to September 1st and who is entitled to attend public schools pursuant to section 3202 of the Education Law and who, because of mental, physical or emotional reasons, has been identified as having a disability and who requires special services and programs approved by the department. The terms used in this definition are defined as follows:

(1)

(2)

(3)

(4)

(5)

(6) Learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which manifests itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia. The term does not include learning problems that are primarily the result of visual, hearing or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural or economic disadvantage. [A student who exhibits a discrepancy of 50 percent or more between expected achievement and actual achievement determined on an individual basis shall be deemed to have a learning disability.]

(7)

(8)

(9)

(10)

(11)

(12)

(13)

(ccc) Surrogate parent means a person appointed to act in place of parents or guardians when a student's parents or guardians are not known, or when after reasonable efforts, the board of education cannot discover the whereabouts of a parent, the student is an unaccompanied homeless youth or the student is a ward of the State.

(fff) Transition Services means a coordinated set of activities for a student with a disability, designed within [an outcome-oriented] a results-oriented process that [promotes movement] is focused on improving the academic and functional achievement of the student with a disability to facilitate the student's movement from school to post-school activities, including, but not limited to, post-secondary education, vocational [training] education, integrated competitive employment (including supported employment), continuing and adult education, adult services, independent living, or community participation. The coordinated set of activities must be based on the individual student's needs, taking into account the student's strengths, preferences and interests, and shall include needed activities in the following areas:

(1)

(2)

(3)

(4)

(5) [if] when appropriate, acquisition of daily living skills and

functional vocational evaluation.

(hhh) Homeless youth means the same as the term 'homeless child' as defined in section 100.2(x) of this Title.

(iii) Limited English proficient student means the same as the term 'pupils with limited English proficiency' as defined in section 154.2(a) of this Title.

(jjj) Universal design means a concept or philosophy for designing and delivering products and services that are usable by people with the widest possible range of functional capabilities, which include products and services that are directly usable (without requiring assistive technologies) and products and services that are made usable with assistive technologies.

(kkk) Ward of the State means a child or youth under the age of twenty-one:

(1) who is in foster care and whose foster parents are not parents as defined in subdivision (ii) of this section; or

(2) who is not in foster care but whose custody and guardianship has been committed to an authorized agency pursuant to section 384 or 384-b of the Social Services Law; or

(3) who has been placed by a court in the permanent custody of a State or local social services agency or officer, and whose parents as defined in subdivision (ii) of this section are deceased or cannot be located.

5. Subdivisions (a), (b), (d), (e) and (h) and of section 200.2 of the Regulations of the Commissioner of Education are amended and a new subdivision (j) is added, effective September 29, 2005, as follows:

(a) Census and register of students with disabilities. (1) The board of education or trustees of each school district shall conduct a census in accordance with Education Law, sections 3240, 3241 and 3242, to locate and identify all students with disabilities who reside in the district and shall establish a register of such students who are entitled to attend the public schools of the district or are eligible to attend a preschool program in accordance with section 4410 of the Education Law during the next school year, including students with disabilities who are homeless or who are wards of the State. The register of such students and others referred to the committee as possibly having a disability shall be maintained and revised annually by the district committee on special education or the committee on preschool special education, as appropriate. Procedures shall be implemented to assure the availability of statistical data to readily determine the status of each student with a disability in the identification, location, evaluation, placement and program review process. Census data shall be reported by October 1st to the committee on special education or committee on preschool special education, as appropriate.

(2) Data requirements. (i) Procedures shall be designed to record data on each student, and shall include at least the following types of data:

(a)

(b)

(c)

(d)

(e) site where the student is currently receiving an educational

program; [and]

(f) other student information as required by the Individuals with

Disabilities Education Act (20 U.S.C. 1400 et. seq.) and federal regulations, including

but not limited to the student’s race, ethnicity, limited English proficiency status, gender

and disability category;

[f] (g). . . .

(ii)

(3)

(4) Data reporting. The reporting of data shall be conducted in

accordance with the following policies and procedures:

(i)

(ii)

(5)

(6)

(7) [The procedures] Procedures to locate, identify, and

evaluate all nonpublic private elementary and secondary school students with

disabilities, including religious-school children [residing in the school district,] as

required by the Education Law must be established to ensure the equitable participation

of parentally placed private school students with disabilities and an accurate count of such students. The child find activities must be comparable to activities undertaken for students with disabilities in public schools and must be completed in a time period comparable to that for other students attending public schools in the school district. The [board of education] school district shall consult with [appropriate] representatives of private [school students with disabilities, that may include representatives of organizations of nonpublic school groups, selected parents of students with disabilities enrolled in nonpublic schools and selected representatives of the nonpublic schools in the school district, on how to carry out the activities described in this section] schools and representatives of parents of parentally placed private school students with disabilities on the child find process. The school district shall maintain in its records and report to the commissioner, in a manner prescribed by the commissioner, on the number of students enrolled in such private schools by their parents who are evaluated to determine if they are students with disabilities, the number of such students who are determined to have a disability and the number of such students who received special education services under this Part.

(b) Written policy. Each board of education or board of trustees shall adopt written policy that:

- (1)
- (2)
- (3)
- (4)
- (5)

(6)

(7)

(8)

(9) establishes administrative procedures for the selection and board appointment of an impartial hearing officer consistent with the procedures in paragraph (e)(1) of this section and section [200.5(i)] 200.5(j) of this Part; [and]

(10) establishes a plan [by July 1, 2002], pursuant to sections 1604(29-a), 1709(4-a), 2503(7-a) and 2554(7-a) of the Education Law, to ensure that all instructional materials to be used in the schools of the district are available in a usable alternative format, which shall meet the National Instructional Materials Accessibility Standard as defined in 20 U.S.C. section 1474(e)(3)(B) (Public Law section 108-446, section 674, 118 STAT. 2792; Superintendent of Documents, U.S. Government Printing Office, Stop SSOP, Washington, DC 20402-0001; 2004; available at the Office of Vocational and Educational Services for Individuals with Disabilities, Room 1624, One Commerce Plaza, Albany, New York 12234), for each student with a disability in accordance with the student's educational needs and course selections at the same time that such materials are available to nondisabled students. For purposes of this paragraph, alternative format is defined as any medium or format for the presentation of instructional materials, other than a traditional print textbook, that is needed as an accommodation for a student with a disability enrolled in the school district, including but not limited to Braille, large print, open and closed captioned, audio, or an electronic file. An electronic file must be compatible with at least one alternative format conversion

software program that is appropriate to meet the needs of the individual student. The plan shall:

(i)

(ii)

(iii). . . .

(iv)

(v)

(11) establishes administrative practices and procedures to

ensure that:

(i) each regular education teacher, special education teacher,

related service provider and/or other service provider, as defined in clause (a) of this

subparagraph, who is responsible for the implementation of a student's individualized

education program (IEP) is provided a paper or electronic copy of such student's IEP,

including amendments to the IEP made pursuant to section 200.4(g)(2) of this Part,

prior to the implementation of such program:

(a)

(ii)

(iii)

(12) identifies the measurable steps it shall take to recruit, hire,

train and retain highly qualified personnel to provide special education programs and

services;

(13) describes the guidelines for the provision of appropriate

accommodations in the administration of districtwide assessments; and

(14) identifies how the district, to the extent feasible, will use universal design principles in developing and administering any districtwide assessment programs.

(d) Approval of services. (1) Approval of services for students with disabilities. The board of education or board of trustees of each school district shall, upon completion of its review of the [IEP] recommendation of the committee on special education for special education programs and services, including changes to the committee on special education's recommendation made pursuant to section 200.4(g)(2) of this Part, in accordance with section 200.4(e)(1) and (2) of this Part, arrange for the appropriate special education programs and services to be provided to a student with a disability as recommended by the committee on special education. The board shall notify the parent of its action in accordance with section 4402(2)(b)(2) of the Education Law.

(2) Approval of services for preschool students with disabilities. The board of education or the board of trustees of each school district shall, upon completion of the [IEP] recommendation of the committee on preschool special education for special education programs and services, including changes to the committee's recommendation made pursuant to section 200.4(g)(2) of this Part, arrange for appropriate special education programs and services for a preschool student with a disability, as recommended by the committee on preschool special education, from among the services and programs approved for such purpose by the commissioner. The board shall notify the parent, the municipality and the commissioner of its action in accordance with section 4410 of the Education Law.

(e) Maintenance of lists. The board of education or trustees of each school district shall establish a list of:

(1) the name and statement of the qualifications of each impartial hearing officer who is:

(i)

(ii) available to serve in the district in hearings conducted pursuant to Education Law, section 4404(1). Appointment of impartial hearing officers pursuant to Education Law, section 4404(1) shall be made only from such list and in accordance with the rotation selection process prescribed herein and the timelines and procedures in section [200.5(i)] 200.5(j) of this Part. Such names will be listed in alphabetical order. Selection from such list shall be made on a rotational basis beginning with the first name appearing after the impartial hearing officer who last served or, in the event no impartial hearing officer on the list has served, beginning with the first name appearing on such list. Should that impartial hearing officer decline appointment, or if, within 24 hours, the impartial hearing officer fails to respond or is unreachable after reasonable efforts by the district that are documented and can be independently verified, each successive impartial hearing officer whose name next appears on the list shall be offered appointment, until such appointment is accepted. The name of any newly certified impartial hearing officer who is available to serve in the district shall be inserted into the list in alphabetical order;

(2) persons from whom the district shall choose a surrogate parent pursuant to section 200.5(n) of this Part; and

(3)

(h) [Local comprehensive system of personnel development (CSPD) plan.] The board of education or trustees of each school district and each board of cooperative educational services shall [submit to the State Education Department annually, by a date prescribed by the commissioner, a local CSPD] develop and implement a plan as part of the professional development plan pursuant to section 100.2(dd) of this Title [containing the information demonstrating that all personnel providing services to students with disabilities are adequate as prescribed by the commissioner. The CSPD plan] that shall include, but is not [be] limited to, a description of the professional development activities provided to all professional staff and supplementary school personnel who work with students with disabilities to assure that they have the skills and knowledge necessary to meet the needs of students with disabilities. [A school district or BOCES may include the local CSPD plan as part of the professional development plan pursuant to section 100.2(dd) of the commissioner's regulations.]

(i) Responsibility of boards of cooperative educational services (BOCES). (a) Responsibility for ensuring the availability of instructional materials in alternative formats for students with disabilities. By July 1, 2002, each BOCES shall establish a plan to ensure that all instructional materials to be used in the programs of the BOCES are available in a usable alternative format, which shall meet the National Instructional Materials Accessibility Standard as defined in 20 U.S.C. section 1474(e)(3)(B) (Public Law section 108-446, section 674, 118 STAT.2792; Superintendent of Documents, Stop SSOP, U.S. Government Printing Office,

Washington, DC 20402-0001; 2004; available at the Office of Vocational and Educational Services for Individuals with Disabilities, Room 1624, One Commerce Plaza, Albany, New York 12234), for each student with a disability in accordance with the student's educational needs and course selections at the same time that such materials are available to nondisabled students. For purposes of this subdivision, alternative format is defined as any medium or format for the presentation of instructional materials, other than a traditional print textbook, that is needed as an accommodation for a student with a disability enrolled in a program of the BOCES, including but not limited to Braille, large print, open and closed captioned, audio, or an electronic file. An electronic file must be compatible with at least one alternative format conversion software program that is appropriate to meet the needs of the individual student. The plan shall:

- (1)
- (2)
- (3)
- (4)
- (5)

(b) Responsibility to identify and take measurable steps to recruit, hire, train and retain highly qualified personnel. Each BOCES shall identify and take steps recruit, hire, train and retain highly qualified personnel to provide special education programs and services to students with disabilities served by the BOCES.

6. Section 200.3 of the Regulations of the Commissioner of Education is amended, effective September 29, 2005, as follows:

(a) Each board of education or board of trustees shall appoint:

(1) committees on special education in accordance with the provisions of Education Law, section 4402, as necessary to ensure timely evaluation and placement of students. The membership of each committee shall include, but not be limited to:

(i)

(ii) [at least] not less than one regular education teacher of the student whenever the student is or may be participating in the regular education environment;

(iii) not less than one special education teacher of the student, or, if appropriate, [a] not less than one special education provider of the student;

(iv)

(v) a representative of the school district who is qualified to provide or supervise special education and who is knowledgeable about the general education curriculum and the availability of resources of the school district, provided that an individual who meets these qualifications may also be the same individual appointed as the special education teacher or the special education provider of the student or the school psychologist;

(vi)

(vii). . . .

(viii) an additional parent member of a student with a disability residing in the school district or a neighboring school district, provided that the additional parent member may be the parent of a student who has been declassified within a

period not to exceed five years or the parent of a student who has graduated within a period not to exceed five years. [such] Such parent is not a required member if the parents of the student request that the additional parent member not participate in the meeting;

(ix)

(x)

(2) committees on preschool special education in accordance with provisions of Education Law, section 4410 to implement the provisions of section 200.16 of this Part. The membership of each committee on preschool special education shall include, but not be limited to:

(i)

(ii) [a] not less than one regular education teacher of the child whenever the child is or may be participating in the regular education environment;

(iii) [a] not less than one special education teacher of the child, or, if appropriate, [a] not less than one special education provider of the child;

(iv) a representative of the school district who is qualified to provide or supervise special education and who is knowledgeable about the general education curriculum and the availability of preschool special education programs and services and other resources of the school district and the municipality. The representative of the school district shall serve as the chairperson of the committee;

(v)

(vi)

(vii)

(viii)

(ix)

(b)

(c) The board of education in a city school district in a city

having a population in excess of 125,000 inhabitants shall appoint subcommittees on special education to the extent necessary to ensure timely evaluation and placement of students with disabilities. Boards of education or trustees of any school district outside of a city having a population in excess of 125,000 inhabitants may appoint subcommittees on special education to assist the board of education in accordance with Education Law, section 4402(1)(b)(1)(b) and the provisions of this subdivision.

(1)

(2) The membership of each subcommittee shall include, but not be limited to:

(i)

(ii) not less than one regular education teacher of the student

whenever the student is or may be participating in the regular education environment;

(iii) not less than one of the student's special education [teacher]

teachers or, if appropriate, [a] not less than one special education provider of the student;

(iv) a representative of the school district who is qualified to

provide, administer or supervise special education and who is knowledgeable about the general education curriculum and who is knowledgeable about the availability of

resources of the school district, who may also fulfill the requirement of subparagraph (iii) or (v) of this paragraph;

(v)

(vi)

(vii)

(viii)

(3)

(4)

(5)

(6)

(d)

(e) Attendance at committee on special education,

subcommittee or committee on preschool special education meetings. (1) A member of the committee on special education, subcommittee or committee on preschool special education, as appropriate, shall not be required to attend a meeting of the committee, in whole or in part, if the parent and the school district representative appointed to the committee on special education agree in writing that, based on the purpose of the meeting, the attendance of such member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.

(i) The parent shall receive meeting notice pursuant to section 200.5(c) of this Part that includes a statement that the parent and school district can agree that the attendance of a committee member is not necessary.

(ii) Whenever feasible, the parent and school district should reach such agreement prior to the day of the meeting, except that the parent may provide his or her written agreement with the school district on the day of the scheduled meeting.

(2) A member of the committee on special education, subcommittee or committee on preschool special education, as appropriate, may be excused from attending a meeting of the committee, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services if:

(i) the parent and school district representative appointed to the committee on special education agree, and the parent provides consent in writing to the excusal pursuant to section 200.5(b) of this Part; and

(ii) the member to be excused prepares a written summary of his or her input, including recommendations to be considered in the development of the IEP, and submits the summary to the committee and to the parent of the student. The written summary of the member to be excused shall be submitted to the parent at the same time that the parent's consent to excuse the member is requested which must be prior to the day of the meeting, provided that the parent may confirm his or her agreement in writing on the day of the scheduled meeting.

7. Section 200.4 of the Regulations of the Commissioner of Education is amended, effective September 29, 2005 as follows:

(a)

(1)

(2)

(3)

(4)

(5)

(6)

(7)

(8) In the absence of a written agreement to withdraw a referral, as described in paragraph (7) of this subdivision, and in the event that parental consent is not obtained within 30 days of the date of receipt of referral, the chairperson shall document attempts made by the chairperson or other representatives of the committee to obtain parental consent, and shall [request that the board of education initiate an impartial hearing in accordance with section 200.5(b)(1)(i)(c)] notify the board of education that they may utilize the due process procedures described in section 200.5 of this Part to permit the district to conduct an evaluation of the student without the consent of the parent.

(9)

(b) Individual evaluation and reevaluation. (1) Unless a referral is withdrawn pursuant to paragraph (a)(7) or (9) of this section, an individual evaluation of the referred student shall be initiated by a committee on special education and shall include a variety of assessment tools and strategies, including information provided by the parent, to gather relevant functional, [and] developmental and academic information about the student [and] that may assist in determining whether the student is a student with a disability and the content of the student's individualized education program,

including information related to enabling the student to participate and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities). The individual evaluation must be at no cost to the parent, and the initial evaluation must include at least:

(i)

(ii)

(iii). . . .

(iv)

(v)

(2)

(3)

(4) A committee on special education shall arrange for an

appropriate reevaluation of each student with a disability if [conditions] the school district determines that the educational or related services needs, including improved academic achievement and functional performance of the student warrant a reevaluation, or if the student's parent or teacher requests a reevaluation, but not more frequently than once a year, unless the parent and representative of the school district appointed to the committee on special education agree otherwise; and at least once every three years unless the parent and the representative of the school district appointed to the committee on special education agree in writing pursuant to sections 200.5(a) and (b) of this Part that a reevaluation is unnecessary. The reevaluation shall be conducted by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of the student's disability. In

accordance with paragraph (5) of this subdivision, the reevaluation shall be sufficient to determine the student's individual needs, educational progress and achievement, the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education. The results of any reevaluations must be addressed by the committee on special education in a meeting to [reviewing] review and, as appropriate, [revising] revise the student's IEP. To the extent possible, the school district shall encourage the consolidation of reevaluation meetings for the student and other committee on special education meetings for the student.

(5) Determination of needed evaluation data.

(i) As part of an initial evaluation, if appropriate, and as part of any reevaluation in accordance with section 200.4(b)(4) of this Part, a group that includes the committee on special education, and other qualified professionals, as appropriate, shall review existing evaluation data on the student, including evaluations and information provided by the parents of the student, current classroom-based assessments, local or State assessments, [and] classroom-based observations, and observations by teachers and related services providers. The group may conduct its review without a meeting.

(ii) On the basis of that review, and input from the student's parents, the committee on special education and other qualified professionals, as appropriate, shall identify what additional data, if any, are needed to determine:

(a) whether the student has a [particular category of] disability as defined in section 200.1(mm) or (zz) of this Part, or, in the case of a reevaluation of a student, whether the student continues to have such a disability;

(b) the present levels of [performance] academic achievement and related [educational] developmental needs of the student, including the four areas listed in section 200.1(ww) of this Part;

(c)

(d)

(iii)

(iv) If additional data are not needed, the school district must notify the parents of that determination and the reasons for it and of the right of the parents to request an assessment to determine whether, for purposes of services under this Part, the student continues to be a student with a disability and to determine the student's educational needs. The school district is not required to conduct the assessment unless requested to do so by the student's parents.

(6) School districts shall ensure that:

(i) [tests and other assessment procedures] assessments and other evaluation materials used to assess a student under this section:

(a) are provided and administered in the [student's native] language [or other mode of communication] and form most likely to yield accurate information on what the student knows and can do academically, developmentally and functionally, unless it is clearly not feasible to [do] so provide or administer;

(b) [have been validated for the specific purpose for which they are used] are used for purposes for which the assessments or measures are valid and reliable;

(c) are administered by trained and knowledgeable personnel in accordance with the instruction provided by those who developed such [tests or procedures] assessments; and

(d) are selected and administered so as not to be [racially or culturally] discriminatory on a racial or cultural basis;

(ii)

(iii) tests and other [assessment procedures] evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a general intelligence quotient;

(iv)

(v) no single [procedure] measure or assessment is used as the sole criterion for determining whether a student is a student with a disability [and] or for determining an appropriate educational program for a student;

(vi)

(vii)

(viii)

(ix)

(x)

(xi)

(xii) the results of the evaluation are provided to the parents [or persons in parental relationship] in their native language or mode of communication, unless it is clearly not feasible to do so;

(xiii)

(xiv) the procedures for evaluating students suspected of having a learning disability are in accordance with sections 300.540, 300.542 [through] and 300.543 of title 34 of the Code of Federal Regulations (Code of Federal Regulations, 1999 edition, Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402: 1999 – available at the Office of Vocational and Educational Services for Individuals with Disabilities, Room 1624, One Commerce Plaza, Albany, NY 12234);

(xv) the procedures for conducting expedited evaluations are conducted pursuant to Part 201 of this Title; [and]

(xvi) materials and procedures used to assess a student with limited English proficiency are selected and administered to ensure that they measure the extent to which the student has a disability and needs special education, rather than measure the student's English language skills[.] and

(xvii) assessments of students with disabilities who transfer from one school district to another school district in the same academic year are coordinated with such student's prior and subsequent schools, as necessary, and as expeditiously as possible to ensure prompt completion of full evaluations.

(7) The initial evaluation to determine if a student is a student with a disability must be completed within 60 days of receiving parental consent for the evaluation. The 60-day timeframe shall not apply if:

(i) a student enrolls in a school served by the school district after the relevant timeframe in this paragraph has begun and prior to a determination by the student's previous school district as to whether the student is a student with a

disability, but only if the subsequent school district is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and subsequent school district agree to a specific time when the evaluation will be completed; or

(ii) the parent of a student repeatedly fails or refuses to produce the student for the evaluation.

(8) The screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education.

(9) No student shall be required to obtain a prescription for a drug or other substance identified under schedule I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)) as a condition of receiving an evaluation under this Part (United States Code, 2000 edition, volume 11; Superintendent of Documents, U.S. Government Printing Office, Stop SSOP, Washington, D.C. 20402-0001; available at the Office of Vocational and Educational Services for Individuals with Disabilities, Room 1624, One Commerce Plaza, Albany, NY 12234).

(c) Eligibility Determinations

(1)

(2) A student [may] shall not be determined [to be] eligible for special education if the determinant factor [for that eligibility determination] is:

(i) lack of appropriate instruction in reading, including explicit and systematic instruction in phonemic awareness, phonics, vocabulary development, reading fluency (including oral reading skills) and reading comprehension strategies;

(ii) lack of instruction in [or] math; or

(iii) limited English proficiency.

(3) A school district must evaluate a student with a disability prior to determining that the student is no longer a student with a disability, in accordance with paragraph (b)(4) of this section, and the school district must provide a copy of the evaluation report and the documentation of eligibility to the student's parent.

(4) A school district is not required to conduct a reevaluation of a student before the termination of a student's eligibility due to graduation with a local high school or Regents diploma or exceeding the age eligibility for a free appropriate public education but is required to provide such student with a summary of the student's academic achievement and functional performance, which shall include recommendations on how to assist the student in meeting his or her postsecondary goals.

[(4)] (5)

(6) Learning disabilities. In determining whether a student has a learning disability as defined in section 200.1(zz)(6) of this Part, the school district:

(i) may use a process that determines if the student responds to scientific, research-based intervention as part of the evaluation procedures pursuant to paragraph (b) of this section; and

(ii) is not required to consider whether a student has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation or mathematical reasoning.

(d) Recommendation. [Individualized education program (IEP).]

For a student not previously identified as having a disability, the committee on special education shall provide a recommendation to the board of education, which shall arrange for the appropriate special education programs and services to be provided to the student with a disability within 60 school days of the receipt of consent to evaluate.

For a student with a disability referred for review pursuant to subdivision (f) of this section, a recommendation shall be provided to the board of education, which shall arrange the appropriate special education programs and services to be provided to the student with a disability within 60 school days of the referral for review of the student with a disability. Prior to development of a recommendation, the committee shall ensure that the appropriateness of the resources of the regular education program, including educationally related support services, and academic intervention services, has been considered.

(1)

(2) Individualized education program (IEP). If the student has been determined to be eligible for special education services, the committee [must] shall develop an [individualized education program (IEP)] IEP. In developing the recommendations for the IEP, the committee must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the results of the student's performance on any general State or districtwide assessment programs; and any special

considerations in paragraph (3) of this subdivision. The recommendation shall include the following.[:]

(i) Present levels of performance. The IEP shall report the present levels of performance and indicate the individual needs of the student according to each of the four areas listed in section 200.1(ww) of this Part, including:

(a) how the student's disability affects involvement and progress in the general education curriculum; or

(b) for preschool students, as appropriate, how the disability affects the student's participation in appropriate activities[; or].

[(c) for students age 15 (and at a younger age, if determined appropriate), a statement of the student's needs, taking into account the student's preferences and interests, as they relate to transition from school to post-school activities as defined in section 200.1(fff);]

(ii) Disability classification. The IEP shall indicate the classification of the disability pursuant to section 200.1(mm) or (zz) of this Part.

(iii) Measurable annual goals. (a) The IEP shall list measurable annual goals, consistent with the student's needs and abilities[, including benchmarks or short-term instructional objectives] and evaluative criteria, evaluation procedures and schedules to be used to measure progress toward the annual goals and to be followed during the period beginning with placement and ending with the next scheduled review by the committee. [Such benchmarks or short-term instructional objectives shall be measurable, intermediate steps between present levels of educational performance and

the annual goals that are established for a student with a disability.] The measurable annual goals must relate to:

[(a)] (1) meeting the student's needs that result from the student's disability to enable the student to be involved in and progress in the general education curriculum; and

[(b)] (2) meeting each of the student's other educational needs that result from the student's disability;

(b) The IEP shall identify when periodic reports on the progress the student is making toward the annual goals (such as through the use of quarterly or other periodic reports that are concurrent with the issuance of report cards) will be provided to the student's parents.

(iv) Short-term instructional objectives and benchmarks. For students who take alternate assessments aligned with alternate achievement standards and for preschool students with disabilities, the IEP shall include a description of the short-term instructional objectives and/or benchmarks that are the measurable intermediate steps between the student's present level of performance and the measurable annual goal.

(v) Special education program and services. (a) The IEP shall indicate the recommended special education program and services as defined in sections 200.1(qq) and 200.1(ww) of this Part from the options set forth in section 200.6 of this Part or, for preschool students from those options set forth in section 200.16(h) of this Part, and that are, to the extent practicable, based on peer-reviewed research]; the class size, if appropriate; the supplementary aids and services to be provided to the

student, or on behalf of the student; and a statement of the program modifications or supports for school personnel] that will be provided for the student:

[(a)] (1) to advance appropriately toward attaining the annual goals;

[(b)] (2) to be involved and progress in the general education curriculum and to participate in extracurricular and other nonacademic activities; and

[(c)] (3) to be educated and participate with other students with disabilities and nondisabled students in the activities described in this section[;].

[(v)] (b) _____ The recommended program and services shall, as appropriate indicate:

(1) the regular education classes in which the student will receive consultant teacher services;

(2) the class size, as defined in section 200.1(i) of this Part, if appropriate;

(3) the supplementary aids and services and program modifications to be provided to the student or on behalf of the student;

(4) a statement of supports for school personnel on behalf of the student;

(5) the extent to which the student's parents will receive parent counseling and training as defined in section 200.1(kk) of this Part, when appropriate;

(6) any assistive technology devices or services needed for the student to benefit from education, including the use of such devices in the student's home or in other settings;

(7) the anticipated frequency, duration and location and, for a preschool student with a disability, the intensity for each of the recommended programs and services, including the supplementary aids and services and program modifications to be provided to or on behalf of the student;

(8) if the recommendation for a preschool student is for one or more related services selected from the list maintained by the municipality, or itinerant services, the child care location arranged by the parent or other site at which each service shall be provided; and

(9) the projected date for initiation of the recommended special education program and services.

(vi) Testing accommodations. The IEP shall provide a statement of any individual testing accommodations to be used consistently by the student in the recommended educational program and in the administration of districtwide assessments of student achievement and, in accordance with department policy, State assessments of student achievement that are necessary to measure the academic achievement and functional performance of the student.

[(vi)] (vii) Participation in State and districtwide assessments.

[indicate if] If the student will [not] participate in an alternate assessment on a particular State or [local] districtwide [assessments (or part of an assessment), why the assessment is not appropriate for the student and how the student will be assessed]
assessment of student achievement, the IEP shall provide a statement of why the student cannot participate in the regular assessment and why the particular alternate assessment selected is appropriate for the student.[;]

[(vii)] (viii) Participation in regular programs. The IEP shall provide:

(a) an explanation of the extent, if any, to which the student will not participate in the regular education programs; or

(b) for preschool students, an explanation of the extent, if any, to which the student will not participate in appropriate activities with age-appropriate nondisabled peers;

(c) identify if the provision of IEP services for a preschool child with a disability will be in a setting with no regular contact with age-appropriate peers without disabilities; and

(d) if a student is not participating in a regular physical education program, the extent to which the student will participate in specially-designed instruction in physical education, including adapted physical education[;].

[(viii)] provide for those students age 14 and updated annually, a statement of the transition service needs of the student under applicable components of the student's IEP that focuses on the student's courses of study, such as participation in advanced-placement courses or a vocational education program;]

(ix) Transition services. [provide, for] For those students beginning not later than the first IEP to be in effect when the student is age 15 (and at a younger age, if determined appropriate), and updated annually, the IEP shall, under the applicable components of the student's IEP, include: [a statement of the student's projected post-school outcomes, based on the student's needs, preferences, and interests, in the areas of employment, post secondary education, and community living

and] a statement of the needed transition services as defined in section 200.1(fff) of this Part, including]

(a) a statement of the student's needs, taking into account the student's preferences and interests, as they relate to transition from school to post-school activities as defined in section 200.1(fff);

(b) appropriate measurable postsecondary goals based upon age appropriate transition assessments relating to training, education, employment and, where appropriate, independent living skills;

(c) a statement of the transition service needs of the student that focuses on the student's courses of study, such as participation in advanced-placement courses or a vocational education program;

(d) needed activities to facilitate the student's movement from school to post-school activities, including instruction, related services, community experiences, the development of employment and other post-school adult living objectives and, when appropriate, acquisition of daily living skills and functional vocational evaluation; and

(e) a statement of the responsibilities of the school district and, when applicable, participating agencies for the provision of such services and activities that promote movement from school to postschool opportunities, or both, before the student leaves the school setting. [Needed activities shall be provided in each area specified in section 200.1(fff)(1) through (4) and, as appropriate, (5) of this Part;]

(x) [provide a statement of how the student's parents will be regularly informed of their child's progress, at least as often as parents are informed of

their nondisabled student's progress, toward the annual goals and the extent to which that progress is sufficient to enable the student to achieve the goals by the end of the year; (xi) 12-month services. For students eligible for 12-month service and/or program, the IEP shall indicate the [projected date for initiation of special education and related services and supplementary aids and services, the frequency, location and duration of such services, whether the student is eligible for a 12-month special service and/or program and the] identity of the provider of services during the months of July and August, and, for preschool students determined by the committee on preschool special education to require a structured learning environment of 12 months duration to prevent substantial regression, a statement of the reasons for such recommendation.

(xi) Projected date of annual review. The IEP shall indicate the projected date of the review of the student's need for such services[;].

[(xii) describe any assistive technology devices or services needed for the student to benefit from education;

(xiii) provide a statement of any individual testing accommodations to be used consistently by the student in the recommended educational program and in the administration of district-wide assessments of student achievement and, in accordance with department policy, State assessments of student achievement that are needed in order for the student to participate in the assessment; and]

(xiv) Placement. The IEP shall indicate the recommended placement.

(3) Consideration of special factors. The CSE shall:

(i) in the case of a student whose behavior impedes his or her learning or that of others, consider[, when appropriate,] strategies, including positive behavioral interventions and supports and other strategies to address that behavior;

(ii)

(iii)

(iv)

(v)

(vi)

(4) Such recommendations shall:

(i) be developed in meetings of the committee on special education, except as provided in subdivision (g) of this section.

(a)

(b)

(c)

(d) when conducting a meeting of the committee on special education, the parent and the representative of the school district appointed to the committee on special education may agree to use alternative means of meeting participation, such as videoconferences and conference calls.

(ii) be developed in conformity with the least restrictive environment provisions of this Part.

(a)

(b)

(c)

(d) a student with a disability must not be removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

(5)

(6)

(e) IEP implementation. (1) Within 60 school days of the receipt of consent to evaluate for a student not previously identified as having a disability, or within 60 school days of the referral for review of the student with a disability, the board of education shall arrange for appropriate special programs and services, except that if such recommendation is for placement in an approved in-state or out-of-state private school, the board shall arrange for such programs and services within 30 school days of the board's receipt of the recommendation of the committee.

(i)

(ii) The school district shall ensure that each student with a disability has an IEP in effect at the beginning of each school year.

(2)

(3) The school district shall ensure that the recommendations on a student's IEP, including changes to the IEP made pursuant to subdivision (g) of this section, are implemented, including but not limited to:

(i)

(ii)

(iii)

(iv) ensuring that a copy of the IEP is provided to the student's parents, including a revised copy of the IEP at the parent's request with the amendments developed pursuant to subdivision (g) of this section incorporated, at no cost to the student's parents.

(4)

(5)

(6)

(7) The school district must provide special education and related services to a student with a disability in accordance with the student's IEP and must make a good faith effort to assist the student to achieve the annual goals and, if appropriate, short-term instructional objectives or benchmarks listed in the student's IEP.

(8) Students with disabilities who transfer school districts. (i) Transfer within New York State. In the case of a student with a disability who had an IEP that was in effect in this State and who transfers from one school district and enrolls in a new school district within the same academic year, the new school district shall provide such student with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents, until such time as the school district adopts the previously held IEP or develops, adopts and implements a new IEP that is consistent with federal and State law and regulations.

(ii) Transfer from outside New York State. In the case of a student with a disability who transfers school districts within the same academic year,

who enrolls in a new school district and who had an IEP that was in effect in another State, the school district shall provide such student with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents, until such time as the school district conducts an evaluation pursuant to this section, if determined to be necessary by such school district, and develops a new IEP, if appropriate, that is consistent with federal and State law and regulation.

(iii) Transmittal of Records. (a) To facilitate the transition for a student described in this paragraph, the new school district in which the student enrolls shall take reasonable steps to promptly obtain the student's records, including the IEP and supporting documents and any other records relating to the provision of special education services to the student, from the previous school in which the student was enrolled pursuant to 34 C.F.R. section 99.31(a)(2) (Code of Federal Regulations, 2004 edition, Superintendent of Documents, U.S. Government Printing Office, Stop SSOP, Washington, DC 20402-0001: 2004 – available at the Office of Vocational and Educational Services for Individuals with Disabilities, Room 1624, One Commerce Plaza, Albany, NY 12234).

(b) The previous school in which the student was enrolled shall take reasonable steps to promptly respond to such request from the new school.

(9) The school district shall not require a student with a disability to obtain a prescription for a drug or other substance identified under schedule I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. section 812(c)) as a condition of receiving services under this Part (United States Code, 2000 edition,

volume 11; Superintendent of Documents, U.S. Government Printing Office, Stop SSOP, Washington, D.C. 20402-0001: 2001 - available at the Office of Vocational and Educational Services for Individuals with Disabilities, Room 1624, One Commerce Plaza, Albany, NY 12234).

(f) Annual review [and reevaluation]. The individualized education program (IEP) of each student with a disability shall be reviewed and, if appropriate, revised, periodically but not less than annually to determine if the annual goals for the student are being achieved. [(1)] Any meeting to develop, review or revise the IEP of each student with a disability to be conducted by the committee on special education or subcommittee thereof, pursuant to section 4402(1)(b)(2) of the Education Law, shall be based upon review of a student's IEP and other current information pertaining to the student's performance.

(1) Such review shall consider the following factors:

[(i)] (a) [consider] the strengths of the student[.];

(b) the concerns of the parents for enhancing the education of their child[.];

(c) the results of the initial or most recent evaluation of the student[.];

(d) as appropriate, the results of the student's performance on any general State or district-wide assessment programs[.];

(e) the academic, developmental and functional needs of the student;

(f) the special factors described in paragraph (d)(3) of this section[,]; and

(g) the educational progress and achievement of the student with a disability and the student's ability to participate in instructional programs in regular education and in the least restrictive environment[; and].

[(ii) upon consideration of the factors in clause (a) of this paragraph, revise the IEP as appropriate to address]

(2) If appropriate, the IEP must be revised to address:

(a) any lack of expected progress toward the annual goals and in the general education curriculum or participation in appropriate activities for preschool students with disabilities, if appropriate;

(b) the results of any reevaluation conducted pursuant to this Part and any information about the student provided to, or by, the parents;

(c) the student's anticipated needs;

(d) or other matters, including a student's need for test accommodations and/or modifications and the student's need for a particular device or service (including an intervention, accommodation or other program) in consideration of the special factors contained in paragraph (3) of subdivision (d) of this section in order for the student to receive a free appropriate public education.

~~[(2)](3)~~

~~[(3)] (4)~~ Upon completion of the annual review, the committee on special education shall notify the parent of the committee's recommendation in accordance with section ~~[200.5(a)(4)]~~ 200.5(a) of this Part.

~~[(4)~~ In accordance with paragraph (b)(4) of this section, the results of any reevaluations must be addressed by the committee on special education in a meeting to review, and as appropriate, revise the student's IEP.]

(g) Changes to the IEP after the annual review. (1) In making changes to a student's IEP after the annual review meeting for that school year, the parent of the student with a disability and the representative of the school district appointed to the committee on special education may agree not to convene the committee on special education for the purposes of making such changes, and instead may develop a written document to amend or modify the student's current IEP.

(2) Amendments to the IEP. Amendments to an IEP made after the annual review may be made by rewriting the IEP or by developing a written document to amend or modify the student's current IEP, provided that:

(a) the parent shall receive prior written notice of any changes to the IEP pursuant to section 200.5(a) of this Part; and

(b) upon request, the parent shall be provided a revised copy of the IEP with the amendments incorporated.

(h) Requests to the committee on special education pursuant to section 4005 of the Education Law. (1). . . .

(2) A committee on special education which receives such a request shall:

(i)

(ii) in the event that the parent does not grant consent or fails to respond to a request for consent, [within five days after receipt of the request for such consent,] the committee shall notify the board of education [of the need to initiate a formal impartial hearing to be conducted pursuant to section 200.5(i)] that they may utilize the procedures described in section 200.5 of this Part[,], to permit the district to conduct an evaluation of the student without the consent of the parent;

(iii)

(iv)

(3)

[(h)] (i) Written notice upon graduation or aging out. Pursuant to Education Law, section 4402(1)(b)(5), the committee on special education or, in the case of a State-operated school, the multidisciplinary team, shall provide written notice to the parents or guardian of each student specified in subparagraphs (1)(i) and (ii) of this subdivision and, if such student is 18 years of age or older, to the student, of the date upon which the student will no longer be entitled to receive tuition free educational services by reason of receipt of a high school diploma or in accordance with Education Law, section 4402(5), whichever is earlier.

(1)

(2)

(3)

(4)

(5)

8. Section 200.5 of the Regulations of the Commissioner of Education is amended, effective September 29, 2005 as follows:

(a) Prior written notice and other written notifications. (1)

[Written prior] Prior written notice that meets the requirements of section 200.1(oo) of this Part must be given to the parents of a student with a disability a reasonable time before the school district proposes to or refuses to initiate or change the identification, evaluation, educational placement of the student or the provision of a free appropriate public education to the student.

(2) If the prior written notice relates to an action proposed by the school district that also requires parental consent under subdivision (b) of this section, the district must give notice at the same time it requests parent consent.

(3) The prior written notice must include:

(i)

(ii)

(iii)

(iv)

(v) a description of [any other] the factors that the district considered and the reasons why those options were rejected;

(vi)

(vii)

(4) The prior written notice must be written in language understandable to the general public, and provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so. If the native language or other mode of communication of the parent is not a written language, the school district shall take steps to ensure that the notice is translated orally or by other means to the parent in his or her native language or other mode of communication; that the parent understands the content of the notice; and that there is evidence that the requirements of this section have been met.

(5) In addition to the requirements of paragraphs (3) and (4) of this subdivision:

(i) Upon receipt of a referral for initial evaluation or prior to conducting a reevaluation, such prior written notice shall include a description of the proposed evaluation or reevaluation and the uses to be made of the information and indicate that the parent may submit evaluation information which, if submitted, shall be considered by the committee on special education as part of its evaluation or review. [Notice provided to parents of students referred for a reevaluation must indicate that the parents have the right to request a test or assessment as part of the reevaluation to determine whether the student continues to be a student with a disability under this Part.

(ii) Upon a board of education's disagreement with the recommendation of the committee on special education pursuant to section 200.4(e)(2) of this Part, the notice to the parent and to the committee shall set forth in writing a statement of the board of education's reasons and indicate that the recommendation will

be sent back to the committee, with notice of the need to schedule a timely meeting to review the board's concerns and to revise the IEP as deemed appropriate.]

[(iii)] (ii) Prior to the student's graduation with a local high school or Regents diploma, such prior written notice must indicate that the student is not eligible to receive a free appropriate public education after graduation with the receipt of the local high school or Regents diploma, unless the school district provides such services to nondisabled students pursuant to section 3202 of the Education Law.

[(iv)] (iii) Prior to the student's graduation with an individualized education program (IEP) diploma, such prior written notice must indicate that the student continues to be eligible for a free appropriate public education until the end of the school year in which the student turns age 21 or until the receipt of a regular high school diploma.

(6) Other required notifications. A parent of a student with a disability shall also be provided written notification as follows.

(i) If the committee on special education and other qualified professionals, as appropriate, determine in accordance with section 200.4(b)(5) of this Part that no additional data are needed to determine whether the student continues to be a student with a disability and to determine the student's educational needs, the school district must notify the parents of that determination and the reasons for the determination and the right of such parents to request an assessment to determine whether the student continues to be a student with a disability and to determine the student's education needs.

(ii) Upon a board of education's disagreement with the recommendation of the committee on special education pursuant to section 200.4(e)(2) of this Part, the notice to the parent and to the committee shall set forth in writing a statement of the board of education's reasons and indicate that the recommendation will be sent back to the committee, with notice of the need to schedule a timely meeting to review the board's concerns and to revise the IEP as deemed appropriate.

[(v)] (iii)

[(vi)] (iv)

[(vii)] (v)

(7) A parent of a student with a disability may elect to receive prior written notice and other required notifications by an electronic mail (e-mail) communication if the school district makes this option available.

(b) Consent. (1) Written consent of the parent, defined in section 200.1(l) of this Part, is required:

(i) prior to conducting an initial evaluation or reevaluation, except that:

(a)

(b)

(c) in the event the parent of the student to be evaluated does not grant consent for an initial evaluation, such parent shall be informed by the committee chairperson that, upon request, the parent will be given an opportunity to attend an informal conference with the committee or designated professionals most familiar with the proposed evaluation, the person who referred the student for such an

evaluation, and counsel or an advisor of the parent's choice, at which time the parent shall be afforded an opportunity to ask questions regarding the proposed evaluation. If at this meeting the parent and the person initiating the referral agree in writing that the referral [in] is not warranted, the referral shall be withdrawn. Except in the case of a preschool child, if the parent does not request or attend such a conference, or continues to withhold consent for evaluation otherwise required for a period of 30 days after the date of receipt of a referral, the board of education [shall initiate an impartial hearing to be conducted in accordance with subdivision (i) of this section for the purpose of determining whether such an evaluation shall be conducted without parental consent] may pursue the initial evaluation of the student by utilizing the due process procedures described in this section;

(ii)

(iii)

(iv)

(v)

(vi) prior to excusing a member of the committee on special education from attending a committee meeting, in whole or in part, pursuant to section 200.3(e) of this Part.

(2)

(3) If the parents of a student with a disability refuse consent for an initial evaluation or reevaluation, the school district may continue to pursue those evaluations by using the due process procedures in section 200.5 of this Part.

(4) If the parent of the student refuses to consent or fails to respond to a request to provide such consent to the provision of special education programs and services, the school district shall not provide the special education program and services to the student and shall not use the due process procedures described in this section to challenge the parent's refusal to consent.

(i) The school district shall not be considered to be in violation of the requirements to make available a free appropriate public education to the student for the failure to provide such student with the special education program and services for which the school district requests such consent; and

(ii) the school district shall not be required to convene a meeting of the committee on special education or develop an IEP under section 200.4 of this Part for the special education program and services for which the school district requests such consent.

(4) Consent for a ward of the State. If the student is a ward of the State and is not residing with the student's parent, the school district shall make reasonable efforts to obtain the informed consent from the parent of the student for an initial evaluation to determine whether the student is a student with a disability. The school district is not required to obtain informed consent from the parent of a student, as defined in section 200.1(ii) of this Part, for an initial evaluation to determine eligibility for special education services if.:

(a) despite reasonable efforts to do so, the school district cannot discover the whereabouts of the parent of the student; or

(b) the rights of the parents of the student have been terminated in accordance with State law; or

(c) the rights of the parent to make educational decisions have been subrogated by a judge in accordance with State law.

(5) If the student is an unaccompanied homeless youth, consent for an initial evaluation may be provided by a surrogate parent, or, to the extent authorized by federal law and regulations, consent may be given by an employee of a temporary housing facility that is operated or approved by a local social services district or a residential facility for runaway and homeless youth, provided that such a role is temporary until a surrogate parent can be appointed pursuant to section 200.5(n) of this Part and provided that the role of the representative of the homeless program shall not conflict with, or be in derogation of, the provision of a free appropriate education to a homeless youth.

(c) Notice of meetings. (1) Whenever the committee on special education proposes to conduct a meeting related to the development or review of a student's IEP, or the provision of a free appropriate public education to the student, the parent must receive notification in writing at least five days prior to the meeting. The meeting notice may be provided to the parent less than five days prior to the meeting to meet the timelines in accordance with Part 201 of this Title and in situations in which the parent and the school district agree to a meeting that will occur within five days. The parent may elect to receive the notice of meetings by an electronic mail (e-mail) communication if the school district makes such option available.

(2) Such notice shall:

(i)

(ii)

(iii)

(iv)

(v)

(vi) if the meeting is being conducted by a subcommittee on special education, inform the parent(s) that, upon receipt of a written request from the parent, the subcommittee shall refer to the committee on special education any matter on which the parent(s) disagrees with the subcommittee's recommendation concerning a modification or change in the identification, evaluation, educational placement or provision of a free appropriate public education to the student; [and]

(vii) state that the parent and the school district may agree in writing, in accordance with section 200.3(e) of this Part, that:

(a) the attendance of a member of such committee is not necessary; and/or

(b) that a member of such committee may be excused, in whole or in part, with written consent of the parent; and

(viii) if the purpose of the meeting is to consider transition services, the meeting notice must also:

(a)

(b)

(c)

(d) Parent participation in CSE meetings. (1) Each school district shall take steps to ensure that one or both of the student's parents are present at each committee on special education meeting or are afforded the opportunity to participate, including:

(i)

(ii)

(iii) using other methods to ensure parent participation, including individual or conference telephone calls [if neither parent can attend] pursuant to paragraph (7) of this subdivision.

(2)

(3)

(4)

(5)

(6)

(7) When conducting a meeting of the committee on special education, the school district and the parent may agree to use alternative means of participation, such as videoconferences or conference telephone calls.

(e)

(f) Procedural safeguards notice. (1)

(2)

(3) A copy of such notice must be given to the parents of a student with a disability, at a minimum one time per year and also:

(i) upon initial referral or parental request for evaluation;

- (ii) [upon each notification of an IEP meeting;
- (iii) upon reevaluation of the student; and
- (iv)] upon [receipt of a request for] the first filing of a due process

hearing request notice to request mediation or an impartial hearing as described in [subdivision (i)] subdivisions (h) and (j) of this section; and

(iii) upon request by a parent.

(4) The procedural safeguards notice must include a full explanation of all the procedural safeguards available under this Part relating to:

- (i)
- (ii)
- (iii). . . .
- (iv)
- (v) opportunity to present and resolve due process complaints

[to initiate due process hearings], including the time period in which to request an impartial hearing, the opportunity for the school district to resolve the complaint and the availability of mediation;

- (vi)
- (vii)
- (viii)
- (ix) [mediation;
- (x)] due process hearings, including requirements for disclosure

of evaluation results and recommendations;

[(xi)] (x)

[(xii)] (xi) civil action, including the time period in which to file such actions;

[(xiii)] (xii)

[(xiv)] (xiii)

[(xv)] (xiv)

(5) A school district may place a current copy of the procedural safeguards notice on its Internet website if such website exists.

(6) A parent of a student with a disability may elect to receive the procedural safeguards notice by an electronic mail (e-mail) communication if the school district makes such option available.

(g)

(h) Mediation. (1) Each school district must ensure that procedures are established and implemented to allow parties to resolve disputes involving any matter for which an impartial due process hearing may be brought through a mediation process [that, at a minimum, must be available whenever a hearing is requested under this section], including matters arising prior to the filing of a request for an impartial hearing pursuant to subdivisions (j) and (k) of this section. Such procedures must ensure that:

(i) the mediation process is voluntary on the part of the parties;

(ii) the mediation process is not used to deny or delay a parent's right to a due process hearing or to deny any other rights afforded under this Part;

(iii) the mediation session is conducted by a qualified and impartial mediator, as defined in section 200.1(dd) of this Part, who is trained in effective

mediation techniques, is knowledgeable in laws and regulations relating to the provision of special education services and who is selected by the community dispute resolution center on a random, i.e., rotation basis or, if not selected on a random basis, then by mutual agreement of both parties;

(iv)

(v) discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings[and the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of the process;] and

(vi) [an agreement reached by the parties to the dispute in the mediation process is set forth in a written mediation agreement] in the case that a resolution is reached to resolve the complaint through the mediation process, the parties shall execute a legally binding written agreement that sets forth the resolution and that states that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding. The agreement shall be signed by both the parent and a representative of the school district who has the authority to bind the school district. The agreement is enforceable in any State court of competent jurisdiction or in a district court of the United States.

(2) Opportunity to meet with a disinterested party. A school district may establish procedures [for] that provide parents and schools who elect not to use the mediation process the opportunity to meet, at a time and location convenient to the parents, with a disinterested party who is from a community dispute resolution

center who would explain the benefits of the mediation process, and encourage the parents to use the process; except that, a school district may not deny or delay a parent's right to a due process hearing under this section if the parent elects not to participate in this meeting.

(3) [The] If the written agreement reached by the parties in mediation [amends] is inconsistent with the student's IEP [and is binding upon the parties. The committee on special education must immediately meet to amend the] then the student's IEP must be immediately amended to be consistent with the mediation agreement.

(4)

(5) When conducting meetings and carrying out administrative matters under this subdivision, the parent and the school district may agree to use alternative means of meeting participation, such as video conferences and conference calls.

(i) Due process hearing request notification requirements. (1)
A parent or school district may present a complaint with respect to any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student. The party presenting the complaint, or the attorney representing such party, shall provide a written due process hearing request notice to the party, which shall include:

(a) the name of the student;

(b) the address of the residence of the student (or available contact information in the case of a homeless student);

(c) the name of the school the student is attending;

(d) a description of the nature of the problem of the student relating to such proposed initiation or change, including facts relating to such problem;
and

(e) a proposed resolution of the problem to the extent known and available to the party at the time.

(2) A party may not have an impartial due process hearing until the party, or the attorney representing the party, files a due process hearing request notice that meets the requirements of paragraph (1) of this subdivision.

(3) The due process hearing request notice shall be deemed to be sufficient unless the party receiving the notice notifies the impartial hearing officer and the other party in writing that the receiving party believes the notice has not met the requirements of paragraph (1) of this subdivision.

(4) School district response to the parent. (i) If the school district has not sent a prior written notice pursuant to subdivision (a) of this section to the parent regarding the subject matter in the parent's due process hearing request notice, such school district shall, within 10 days of receiving the complaint, send to the parent a response that shall include:

(a) an explanation of why the school district proposed or refused to take the action raised in the complaint;

(b) a description of other options that the committee on special education considered and the reasons why those options were rejected;

(c) a description of each evaluation procedure, assessment, record or report the school district used as a basis for the proposed or refused action; and

(d) a description of the factors that are relevant to the school district's proposal or refusal.

(ii) A response filed by the school district pursuant to this paragraph shall not be construed to preclude such school district from asserting that the parent's due process hearing request notice was insufficient where appropriate.

(5) Other party response. (i) Except as provided in paragraph (4) of this subdivision, the noncomplaining party shall, within 10 days of receiving the due process hearing request notice, send to the complaining party a response that specifically addresses the issues raised in the notice.

(6) Allegation of insufficient due process hearing request notice.
(a) Timing. If the party receiving the due process hearing request notice believes the notice has not met the requirements of paragraph (1), it shall notify the impartial hearing officer and the other party in writing within 15 days of receiving the due process hearing request notice.

(b) Determination. Within five days of the receipt of the notice of insufficiency, the impartial hearing officer shall make a determination on the face of the notice of whether the notification meets the requirements of paragraph (1) and shall immediately notify the parties in writing of such determination.

(7) Amended due process hearing request notice. (a) A party may amend its due process hearing request notice only if:

(i) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to subdivision (j)(2) of this section; or

(ii) the impartial hearing officer grants permission, except that the impartial hearing officer may only grant such permission at any time not later than five days before an impartial due process hearing commences.

(b) The applicable timelines for an impartial due process hearing, including the timelines for a resolution session, shall recommence at the time the party files an amended notice.

(j) Impartial due process hearings. (1) A parent or a school district [may initiate a] must submit a complete due process hearing request notice pursuant to subdivision (i) of this section prior to initiation of an impartial due process hearing on matters relating to the identification, evaluation or educational placement of a student with a disability, or the provision of a free appropriate public education to the child. [Parental requests must be in writing.]

[(i)]

(i) Timeline for requesting an impartial hearing. The request for an impartial due process hearing must be submitted within one year of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, except that the one year timeline shall not apply to a parent if the parent was prevented from requesting the impartial hearing due to specific

misrepresentations by the school district that it had resolved the problem forming the basis of the complaint or the school district's withholding of information from the parent that was required to be provided to the parent under this Part or under Part 201 of this Title.

(ii) Subject matter of the impartial due process hearing. The party requesting the impartial due process hearing shall not be allowed to raise issues at the impartial due process hearing that were not raised in the notice filed under subdivision (i) of this section, unless the other party agrees otherwise.

[(2)] (iii) When [a] an impartial due process hearing is requested by either party, the school district shall inform the parent [shall be given notice which shall inform them] in writing of the availability of mediation and of any free or low-cost legal and other relevant services available in the area.

(2) Resolution session. (i) Preliminary meeting. Prior to the opportunity for an impartial due process hearing under paragraph (1), the school district shall, within 15 days of receiving the due process hearing request notice from the parent, convene a meeting with the parents and the relevant member or members of the committee on special education who have specific knowledge of the facts identified in the complaint, which shall include a representative of the school district who has decision-making authority on behalf of the school district and may not include an attorney of the school district unless the parent is accompanied by an attorney, where the parents of the student discuss their complaint and the facts that form the basis of the complaint, and the school district has the opportunity to resolve the complaint.

(ii) When conducting meetings and carrying out administrative matters (such as scheduling) under this paragraph, the parent and the school district may agree to use alternative means of meeting participation, such as video conferences and conference calls.

(iii) Waiver of resolution session. The parent and the school district may agree, in writing, to waive the resolution session or agree to use the mediation process described in subdivision (h) of this section to resolve the dispute.

(iv) Written settlement agreement. If the parent and school district reach an agreement to resolve the complaint at a resolution session, the parties shall execute a legally binding agreement that is signed by both the parent and a representative of the school district who has the authority to bind the school district. Such agreement shall be enforceable in any State court of competent jurisdiction or in a district court of the United States. A party may void such agreement within three business days of the agreement's execution.

(v) Timelines for resolution session. If the school district has not resolved the complaint to the satisfaction of the parents within 30 days of the receipt of the due process hearing request notice, the impartial due process hearing may occur, and all the applicable timelines for an impartial due process hearing under subdivision (j) of this section shall commence.

(3) Initiation of an impartial due process hearing. In the event that the complaint is not resolved in a resolution session conducted pursuant to paragraph (2) of this subdivision, [The] the board of education shall arrange for [such a]

an impartial due process hearing to be conducted in accordance with the following rules:

(i) Appointment from the impartial hearing officer list must be made in accordance with the rotational selection process established in section 200.2(e)(1) of this Part and the administrative procedures established by the board of education pursuant to section 200.2(b)(9) of this Part.

(a) The rotational selection process must be initiated immediately, but not later than two business days after receipt by the school district of the [written request for the hearing] due process hearing request notice or mailing of the due process hearing request notice to the parent.

(b) The impartial hearing officer may not accept appointment unless he or she is available to make a determination of sufficiency of a due process hearing request notice within five days of receiving such a request and to initiate the hearing within the first 14 days of being appointed by the school district.

(ii)

(iii) Unless an extension is granted pursuant to subparagraph (5)(i) of this subdivision, [The] the hearing, or a prehearing conference, shall [be scheduled to begin] commence within the first 14 days [of the impartial hearing officer's appointment, unless an extension is granted pursuant to subparagraph (4)(i) of this subdivision] after:

(a) the date upon which the parent and school district agree in writing to waive the resolution session and commence an impartial due process hearing;

or

(b) the date upon which the school district informs the impartial hearing officer that a resolution session was held but no agreement could be reached.

(iv)

(v)

(vi)

(vii)

(viii)

(ix)

(x)

(xi)

(xii) The parents, school authorities, and their respective counsel or representative, shall have an opportunity to present evidence, compel the attendance of witnesses and to confront and question all witnesses at the hearing. Each party shall have the right to prohibit the introduction of any evidence the substance of which has not been disclosed to such party at least five business days before the hearing.

(a) Additional disclosure of information. Except as provided for in section 201.11 of this Title, [at least] not less than five business days prior to a hearing, each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing. An impartial hearing officer may bar any party that fails to comply with this requirement from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(b)

- (c)
- (d)
- (e)
- (f)
- (g)
- (xiii)
- (xiv)
- (xv)
- (xvi)

(xvii) When carrying out administrative matters relating to an impartial due process hearing, such as scheduling, exchange of witness lists and status conferences, the parent and the school district may agree to use alternative means of meeting participation, such as video conferences and conference calls.

(4) Decision of the impartial hearing officer. (a) In general. Subject to subparagraph (b), a decision made by an impartial hearing officer shall be made on substantive grounds based on a determination of whether the student received a free appropriate public education.

(b) Procedural issues. In matters alleging a procedural violation, an impartial hearing officer may find that a student did not receive a free appropriate public education only if the procedural inadequacies impeded the student's right to a free appropriate public education, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parent's child, or caused a deprivation of

educational benefits. Nothing in this paragraph shall be construed to preclude an impartial hearing officer from ordering a school district to comply with procedural requirements under this Part and Part 201 of this Title.

(5) Timeline to render a decision. Except as provided in section 200.16(g)(9) of this Part and section 201.11 of this Title, the impartial hearing officer shall render a decision, and mail a copy of the written, or at the option of the parents, electronic findings of fact and the decision to the parents, to the board of education, and to the Office of Vocational and Educational Services for Individuals with Disabilities (VESID) of the State Education Department, not later than 45 days [after the receipt by the board of education of a request for a hearing or after the initiation of such a hearing by the board] from the date required for commencement of the impartial hearing in accordance with paragraph (3)(iii) of this subdivision. In cases where extensions of time have been granted beyond the applicable required timelines, the decision must be rendered and mailed no later than 14 days from the date the impartial hearing officer closes the record. The date the record is closed shall be indicated in the decision. The record of the hearing and the findings of fact and the decision shall be provided at no cost to the parents. All personally identifiable information shall be deleted from the copy forwarded to VESID.

- (i)
- (ii)
- (iii)
- (iv)
- (v)

[(j)] (k)

[(k)] (l)

[(l)] (m) Student's status during proceedings. (1) Except as otherwise provided in paragraph (2) of this subdivision and section 200.16 and Part 201 of this Title, during the pendency of any proceedings conducted pursuant to subdivision [(i) or] (j) or (k) of this section, unless the local board of education and the parents otherwise agree, the student shall remain in the then current placement of such student. During the pendency for any due process proceeding relating to the evaluation and initial placement in special education, unless the local board of education and the parents otherwise agree, the student shall not be evaluated and shall remain in the then current educational placement of such student or, if applying for initial admission to a public school, shall be placed in the public school program until all such proceedings have been completed.

(2) If a decision of a State review officer, pursuant to subdivision [(j)] (k) of this section, agrees with the student's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or school district and the parents for purposes of pendency during any subsequent appeals pursuant to paragraph [(j)(3)] (k)(3) of this section.

[(m)] (n) Surrogate parents. (1) Duty of the board of education. The board of education or other appropriate body shall select a surrogate parent from a list of individuals who are eligible and willing to serve as surrogate parents in order to ensure that the rights of a student are protected if:

(i)

(ii) the school district, after reasonable efforts cannot discover the whereabouts of a parent, or the student is an unaccompanied homeless youth, as such term is defined in section 100.2(x)(1)(vi) of this Title; or

(iii)

(2)

(3) Procedures for assigning surrogates. Assignment of a surrogate parent to a particular student shall be made in accordance with the following procedures:

(i)

(ii)

(iii)

(iv)

(v)

9. A new subdivision (m) is added to section 200.6 of the Regulations of the Commissioner of Education, effective September 29, 2005, as follows:

(m) Interim alternative education setting (IAES). Students with disabilities who have been suspended or removed from their current placement for more than 10 school days pursuant to Part 201 may be placed in an IAES. The IAES, to the extent provided in Part 201 of this Title, shall be an educational setting, other than the student's current placement at the time the behavior precipitating the IAES placement occurred that enables the student to:

(1) continue to progress in the general education curriculum, although in another setting;

(2) progress toward the goals set out in the student's IEP; and

(3) receive, as appropriate, a functional behavioral assessment and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur.

10. Paragraph (4) of subdivision (c) and subdivision (d) of section 200.7 of the Regulations of the Commissioner of Education are amended, effective September 29, 2005, as follows:

(4) An educational progress report on each student, which describes such student's progress toward meeting the annual goals, shall be provided by the approved school to the committee on special education of the referring district or the referring agency at least annually. Other required data and/or reports shall be made available by the private school to the referring district or agency on request.

(d) Appointment of blind, deaf and severely physically disabled students to certain State-operated and State-supported schools pursuant to articles 85, 87 and 88 of the Education Law, chapter 1060 of the Laws of 1974 and chapter 474 of the Laws of 1996.

(1) Application for State appointment of deaf, blind, severely physically disabled or severely emotionally disturbed students to State-operated or State-supported schools for the blind, deaf, severely physically disabled or severely emotionally disturbed shall be initiated by parents through application to the commissioner, supported by adequate written evidence of blindness, deafness or

severe disability, or by the committee on special education or committee on preschool special education of the school district responsible for the student. The commissioner or the committee on special education or committee on preschool special education will direct the parents to make arrangements at a State-operated or State-supported school designated by the commissioner for an evaluation. Such school shall evaluate the student's special educational needs and eligibility for its program.

(i)

(a)

(b)

(c)

(d)

(e)

(f) In the case of a student not recommended for appointment to a particular State-operated school, or in the event of a change in a recommendation concerning the classification, placement or provision of a free appropriate public education to a student at a State-operated school, the State-operated school shall notify the parent. Such notification shall be comparable to that required by section 200.5(a) of this Part, shall include all reasons for lack of acceptance of the student into the program or for the change in the recommendation, and shall include suggestions for more appropriate placement or program. The parent may request mediation or may, in accordance with section 200.5(i) of this Part, file with the department a written request for a hearing before an impartial hearing officer who will be designated by the department. Such hearing officer shall not be an employee of the department. The

procedures relating to a resolution session, the conduct of the hearing and review of the decision of the hearing officer shall be comparable to those set forth in section [200.5(i)] 200.5(i) through [(j)] (k) of this Part.

(ii)

(iii) with respect to an application for admission of a preschool student with a disability to a State-supported school, the school shall report the results of its evaluation to the committee on preschool special education. Upon receipt of such report, the committee on preschool special education shall conduct a meeting in accordance with the provisions of section 200.16 of this Part. The committee may recommend that the commissioner appoint the student to the State-supported school, or it may recommend a different placement. If the parents disagree with the recommendation of the committee on preschool special education, they may request mediation or [that the board of education appoint an impartial hearing officer] submit a request for an due process impartial hearing pursuant to sections 200.5(i) and (j) to review that recommendation[.], [and the] The impartial hearing officer shall consider, together with all other relevant information, the evaluation conducted by the State-supported school. If the committee on preschool special education has recommended a placement other than the State-supported school, and the impartial hearing officer finds that such recommendation is inappropriate and that placement in the State-supported school would be appropriate, the impartial hearing officer may order that the board of education recommend to the commissioner that the student be placed in the State-supported school. The decision of the impartial hearing officer may be appealed in accordance with section 4404 of the Education Law.

- (2)
- (3)
- (4)
- (5)
- (6)
- (7)
- (e)

11. Subdivisions (d) and (e) of section 200.14 of the Regulations of the Commissioner of Education are amended, effective September 29, 2005, as follows:

(d) Recommendation. [Individualized education program (IEP).]

(1) The results of the individual evaluation described in subdivision (c) of this section, as well as the suggestions of the treatment team, including the type, frequency and duration of services needed to meet the student's mental health and educational needs, shall be used in the development of the (IEP) individualized education program (IEP).

(2) Individualized education program (IEP). The IEP shall be developed, pursuant to section 200.4 of this Part, in meetings of the committee on special education, except as provided in section 200.4(g) of this Part. A representative of the treatment team shall be given the opportunity to attend. In the event that such representative is unable to attend such meetings, the committee shall attempt alternative means of assuring the representative's participation, such as individual or conference telephone discussions, and such attempts shall be documented. Referral to

the committee on special education for review of the IEP shall be conducted pursuant to section 200.4(d) of this Part.

(e) Student progress reports. (1)

(2)

(3) An annual review and reevaluation of each student's IEP

shall be conducted pursuant to [section 200.4(e)] sections 200.4(b) and (f) of this Part and subdivision (d) of this section.

(f)

12. Section 200.16 of the Regulations of the Commissioner of Education is amended, effective September 29, 2005, as follows:

200.16 Educational programs for preschool students with disabilities

Educational programs and services for preschool students with disabilities, as defined in section 200.1(mm) of this Part, shall be provided in accordance with this section, and those other applicable provisions of this Part that are not inconsistent with this section. Where other provisions of this Part are made applicable to preschool students with disabilities, committee on special education shall mean a committee on preschool special education; student shall mean a preschool student with a disability; and programs shall mean preschool programs.

(a)

(b) [Procedures for referral, evaluation, individualized education program development, placement and review.] (1) Referral

(c) Individual evaluation and reevaluation. (1)

- (2)
- (3)
- (4)
- (5)

[(6)] (d) Evaluations and eligibility determinations. (1) Upon the completion of the administration of tests and other evaluation materials, the committee must determine whether the student is a preschool student with a disability, as defined in section 200.1(mm) of this Part.

(2) [For purposes of eligibility and continuing eligibility determinations] Upon completion of the administration of assessments and other evaluation measures, the committee must provide a copy of the evaluation report and the documentation of determination of eligibility to the parent.

- [(7)] (3)
- [(8)] (4). . . .

(5) A committee on preschool special education shall provide for an appropriate reevaluation of a preschool student with a disability in accordance with section 200.4(b)(4), (5) and (6) of this Part.

[(d)] (e) Recommendation. [Individualized education program (IEP).]

- (1)
- (2)
- (3) Individualized education program (IEP). If the committee

determines that the preschool child has a disability, the committee shall recommend

approved appropriate services and/or special programs and the frequency, duration, location and intensity of such services including, but not limited to, the appropriateness of single services or half-day programs based on the individual needs of the preschool child. The committee shall first consider the appropriateness of providing (i) related services only; or (ii) special education itinerant services only; or (iii) related services in combination with special education itinerant services; or (iv) a half-day preschool program as defined in section [200.1] 200.1(u) of this Part; or (v) a full-day preschool program as defined in section 200.1(p) of this Part. If the committee determines that the child demonstrates the need for a single related service, such service shall be provided as a related service only or, where appropriate, as a special education itinerant service. The IEP recommendation shall be developed in accordance with section 200.4(d)(2), (3) and (4) of this Part [provided that subparagraphs (2)(v), (viii), and (ix) of such section shall not apply]. In addition, the recommendation for special education programs and services for a preschool student with a disability shall:

[(i) identify an appropriate program and/or service selected from the lists of preschool programs and services established pursuant to section 4410 of the Education Law;

(ii) indicate the recommended program option from those options set forth in this section;

(iii) if the recommendation is for one or more related services selected from the list maintained by the municipality, or itinerant services, indicate the child care location arranged by the parent or other site, at which each service shall be provided;

(iv)] (i) prior to recommending the provision of special education services in a setting which includes only preschool children with disabilities, the committee shall first consider providing special education services in a setting where age-appropriate peers without disabilities are typically found. Provision of special education services in a setting with no regular contact with age-appropriate peers without disabilities shall be documented on the child's IEP and shall only be considered when the nature or severity of the child's disability is such that education in a less restrictive environment with the use of supplementary aids and services cannot be achieved satisfactorily; and

[(v) define the extent to which the preschool student's parents will receive parent counseling and training as defined in section 200.1(kk) of this Part, when appropriate; and]

(vi)] (ii)

(4) [The] Except as provided in section 200.4(g) of this Part, the committee's recommendation shall be developed at a meeting of the committee on preschool special education in accordance with section 200.4(d)(4) of this Part and section 4410 of the Education Law. To the extent possible, any meeting of the committee shall be held at a site and time mutually convenient to the members of the committee and the parent of the preschool student, including but not limited to the worksite of the evaluator, the municipal representative on the committee, or the chairperson of the committee. The committee's recommendation shall be developed following a review of information presented by the preschool student's teacher(s) and/or the parent, the evaluation results provided by the approved program, results of other

evaluations, and any other appropriate information provided by an agency charged with responsibility for the student. However, if the committee determines that a child requires a structured learning environment of 12 months duration to prevent substantial regression, the committee shall include in its recommendation a statement of the reasons for such recommendation as part of the IEP document.

(5)

(6)

(7)

[(e)] (f) Provision of services for preschool students with disabilities.

(1)

(2)

(3)

(4)

(5)

(6) The IEP of a preschool student with a disability shall be implemented in accordance with section 200.4(e)(1)(i) and (ii), (3), (4), [and] (7), (8) and (9) of this Part, except that during the pendency of proceedings conducted pursuant to paragraphs [(g)(9)] (h)(9) and (10) of this section, the placement of a preschool student shall be as provided in paragraph [(g)(3)] (h)(3) of this section.

[(f)] (g) Annual review. The individualized education program (IEP) of each preschool student with a disability shall be reviewed and, if appropriate, revised periodically but not less frequently than annually in accordance with section [200.4(f)(1) through (3)] 200.4(f) of this Part. In any such meeting of the committee, the

professional who participated in the evaluation shall upon request of the parent or committee, attend and participate at such meeting.

[(g)] (h) Procedural due process. (1) Prior written notice of initial evaluation, review or reevaluation of a preschool student with a disability shall be made in accordance with section [200.5(a)(1) through (4) and (5)(i), (ii) and (vii)] 200.5(a) of this Part.

(i)

(2)

(3) The procedural safeguards notice shall be provided to the parent in accordance with section 200.5(f) of this Part. In addition to the requirements of [subparagraph (2)(i) of this subdivision] section 200.5(f)(4) of this Part, the procedural safeguards notice shall also:

(i) indicate that during the pendency of any proceedings conducted pursuant to this Part, those preschool students with disabilities who are receiving special education programs or services pursuant to section 4410 of the Education Law shall remain in the then current education placement of such preschool student until all such proceedings have been completed, except as otherwise provided in section [200.5(l)] 200.5(m) of this Part. Nothing in this subparagraph shall require that a student with a disability remain in a preschool program for which he or she is no longer eligible pursuant to section 4410 of the Education Law during the pendency of any proceeding brought pursuant to this Part;

(ii)

(iii)

(iv)

(4)

(5) Notice upon recommendation. Prior written notice of the recommendation of the committee on preschool special education shall be provided to the board of education and to the parent of the preschool student in accordance with section 200.5(a) of this Part. The notice upon recommendation shall indicate that, in the event that the parent does not provide consent for the initial provision of special education services, no further action will be taken by the committee on preschool special education until such consent is obtained.

(6)

(7)

(8)

(9) Impartial due process hearings. Impartial due process hearings shall be conducted in accordance with section [200.5(i)] 200.5(j) of this Part, provided that the decision of the impartial hearing officer shall be rendered, in accordance with section 4410 of the Education Law, not later than 30 days after the receipt by the board of a request for a hearing or after the initiation of such hearing by the board.

(10) Appeal to a State review officer. Decisions of impartial hearing officers shall be subject to the review of a State review officer of the State Education Department in accordance with section [200.5(j)] 200.5(k) of this Part.

(11) State complaints. State complaint investigations shall be conducted in accordance with section [200.5(k)] 200.5(l) of this Part.

(12) Surrogate parents. Surrogate parents shall be appointed in accordance with section [200.5(m)] 200.5(n) of this Part.

(13)

[(h)] (i). . . .

13. Subdivision (k) of section 201.2 of the Regulations of the Commissioner of Education is amended, a new subdivision (m) is added and subdivisions (m) through (r) are relettered as (n) through (s), effective September 29, 2005, as follows:

(k) Interim alternative educational setting or IAES means a temporary educational placement [for a period of up to 45 days] determined by the committee on special education, other than the student's current placement at the time the behavior precipitating the IAES placement occurred, that enables the student to continue to:

(1) progress in the general education curriculum, although in another setting[, to continue to receive those services and modifications, including those described on the student's current IEP, that will enable the student to meet the goals set out in such IEP and include services and modifications to address the behavior which precipitated the IAES placement that are designed to prevent the behavior from recurring];

(2) progress toward the goals set out in the student's IEP; and

(3) receive, as appropriate, a functional behavioral assessment and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur.

(m) Serious bodily injury means bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ or mental faculty.

[(m)] (n)

[(n)] (o)

[(o)] (p)

[(p)] (q)

[(q)] (r)

[(r)] (s)

14. Section 201.3 of the Regulations of the Commissioner of Education is amended, effective September 29, 2005, as follows:

201.3 CSE responsibilities for functional behavioral assessments and behavioral intervention plans. When a student with a disability is suspended or removed from the student's current placement for more than 10 consecutive school days or when a suspension or removal constitutes a disciplinary change of placement and the student's conduct is a manifestation of the student's disability, the committee on special education shall:

(a) [Initial requirement to conduct assessment and develop plan or to review existing plan. Not later than 10 business days after first suspending or removing a student with a disability for more than 10 school days in a school year or imposing a suspension or removal that constitutes a disciplinary change in placement, including a change in placement to an IAES pursuant to section 201.7(e) of this Part for

behavior involving carrying or possessing a weapon or possession or use of an illegal drug or selling or soliciting the sale of a controlled substance:

(1) If the school district did not conduct a functional behavioral assessment and implement a behavioral intervention plan for the student before the behavior that resulted in the suspension or removal, the school district shall convene a meeting of the CSE to develop an assessment plan. As soon as practicable after developing such behavioral assessment plan, and completing the assessments required by the plan, the school district shall convene a meeting of the CSE to develop appropriate behavioral interventions to address that behavior and shall implement those interventions; and] conduct a functional behavioral assessment and implement a behavioral intervention plan for such student, provided that the school district had not conducted such assessment prior to the manifestation determination before the behavior that resulted in the change in placement; or

(2) if the student already has a behavioral intervention plan, the CSE shall meet to review such plan and its implementation and modify the plan and its implementation as necessary, to address the behavior that resulted in the change in placement.

15. Section 201.4 of the Regulations of the Commissioner is amended, effective September 29, 2005, as follows:

201.4 [CSE responsibilities for manifestation] Manifestation determinations.

(a) General requirement for manifestation review. [The committee on special education shall conduct a] A review of the relationship between

the student's disability and the behavior subject to disciplinary action to determine if the conduct is a manifestation of the disability must be made immediately, if possible, but in no case later than 10 school days after:

(1)

(2)

(3)

(b) Individuals to carry out review. A review described in subdivision (a) of this section shall be conducted by [the CSE and other qualified personnel] a manifestation team in a meeting, which shall include a representative of the school district knowledgeable about the student and the interpretation of information about child behavior, the parent and relevant members of the committee on special education as determined by the parent and the school district. The parent must receive written notification prior to any manifestation team meeting to ensure that the parent has an opportunity to attend. The notification shall inform the parent of the purpose of the meeting, the names of the individuals expected to attend and inform the parent of his or her right to have relevant members of the committee on special education participate at the parent's request.

(c) Conduct of review. The [CSE, with other qualified personnel,] manifestation team shall review [may determine that the behavior of the student was not a manifestation of the student's disability only if they:

(1) first consider] all relevant information in the student's file [pertaining to the behavior subject to disciplinary action,] including[:

(i) evaluation and diagnostic results, including the results or other relevant information supplied by the parents of the student;

(ii) observations of the student; and

(iii) the student's IEP and placement;] the student's IEP, any teacher observations, and any relevant information provided by the parents to determine if:

[(2) then determine that:

(i) in relationship to the behavior subject to disciplinary action, the student's IEP and placement were appropriate and the special education services, supplementary aids and services and behavioral intervention strategies were provided consistent with the student's IEP and placement;

(ii) the student's disability did not impair the ability of the student to understand the impact and consequences of the behavior subject to disciplinary action; and

(iii) the student's disability did not impair the ability of the student to control the behavior subject to disciplinary action.]

(1) the conduct in question was caused by or had a direct and substantial relationship to the student's disability; or

(2) the conduct in question was the direct result of the school district's failure to implement the IEP.

(d) [Decision] Determination. (1) If the [CSE and other qualified personnel] manifestation team [determine] determines that either paragraph (1) or (2) of subdivision (c) of this section is applicable for the student, [any of the standards in

subdivision (c) of this section are not met,] the behavior shall be considered a manifestation of the student's disability.

(2) If the manifestation team determines that the conduct was a manifestation of the student's disability, the CSE shall:

(a) conduct a functional behavioral assessment and implement a behavioral intervention plan for such student in accordance with section (3) of this Part; and

(ii) except as provided in subdivision (e) of section 201.7 of this Part, return the student to the placement from which the student was removed, unless the parent and the school district agree to a change of placement as part of the modification of the behavioral intervention plan.

[(e)]

[(f)] (e)

16. Section 201.5 of the Regulations of the Commissioner of Education is amended, effective September 29, 2005, as follows:

201.5 Students presumed to have a disability for discipline purposes.

(a)

(b) Basis of knowledge. Except as otherwise provided in subdivision (c) of this section, a school district shall be deemed to have knowledge that such student had a disability if prior to the time the behavior occurred:

(1) the parent of such student has expressed concern [to school district personnel] in writing to supervisory or administrative personnel of the appropriate

educational agency or to a teacher of the student that the student is in need of special education, provided that such expression of concern may be oral if the parent does not know how to write or has a disability that prevents a written statement;

(2) [the behavior or performance of the student demonstrates the need for special education in accordance with section 200.1(mm), (ww) and (zz) of this Title; (3)] the parent of the student has requested [that] an [individual] evaluation of the student [be conducted] pursuant to section [200.4(b)] 200.4 or 200.16 of this Title; or

[(4)] (3) a teacher of the student, or other personnel of the school district, has expressed [concern] specific concerns about [the] a pattern of behavior [or performance of] demonstrated by the student, directly to the director of special education of the school district or to other [school district] supervisory personnel of the school district in accordance with the district's established child find or special education referral system.

(c) [Notwithstanding the provisions of subdivision (b) of this section, a] Exception. A student [shall not be considered] is not a student presumed to have a disability for discipline purposes if, as a result of receiving the information specified in subdivision (b) of this section, [the school district either]:

(1) the parent of the student has not allowed an evaluation of the student pursuant to section 200.4 of this Part; or

(2) the parent of the student has refused services under this Part;

or

(3) it was determined [conducted an individual evaluation and determined] that the student is not a student with a disability pursuant to sections 200.4 or 200.16 of this Title; or

(2) determined that an evaluation was not necessary and provided notice to the parents of such determination in accordance with section 200.5(a) of this Title].

(d)

(e)

17. Subdivisions (d) and (e) are amended and a new subdivision (f) is added to section 201.7 of the Regulations of the Commissioner of Education, effective September 29, 2005, as follows:

(d) Exception for pattern of suspensions or removals. A student with a disability may not be removed pursuant to subdivision (b) or (c) of this section if imposition of the 5 school day or 10 school day suspensions or removal would result in a disciplinary change of placement based on a pattern of suspensions or removals as determined by school personnel in accordance with the criteria set forth in section 201.2(e)(2) of this Part, except where the [CSE] manifestation team pursuant to section 201.4 of this Part has determined [in accordance with section 201.4 of this Part] that the behavior was not a manifestation of such student's disability, or the student is placed in an IAES as authorized under subdivision (e) of this section.

(e) Change in placement to an IAES for behavior involving serious bodily injury, weapons, illegal drugs or controlled substances. (1) A superintendent of schools, either directly or upon recommendation of a hearing officer

designated to conduct a superintendent's hearing pursuant to Education Law section 3214 (3)(c), may order the change in placement of a student with a disability to an appropriate IAES, to be determined by the CSE, for up to 45 school days, but not to exceed the period of suspension ordered by the superintendent in accordance with Education Law section 3214(3), where the student:

(i) has inflicted serious bodily injury, as defined in section 201.1(m) of this Part, upon another person while at school, on school premises or at a school function under the jurisdiction of the educational agency;

(ii) carries or possesses a weapon to or at school, on school premises, or to or at a school function; or

(iii) knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function.

(2) The period of suspension or removal ordered by the superintendent may not exceed the amount of time that a nondisabled student would be suspended for the same behavior.

(f) School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement under this Part for a student with a disability who violates a code of student conduct.

18. Section 201.8 of the Regulations of the Commissioner of Education is amended, effective September 29, 2005, as follows:

201.8. Authority of impartial hearing officer to order a change in placement to an IAES in a dangerous situation.

(a) An impartial hearing officer appointed pursuant to Education Law section 4404(1), in an expedited due process hearing conducted pursuant to section 201.11 of this Part, may order a change in placement of a student with a disability to an appropriate interim alternative educational setting (IAES) for not more than 45 school days, if the hearing officer:

(1)

(2)

(3)

(4)

(b)

(c) An IAES ordered pursuant to this section shall be determined by the [impartial hearing officer based on consideration of a setting proposed to the impartial hearing officer by school personnel who have consulted with the student's special education teacher] CSE.

(d)

(e)

(f) A [CSE] determination that the student's behavior is a manifestation of the student's disability shall not preclude an impartial hearing officer from ordering a change in placement to an IAES pursuant to this section.

19. Subdivisions (b) and (c) of section 201.9 of the Regulations of the Commissioner of Education are amended, effective September 29, 2005, as follows:

(b) Procedures for removals other than suspensions. A removal of a student with a disability, as defined in section 201.2(l) of this Part, to which the provisions of paragraphs (a) through (d) of subdivision 3 of section 3214 of the Education Law do not apply, other than a change in placement to an IAES, shall be conducted in accordance with the due process procedures applicable to such removals of nondisabled students, except that school personnel may not impose such removal for more than 10 consecutive days or for a period that would result in a disciplinary change in placement, unless [the CSE has determined] there has been a determination that the behavior is not a manifestation of the student's disability. The removal of a student with a disability to an IAES shall be conducted in accordance with the applicable provisions of section 201.7(e) of this Part and paragraph (c)(3) of this section, or of section 201.8 of this Part.

(c) Procedures for suspensions of more than five school days (superintendent's hearings). Superintendent's hearings on disciplinary charges against students with disabilities and students presumed to have a disability for discipline purposes shall be bifurcated into a guilt phase and a penalty phase and conducted in accordance with the following procedures:

(1) The superintendent of schools or hearing officer in the superintendent's hearing shall proceed with the guilt phase and determine whether the student is guilty of the alleged misconduct. If it is determined that the student is guilty of the alleged misconduct, the superintendent of schools or hearing officer in the superintendent's hearing shall make a threshold determination of whether a suspension or removal in excess of 10 consecutive school days or that would otherwise constitute a

disciplinary change in placement should be considered. If the threshold determination is that such a suspension or removal should be considered, before the superintendent of schools orders or the hearing officer in the superintendent's hearing recommends any such removal, the superintendent's hearing shall be adjourned until a manifestation determination is made by the [committee on special education] manifestation team, except as otherwise provided in paragraph (3) of this subdivision. If the superintendent of schools or hearing officer in the superintendent's hearing determines that a suspension or removal that would constitute a disciplinary change in placement should not be considered, the hearing shall proceed to the penalty phase.

(2) Upon a determination by the [CSE] manifestation team that the behavior of a student with a disability was not a manifestation of the student's disability, such student may be disciplined in the same manner as a nondisabled student, except that such student shall continue to receive services in accordance with this section. Upon receipt of notice of such determination, the superintendent or hearing officer in the superintendent's hearing shall proceed with the penalty phase of the hearing. If the [CSE] manifestation team determines that the behavior was a manifestation of the student's disability, the superintendent or hearing officer in the superintendent's hearing shall dismiss the superintendent's hearing, except as otherwise provided in paragraph (3) of this subdivision.

(3) Notwithstanding the provisions of paragraphs (1) and (2) of this subdivision, if the superintendent or hearing officer in the superintendent's hearing is considering the change in placement of a student with a disability to an IAES pursuant to section 201.7(e) of this Part, upon a determination that the student is guilty of the

alleged misconduct relating to serious bodily injury, weapons, illegal drugs or controlled substances, the superintendent of schools may order, or the hearing officer in the superintendent's hearing may recommend, such change in placement to an IAES, to be determined by the CSE, for up to 45 school days, but not to exceed the length of time that a nondisabled student would be suspended for the same misconduct under the school district's student discipline policy. The superintendent of schools may order such change in placement of a student with a disability to an IAES, directly or upon recommendation of a hearing officer in the superintendent's hearing, even where the [CSE] manifestation team determines that the student's behavior is a manifestation of the student's disability.

(4) The penalty phase of a superintendent's hearing for a student with a disability or a student presumed to have a disability for discipline purposes shall be conducted in the same manner as the penalty phase of a hearing involving a nondisabled student, including the admission of anecdotal evidence of past instances of misconduct. The school district shall assure that copies of the special education and disciplinary records of the student are transmitted to the superintendent of schools or hearing officer in the superintendent's hearing for consideration. Such records shall be transmitted whether or not the [CSE] manifestation team has determined that the student's behavior is a manifestation of the student's disability.

(5) Nothing in this section shall be construed to authorize the suspension or removal of a student with a disability from his or her current educational placement for violation of school rules following a determination by the [CSE] manifestation team that the behavior is a manifestation of the student's disability, except

where the student is placed in an IAES for behavior involving serious bodily injury, weapons, illegal drugs or controlled substances pursuant to section 201.7(e) of this Part or the student is placed in an IAES by an impartial hearing officer pursuant to section 201.8 of this Part.

20. Subdivisions (c), (d) and (e) of section 201.10 of the Regulations of the Commissioner of Education are amended, effective September 29, 2005, as follows:

(c) During subsequent suspensions or removals for periods of 10 consecutive school days or less that in the aggregate total more than 10 school days in a school year but do not constitute a disciplinary change in placement, regardless of the manifestation determination, students with disabilities shall be provided with services necessary to enable the student to appropriately progress in the general education curriculum and appropriately advance toward achieving the goals set out in the student's IEP and to receive, as appropriate, a functional behavioral assessment and behavioral intervention services and modifications that are designed to address the behavior violation so it does not recur. The [building principal, superintendent of schools or other school officials imposing the suspension, or other school personnel delegated such authority, shall determine, in consultation with the student's special education teacher, the extent to which services are necessary to enable the student to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the student's IEP] CSE shall determine the services to be provided to the student.

(d) During suspensions or other disciplinary removals for periods in excess of 10 school days in a school year which [do] constitute a disciplinary change in placement for behavior [that has been determined by the CSE not to be a manifestation of the student's disability], students with disabilities shall be provided with services in the IAES necessary to enable the student to appropriately progress in the general education curriculum and appropriately advance toward achieving the goals set out in the student's IEP, and to receive, as appropriate, a functional behavioral assessment and behavioral intervention services and modifications that are designed to address the behavior violation so it does not recur. The CSE shall determine the extent to which services are necessary to enable the student to appropriately progress in the general education curriculum and appropriately advance toward achieving the goals set out in the student's IEP and the student's need for a functional behavioral assessment, behavioral intervention services and modifications to address the behavior.

(e) [Notwithstanding any other provision of this section to the contrary, the] The interim alternative educational setting and the services to be provided to a student placed in an interim alternative educational setting [pursuant to section 201.7(e) of this Part] shall be determined by the CSE [and the setting to be provided to a student placed in an IAES pursuant to section 201.8 of this Part shall be determined by the impartial hearing officer upon receipt of a proposed setting by school personnel who have consulted with the student's special education teacher]. Such setting shall:

(1) be selected so as to enable the student to continue to progress in the general curriculum, although in another setting, and to continue to receive those

modifications[, including those described in the student's current IEP,] that will enable the child to meet the goals set out in that IEP; and

(2) include, as appropriate, a functional behavioral assessment and behavioral intervention services and modifications to address the behavior that is subject to disciplinary action, that are designed to prevent the behavior from recurring.

21. Subdivisions (b) and (d) of section 201.11 of the Regulations of the Commissioner of Education is amended, effective September 29, 2005, as follows:

(b) An expedited due process hearing shall be conducted in accordance with the procedures specified in 34 C.F.R. sections 300.508 and 300.509 (Code of Federal Regulations, 1999 edition, Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402-9328: 1999 - available at the Office of Vocational and Educational Services for Individuals with Disabilities, Room 1624, One Commerce Plaza, Albany, NY 12234) and subdivision [(i)] (j) of section 200.5 of this Title, except as follows:

(1)

(2)

(d) If a parent requests a hearing or an appeal regarding the change in placement of a student to an IAES by a superintendent of schools [pursuant to a change in placement to an IAES pursuant to section 201.7(e) of this Part for behavior involving carrying or possessing a weapon or illegal drug or controlled

substances], or regarding a change in placement [to an IAES] by an impartial hearing officer pursuant to section 201.8 of this Part where the school district maintains that it is dangerous for the student to remain in his or her current educational placement, or regarding a determination that the behavior is not a manifestation of the student's disability for a student who has been placed in an IAES, the student shall remain in the IAES pending the decision of the impartial hearing officer or until expiration of the time period determined in accordance with [section 201.7(e)] 201.7 or [in accordance with] section 201.8 of this Part, as applicable, [but not to exceed 45 days,] whichever occurs first, unless the parents and the school district otherwise agree.

(e)