

- (v) The foster parent of the student, who otherwise meets the qualifications in paragraph (2) of this section, may be appointed as the surrogate parent of the student without being appointed from a list approved by the board of education.
- (vi) The surrogate parent alternatively may be appointed by the judge overseeing the child's case, provided that the surrogate parent meets the requirements in paragraph (2) of this subdivision. The individual appointed by the judge need not be appointed from a list approved by the board of education.
- (vii) Unaccompanied homeless youth. In the case of a child who is an unaccompanied homeless youth, appropriate staff of emergency shelters, transitional shelters, independent living programs and street outreach programs may be appointed as temporary surrogate parents without regard to paragraph (2) of this section, until a surrogate can be appointed that meets the appropriate qualifications.

200.6 Continuum of services.

- (a) A student with a disability shall be provided with appropriate special education.
 - (1) Students with disabilities shall be provided special education in the least restrictive environment, as defined in section 200.1(cc) of this Part. To enable students with disabilities to be educated with nondisabled students to the maximum extent appropriate, specially designed instruction and supplementary services may be provided in the regular class, including, as appropriate, providing related services, resource room programs and special class programs within the general education classroom.
 - (2) A student with a disability shall be provided the special education specified on the student's IEP to be necessary to meet the student's unique needs.
 - (3) Students with disabilities placed together for purposes of special education shall be grouped by similarity of individual needs as defined in section 200.1(ww) of this Part, in accordance with the following:
 - (i) The range of academic or educational achievement of such students shall be limited to assure that instruction provides each student appropriate opportunities to achieve his or her annual goals. The learning characteristics of students in the group shall be sufficiently similar to assure that this range of academic or educational achievement is at least maintained.
 - (ii) The social development of each student shall be considered prior to placement in any instructional group to assure that the social

interaction within the group is beneficial to each student, contributes to each student's social growth and maturity, and does not consistently interfere with the instruction being provided. The social needs of a student shall not be the sole determinant of such placement.

- (iii) The levels of physical development of such students may vary, provided that each student is provided appropriate opportunities to benefit from such instruction. Physical needs shall be considered prior to determining placement to assure access to appropriate programs. The physical needs of the student shall not be the sole basis for determining placement.
 - (iv) The management needs of such students may vary, provided that environmental modifications, adaptations, or, human or material resources required to meet the needs of any one student in the group are provided and do not consistently detract from the opportunities of other students in the group to benefit from instruction.
- (b) *Staffing requirements pursuant to Part 80 of this Title.* (1) When a remedial service is included in the individualized education program, such service shall be provided by appropriately certified or licensed individuals.
- (2) When a transitional support service is included in the individualized education program to be provided to teachers of a student with a disability, such service shall be provided by personnel appropriately certified or otherwise qualified in each area of service.
 - (3) Related services shall be provided by individuals with appropriate certification or license in each area of related service.
 - (4) Special education instruction shall be provided by individuals appropriately certified or licensed pursuant to Part 80 of this Title.
 - (5) An administrator or supervisor of special education programs serving more than 25 percent of his or her assignment in such capacity shall hold a certificate valid for administrative and supervisory service pursuant to Part 80 of this Title.
 - (6) When specially designed reading instruction is included in the individualized education program, such instruction may be provided by individuals qualified under section 80-2.7 or sections 80-3.3, 80-3.7(a)(3)(iv) and 52.21(b)(3)(xi) of this Title as applicable. For purposes of this paragraph, *specially designed reading instruction* shall mean specially designed individualized or group instruction or special services or programs, as defined in subdivision 2 of section 4401 of the Education Law, in the area of reading and which is provided to a student with a disability who has

significant reading difficulties that cannot be met through general reading programs.

- (c) Transitional support services prescribed in the individualized education program (IEP) shall be provided for a teacher upon the recommendation of the committee on special education, and shall be specified in the student's IEP. When the provision of a transitional support service is under consideration by a committee on special education, the teachers of the student for whom the service is being considered shall be given the opportunity to participate in the meeting of the committee for the purpose of advising the committee of the extent to which such services are needed.
- (d) *Consultant teacher services.* Consultant teacher services, as defined in section 200.1(m) of this Part, shall be for the purpose of providing direct and/or indirect services to students with disabilities who attend regular education classes, including career and technical education classes, and/or to such students' regular education teachers. Such services shall be recommended by the committee on special education to meet specific needs of such students and the student's individualized education program (IEP) shall indicate the regular education classes in which the student will receive consultant teacher services. Consultant teacher services shall be provided in accordance with the following provisions:
 - (1) The total number of students with disabilities assigned to a consultant teacher shall not exceed 20.
 - (2) Each student with a disability requiring consultant teacher services shall receive direct and/or indirect services consistent with the student's IEP for a minimum of two hours each week, except that the committee on special education may recommend that a student with a disability who also needs resource room services in addition to consultant teacher services, may receive a combination of such services consistent with the student's IEP for not less than three hours each week.
 - (3) Upon application and documented educational justification to the commissioner, approval may be granted for a variance for the number of students with disabilities assigned to a consultant teacher as specified in paragraph (1) of this subdivision.
- (e) Related services shall be recommended by the committee on special education to meet specific needs of a student with a disability as set forth in the individualized education program (IEP).
 - (1) The frequency, duration and location of each such service shall be in the IEP, based on the individual student's need for the service.

- (2) For students with disabilities determined to need speech and language services, the total caseload of such students for teachers providing such services shall not exceed 65.
 - (3) When a related service is provided to a number of students at the same time, the number of students in the group shall not exceed five students per teacher or specialist except that, in the city school district of the city of New York, the commissioner shall allow a variance of up to 50 percent rounded up to the nearest whole number from the maximum of five students per teacher or specialist.
 - (4) A student with a disability may be provided with more than one such service in accordance with the need of the student.
 - (5) Related services may be provided in conjunction with a regular education program or with other special education programs and services.
- (f) *Resource room programs.* Resource room programs shall be for the purpose of supplementing the regular or special classroom instruction of students with disabilities who are in need of such supplemental programs.
- (1) Each student with a disability requiring a resource room program shall receive not less than three hours of instruction per week in such program except that the committee on special education may recommend that for a student with a disability who also needs consultant teacher services in addition to resource room services may receive a combination of such services consistent with the student's IEP for not less than three hours per week.
 - (2) Students shall not spend more than 50 percent of their time during the day in the resource room program.
 - (3) An instructional group which includes students with disabilities in a resource room program shall not exceed five students per teacher except that, in the city school district of the city of New York, the commissioner shall allow a variance of up to 50 percent rounded up to the nearest whole number from the maximum of five students per teacher.
 - (4) The composition of instructional groups in a resource room program shall be based on the similarity of the individual needs of the students according to:
 - (i) levels of academic or educational achievement and learning characteristics;
 - (ii) levels of social development;

- (iii) levels of physical development; and
 - (iv) the management needs of the students in the classroom.
- (5) The total number of students with a disability assigned to a resource room teacher shall not exceed 20 students or, for the city school district of the city of New York, the commissioner shall allow a variance of up to 50 percent rounded up to the nearest whole number from the maximum of 20 students per teacher; except that the total number of students with a disability assigned to a resource room teacher who serves students enrolled in grades seven through twelve or a multi-level middle school program operating on a period basis shall not exceed 25 students or, for the city school district of the city of New York, the commissioner shall allow a variance of up to 50 percent rounded up to the nearest whole number from the maximum of 25 students per teacher.
- (6) Upon application and documented educational justification to the commissioner, approval may be granted for a variance from the size of an instructional group and the total number of students assigned to a resource room teacher as specified in paragraphs (3) and (5) of this subdivision.
- (g) A school district may include integrated co-teaching services in its continuum of services. Integrated co-teaching services means the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students.
- (1) The maximum number of students with disabilities receiving integrated co-teaching services in a class shall be determined in accordance with the students' individual needs as recommended on their IEPs, provided that the number of students with disabilities in such classes shall not exceed 12 students, unless a variance is provided pursuant to subparagraph (i) or (ii) of this paragraph.
- (i) Variance by notification. A board of education or trustees of a school district may submit written notice to the commissioner to temporarily add one additional student with a disability to an integrated co-teaching class for the remainder of the school year, provided that at the start of classes in September of the current school year it is in compliance with the standards specified in this paragraph. Written notice to the commissioner shall be submitted on a form prescribed by the commissioner and shall sufficiently demonstrate educational justification and consistency with providing an appropriate education for all children affected.
 - (ii) Variance with Commissioner approval. If the school district has enrolled one student with a disability beyond the maximum 12

students with disabilities in an integrated co-teaching services class pursuant to the procedures established in subparagraph (i) of this paragraph, and it determines there is a need to temporarily add one additional student to such class, the school district may submit to the commissioner for approval an application for a variance to enroll the one additional student in the same class for the remainder of the school year. The application to the commissioner shall be on a form prescribed by the commissioner and shall sufficiently demonstrate educational justification and consistency with providing an appropriate education for all children affected.

- (2) School personnel assigned to each class shall minimally include a special education teacher and a general education teacher.
 - (3) Additional personnel, including supplementary school personnel, assigned to such classes by the district, may not serve as the special education teacher pursuant to paragraph (2) of this subdivision.
- (h) *Special classes.* The following standards shall be used in the provision of special classes for students with disabilities:
- (1) A student with a disability shall be placed in a special class for instruction on a daily basis to the extent indicated in the student's individualized education program.
 - (2) In all cases the size and composition of a class shall be based on the similarity of the individual needs of the students according to:
 - (i) levels of academic or educational achievement and learning characteristics;
 - (ii) levels of social development;
 - (iii) levels of physical development; and
 - (iv) the management needs of the students in the classroom.
 - (3) A special class shall be composed of students with disabilities with similar individual needs.
 - (4) Special class size for students with disabilities. The maximum class size for those students whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting shall not exceed 15 students, or 12 students in a State-operated or State-supported school, except that:

- (i) The maximum class size for special classes containing students whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students, shall not exceed 12 students, with one or more supplementary school personnel assigned to each class during periods of instruction.
 - (ii)
 - (a) The maximum class size for special classes containing students whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention, shall not exceed six students, with one or more supplementary school personnel assigned to each class during periods of instruction.
 - (b) The maximum class size for special classes containing students whose management needs are determined to be intensive, and requiring a significant degree of individualized attention and intervention, shall not exceed eight students, with one or more supplementary school personnel assigned to each class during periods of instruction.
 - (iii) The maximum class size for those students with severe multiple disabilities, whose programs consist primarily of habilitation and treatment, shall not exceed 12 students. In addition to the teacher, the staff/student ratio shall be one staff person to three students. The additional staff may be teachers, supplementary school personnel and/or related service providers.
- (5) The chronological age range within special classes of students with disabilities who are less than 16 years of age shall not exceed 36 months. The chronological age range within special classes of students with disabilities who are 16 years of age and older is not limited. However, there shall be no chronological age-range limitations for groups of students placed in special classes as described in subparagraph (4)(iii) of this subdivision.
- (6) Upon application and documented educational justification to the commissioner, approval may be granted for variance from the special class sizes and chronological age ranges specified in paragraphs (4) and (5) of this subdivision, respectively, except that, to the extent authorized by the provisions of Education Law, section 4402(2)(d) and (6):
- (i) Provided that the district is in compliance with the standards specified in paragraph (4) of this subdivision at the start of classes in September of the current school year, a board of education or trustees

of a school district, except a city school district in a city with a population of one million or more inhabitants, may for the remainder of the school year exceed the class size standards specified in paragraph (4) of this subdivision by no more than 20 percent for middle/secondary students upon parental notification and written notice to the commissioner on a form prescribed by the commissioner which sufficiently demonstrates educational justification and consistency with continuing an appropriate education for all children affected.

- (ii) The board of education of a city school district in a city with a population of 125,000 or more and less than one million inhabitants may establish maximum class sizes in accordance with the provisions of either subparagraph (i) or subparagraph (iii) of this paragraph.
 - (iii) The board of education of a city school district with a population of 125,000 or more inhabitants may, except as otherwise provided in clause (a) of this subparagraph, establish maximum class sizes not to exceed one and two tenths times the applicable maximum class size as specified in paragraph (4) of this subdivision rounded up to the nearest whole number for students with disabilities whose chronological age ranges are equivalent to those students in middle and secondary schools, provided that the board of education shall notify parents and shall file with the commissioner a notice stating the board's intention to increase such class sizes and a certification that the board will conduct a study of attendance problems at the secondary level and will implement a corrective action plan to increase the rate of attendance of students in such classes to at least the rate for students attending regular education classes in secondary schools of the district in accordance with Education Law section 4402(6).
 - (a) In a city school district having a population of one million or more, special classes that have a maximum class size of fifteen students may be increased by no more than one student.
 - (iv) For the purpose of subparagraphs (i)-(iii) of this paragraph, students in middle school shall be defined as students in grades 7 and 8 and students in secondary schools shall be defined as students in grades 9 through 12.
- (7) Each district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, except for special classes described in subparagraphs (4)(ii) and (iii) of this subdivision, provide the committee on special education and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, and the general levels of social

development, physical development and management needs in the class, by November 1st of each year. The parent of each student entering such a class after November 1st shall also be provided a description of the class. A district providing such a description shall also inform the parent of each student in such class that, upon request, the parent shall be afforded the opportunity to discuss the description with an appropriate representative of the district. A copy of such description shall also be included in the district plan required by section 200.2(c) of this Part.

- (8) For parents of students placed in special classes described in subparagraphs (4)(ii) and (iii) of this subdivision, provision shall be made for parent counseling and training as defined in section 200.1 (kk) of this Part for the purpose of enabling parents to perform appropriate follow-up intervention activities at home.
 - (i) *Home and hospital instruction.* Students with disabilities who are recommended for home and/or hospital instruction by the committee on special education shall be provided instruction and appropriate related services as determined by the committee on special education in consideration of the student's unique needs. Home and hospital instruction shall only be recommended if such placement is in the least restrictive environment and must be provided:
 - (1) a minimum of five hours per week at the elementary level, preferably one hour daily; or
 - (2) a minimum of 10 hours per week at the secondary level, preferably two hours daily.
 - (j) *In-state or out-of-state private schools.* (1) State assistance for instruction of public school students placed in approved private schools. An application by a board of education for State reimbursement pursuant to section 4405 of the Education Law for a student in an in-state or out-of-state private school shall be approved by the commissioner provided that:
 - (i) The committee on special education of the school district in which the student resides has provided a current individual evaluation or reevaluation of the student, as prescribed by section 200.4(b) of this Part. For purposes of this subparagraph, the individual evaluation and the classroom observation where applicable, and any other evaluations necessary to describe the relevant circumstances leading up to the recommendation and the basis for the recommendation for change of placement shall have been completed within six months prior to the committee on special education's initial recommendation for private school placement.

- (ii) The committee on special education has provided a current individualized education program (IEP) for the student as required by section 200.4(d)(2) of this Part.
- (iii) The committee on special education has certified that the student is of school-age and has a disability or combination of disabilities, and has further documented that the nature or severity of the student's disability is such that appropriate public facilities for instruction are not available. This documentation shall include, but need not be limited to:
 - (a) documentation of efforts to place the student in a public facility and the outcomes of those efforts, and/or of committee on special education findings regarding the lack of suitability of each currently available and geographically accessible public placement;
 - (b) documentation of all efforts to enable the student to benefit from instruction in less restrictive settings using support services and supplementary aids and special education services as set forth in subdivisions (d), (e), (f), (g) and (h) of this section, and/or for those services not used, a statement of reasons why such services were not recommended;
 - (c) detailed evidence of the student's lack of progress in previous less restrictive programs and placements or a statement of reasons that such evidence is not available;
 - (d) in the case of a recommendation by the committee on special education for placement of a student in a residential program, documentation that residential services are necessary to meet the student's educational needs as identified in the student's IEP, including a proposed plan and timetable for enabling the student to return to a less restrictive environment or a statement of reasons why such a plan is not currently appropriate;
 - (e) in the case of a recommendation by the committee on special education for placement of a student in an educational facility outside of the State, documentation that there are no appropriate public or private facilities for instruction available within this State; and
 - (f) in the case of a reapplication for reimbursement, documentation of the continuing need for placement of the student in a private school.

- (iv) The application includes a statement that the placement is for the entire school year or the balance thereof.
- (2) Criteria for approval. No contract for the placement of a student with a disability shall be approved for purposes of State reimbursement unless:
- (i) the application for reimbursement contains the documentation required in paragraph (1) of this subdivision; and
 - (ii) such placement will be in a private school approved by the commissioner for the education of students with disabilities; and
 - (iii) the proposed placement offers the instruction and services recommended in the student's IEP.
- (3) Procedure for approval for reimbursement. (i) In order to obtain a timely determination, an application for State reimbursement shall be received by the department within six business days of the recommendation by the committee on special education that the student be placed in a private school. An annual re-application for reimbursement in a subsequent year shall be submitted prior to June 1st preceding the school year for which funding is sought.
- (ii) Initial agency determination. Within 15 business days of receipt of an application for State reimbursement, the commissioner's designee shall give notice to the board of education orally or by facsimile machine, and in writing by mail of the approval or initial denial of the application. Written notice of the denial of an application shall be accompanied by a statement of reasons for denial, including specific findings of deficiencies in the application, a statement of additional documentation or information requested and notice to the board of education of the opportunity to cure deficiencies in its application and of the availability of administrative review of the denial.
 - (iii) Opportunity to cure deficiencies. Within 20 business days after written notice of the denial of an application is sent pursuant to subparagraph (ii) of this paragraph, the board of education may submit a revised application which addresses any deficiencies in its initial application identified in the statement of reasons for the denial. Within 10 business days of receipt of a revised application, the commissioner's designee shall send notice to the board of education orally or by facsimile machine, and in writing by mail, of the action taken on the revised application. Written notice of a denial of a revised application shall be accompanied by a statement of reasons for denial including findings of deficiencies in the revised application and shall inform the

board of education of the availability of administrative review of the denial.

- (iv) Administrative review.
 - (a) No later than 40 days after written notice of the initial denial of an application for reimbursement is sent pursuant to subparagraph (ii) of this paragraph, the board of education may request administrative review of such initial denial, or the denial of a revised application, by the commissioner, or his or her designee. The board of education shall submit with such request a response to the statement of reasons for the denial and findings of deficiencies, and may submit with the request additional evidence in support of its application.
 - (b) Within 10 business days of receipt of a request for administrative review, the assistant commissioner or his or her designee shall render a final agency determination on the application for State reimbursement and shall notify the board of education in writing of such determination. The decision shall include a statement of relevant findings and deficiencies, and a concise statement of conclusions, including the legal basis for such conclusions.
 - (v) Where an application for reimbursement is approved by the commissioner's designee, or upon review, the board of education shall be entitled to receive reimbursement as of the date the student commenced actual attendance in the recommended private school placement, except that where the board of education fails to submit a timely application, as prescribed by subparagraph (3)(i) of this subdivision, State reimbursement shall commence on the date the application for reimbursement is received by the department.
- (4) Implementation of placement. (i) It shall be the duty of the local board of education to implement a board-approved committee on special education recommendation for placement in an approved private school within the time prescribed by section 200.4(e)(1) of this Part.
- (ii) Neither the filing of an application or revised application for reimbursement, nor the filing of a request for review, shall be deemed to relieve the board of education of its responsibility to provide appropriate special programs and services within 30 school days of receipt of the recommendation of its committee on special education.
- (5) Additional procedures for private school placements. (i) In the event that the department, in reviewing private school placements made by school districts, determines that a board of education has engaged in a pattern or

practice of placing students with disabilities in private day or residential schools when appropriate placements were available in public facilities, or of failing to make residential and/or nonresidential private school placements in a timely manner, or of failing to submit timely applications pursuant to subparagraph (3)(i) of this subdivision, the department shall advise the board and direct the board to take corrective action, including but not limited to:

- (a) review by the district's committee on special education of all private placements deemed by the department to be inconsistent with the right to placement in the least restrictive environment; and
 - (b) compliance with recommendations by the department to develop programs in the public school setting to enable students to remain in public facilities; and
 - (c) establishment of an agreed upon deadline for filing applications as a precondition for obtaining reimbursement.
- (ii) Upon a finding of noncompliance with a prior directive of the department for corrective action pursuant to subparagraph (i) of this paragraph, the department may require prior approval by the department of individual placements in private and residential school programs for a period prescribed by the department.
 - (iii) Where the department requires, as corrective action, that a board of education obtain prior approval for private day and residential school placements, the department's determination to approve or deny any such application shall be made within 10 business days of a request by the board of education for such approval. Where the department disapproves such a placement recommendation for an individual student, the parent may file with the department a written request for a hearing before an impartial hearing officer who will be designated by the department. The procedures relating to notice and review of the disapproval of the recommended private or residential school placement shall be comparable to those set forth in section 200.5 of this Part, and shall be provided by the department. Review of the determination of the hearing officer shall be available by means of a proceeding pursuant to article 4 of the Civil Practice Law and Rules or 20 U.S.C. 1415, and may be instituted by any party to the hearing.
- (k) *Twelve-month special service and/or program.* (1) Eligibility of students for 12-month special services and/or programs. Students shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression, if they are:

- (i) students whose management needs are determined to be highly intensive and require a high degree of individualized attention and intervention who are placed in classes in accordance with subparagraph (h)(4)(ii) of this section;
 - (ii) students with severe multiple disabilities, whose programs consist primarily of habilitation and treatment and are placed in special classes in accordance with subparagraph (h)(4)(iii) of this section;
 - (iii) students who are recommended for home and hospital instruction whose special education needs are determined to be highly intensive and require a high degree of individualized attention and intervention or who have severe multiple disabilities and require primarily habilitation and treatment;
 - (iv) students whose needs are so severe that they can be met only in a seven-day residential program; or
 - (v) students who are not in programs as described in subparagraphs (i) through (iv) of this paragraph during the period from September through June and who, because of their disabilities, exhibit the need for a 12-month special service and/or program provided in a structured learning environment of up to 12 months duration in order to prevent substantial regression as determined by the committee on special education.
- (2) All programs as described in paragraph (1) of this subdivision and offered during July and August shall have been approved by the commissioner in the first year in which the program is offered and periodically thereafter.
 - (3) The commissioner shall establish tuition reimbursement rates for the special education and related service programs approved for July and August.
- (l) The commissioner may grant a waiver from any requirement in this section and section 200.1 of this Part, upon a finding that such waiver will enable a local school district, board of cooperative educational services, approved private school, State-operated school, State-supported school or State department or agency to implement an innovative special education program that is consistent with State law, applicable Federal requirements and all other sections of this Part, and will enhance student achievement and/or opportunities for placement in regular classes and programs.
 - (1) Except as otherwise provided in paragraph (3) of this subdivision, a local school district, board of cooperative educational services, approved private

school, State-operated school, State-supported school or State department or agency shall submit an application for a waiver at least 60 days in advance of the proposed starting date of the program. Such application shall be in a form prescribed by the commissioner.

- (2) Except as otherwise provided in paragraph (3) of this subdivision, any district, school, or agency granted a waiver shall submit an annual report to the commissioner regarding the operation and evaluation of the program no later than 30 days after the end of each school year for which a waiver is granted.
 - (3) Any district, school or other agency granted a waiver for three consecutive school years may be granted a permanent waiver, upon a finding by the commissioner that the program has resulted in improved student achievement or enhanced opportunities for placement in regular classes and is consistent with State law and Federal requirements and all other sections of this Part. A district, school or other agency granted a permanent waiver shall not be required to submit an annual application or an annual report. A permanent waiver shall continue until terminated in accordance with paragraph (4) of this subdivision.
 - (4) The commissioner may terminate a waiver granted pursuant to this subdivision upon a finding that the program has not met its stated objectives or upon a finding that the program is no longer consistent with any requirement of State or Federal law or provision of this Part not specifically waived in the approval granted pursuant to this subdivision. The commissioner shall provide at least 30 days notice of a proposed termination. The district, school or agency shall be afforded the opportunity to submit a written response to the proposed termination which addresses any deficiencies, provided that such response shall be submitted no later than five business days prior to the date of the proposed termination.
- (m) *Levels of service.* (1) The percent of each instructional school day during which a student is provided any one or combination of the special education programs and services shall be in keeping with the unique needs of the student and the standards established in subdivisions (a), (b), (c), (d), (e), (f), (g), (h), (i) and (j) of this section.
- (2) Claims for State excess cost aid shall be based upon the minimum levels of service established in section 3602 of the Education Law.
 - (3) A child with a disability under the age of seven who is eligible for school-age services, not subject to compulsory attendance requirements and not on a regular school attendance register for school-age children shall be deemed enrolled for the purpose of claiming State aid pursuant to section 3602 of the Education Law for the provision of special education and

related services in accordance with subdivision 2 of section 4401 of the Education Law as recommended by the committee on special education at a site to be arranged by the board of education.

- (n) *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. A student placed in an IAES shall:
- (1) continue to receive educational services so as to enable the student to continue to participate in the general education curriculum, although in another setting and to progress toward the goals set out in the student's IEP; and
 - (2) 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.

200.7 Program standards for education programs for students and preschool students with disabilities being educated in private schools and State-operated or State-supported schools.

- (a) *Approval of private schools for students with disabilities funded pursuant to article 89 of the Education Law.*
- (1) General.
 - (i) Private schools and special-act school districts for students with disabilities, including summer schools, shall be eligible for approval by the commissioner to receive public funds for the education of students with disabilities, provided such schools meet the criteria in this Part.
 - (ii) Facilities of educational programs located outside the continental United States shall not be eligible for approval.
 - (iii) Reimbursement rates shall be calculated according to New York State statutes and applicable regulations for all approved private schools, including out-of-state schools and for special-act school districts. However, the commissioner may accept reimbursement rates for out-of-state schools calculated by the state in which the school is located, provided those rates have been approved by the state in which the school is located.

- (iv) Private schools seeking initial approval to be reimbursed with public funds shall have access to sufficient capital or other financial resources, other than revenues expected from New York State or local school districts, to cover all operating, property maintenance, leasing or purchase costs during the year of conditional approval.
- (2) Approval of private schools for reimbursement with public funds.
- (i) Conditional approval for private schools shall be limited to a period of one school year, or the period of time required to complete approval, and will be based on:
 - (a) submission of program information forms and after September 8, 1995, the submission of documentation of regional need and sufficient evidence to establish that the proposed program will serve only those students who, because of the nature or severity of their disability, would require a separate facility;
 - (b) submission of budget or financial statement information, including evidence that the school has enough capital or other financial resources, other than State or local sources of revenue, to be able to operate for at least one year;
 - (c) a fire safety check by the New York State Division of Fire Prevention and Control for in-state private schools, and a State or local fire safety check for out-of-state schools;
 - (d) for schools operating as corporate entities, evidence of the following:
 - (1) for in-state not-for-profit schools, a charter or application for a charter from the Board of Regents, incorporating a school authorized to provide special education services;
 - (2) for in-state for-profit schools, approval by the commissioner of the school's incorporation for the provision of special education; or
 - (3) for out-of-state schools, a license or charter from the state education agency of the state in which the school is located;
 - (e) at least one onsite program review visit by program or fiscal staff of the Education Department; and
 - (f) submission for approval of the school's procedures regarding behavioral interventions, including, if applicable, procedures for the use of aversive interventions.

- (ii) Final approval of schools which have had conditional approval:
 - (a) will be based on at least two site visits by program or fiscal staff of the Education Department during the year of conditional approval; and
 - (b) will take effect as of the date a final approval letter is issued by the commissioner, or his designee.
- (3) Denial or termination of private school approval. Private schools may be denied approval or removed from New York's list of private schools approved for reimbursement with public funds, or such approval may be terminated according to the following procedure:
 - (i) The commissioner or his/her designee will notify the school in writing of the reasons why denial or termination of approval is necessary, including a list of program or financial deficiencies and violations of State and Federal law or regulations which the commissioner believes to exist at the schools.
 - (ii) Schools may reply to the commissioner's notification within 30 days, addressing the commissioner's statement of reasons, indicating whether deficiencies or violations exist, what steps may be taken to correct conceded deficiencies or violations, and the time period in which deficiencies or violations will be corrected. If no reply is received, termination will be effective 30 days from the date of receipt of the commissioner's notification.
 - (iii) Requests for a hearing to review a proposed decision to deny or terminate approval may be made to the commissioner's designee. The request shall be made in writing to the commissioner's designee within 10 business days of receipt of a notice of removal from the list.
 - (iv) Schools may be removed from the approved list five business days after written notice by the commissioner indicating that there is a clear and present danger to the health or safety of students attending the school, and listing the dangerous conditions at the school, including, but not limited to, evidence that an approved private school is using aversive interventions to reduce or eliminate maladaptive behaviors of students without a child-specific exception provided pursuant to section 200.22(e) of this Part or that an approved private school is using aversive interventions in a manner inconsistent with the standards as established in section 200.22 (f) of this Part.

(b) *Operation and administration of private schools and State-operated and State-supported schools.*

- (1) Parents of students attending schools governed by this section shall not be asked to make any payments in lieu of, in advance of or in addition to, State, school district or county payments for allowable costs for students placed according to New York State procedures.
- (2) The confidentiality of pupil records at schools governed by this Part shall be maintained, and parental access to such records shall be permitted, in a manner comparable to that required of school districts pursuant to section 200.2(b)(6) of this Part.
- (3) Policy on school conduct and discipline. An approved private school, a State-operated school, and a State-supported school shall develop a policy on school conduct and discipline. The content of such policy shall be consistent with the provisions of section 100.2(l)(1)(i)(a)-(d), (f)-(g) of this Title. The discipline of students with disabilities attending any school governed by this section shall be consistent with Part 201 of this Title. The code of conduct developed by the Justice Center pursuant to article 20 of the Executive Law shall govern the conduct of custodians, as such term is defined in section 200.15(b)(1) of this Part, with respect to the safety, dignity and welfare of students attending in-state residential schools governed by this section.
- (4) The length of the school day shall be comparable to that required by section 175.5 of this Title. The school day shall include instructional services and related services, as required, but shall not include transportation.
- (5) Instruction for not less than 180 days each year shall be provided for each student. Approved private schools and State-operated and State-supported schools shall submit calendars of such days in session to the commissioner for approval by July first of the preceding school year. All approved private schools shall comply with the Education Law regarding attendance. Attendance registers shall be available for inspection by appropriate personnel of the contracting school districts, the department, and the school district in which the school is located.
- (6) Personnel qualifications and screening procedures. All professional instructional and supervisory personnel at schools governed by this section shall be appropriately certified in accordance with the provisions of Part 80 of this Title and section 200.6 of this Part. All noninstructional personnel at residential schools governed by this section shall be appropriately qualified in accordance with the provisions of section 200.15 of this Part. All persons applying to be employees or volunteers at residential schools governed by this section shall be screened in accordance with the provisions of section 200.15(c) of this Part. All persons providing preschool special education services established pursuant to section 4410 of the Education Law shall be

screened in accordance with the provisions of sections 424-a and 495(2) and (3) of the Social Services Law.

- (7) An approved private school, a state-operated school, or a state-supported school shall conform to all applicable fire and safety regulations of the state and municipality in which it is located. Each such school shall cause an annual inspection to be made in the manner set forth in subdivision 3 of section 807-a of the Education Law. A report of such inspection shall be made upon forms supplied by the commissioner and shall be maintained on file at the school. For schools subject to provisions of section 807-a of the Education Law, the report prepared pursuant thereto shall be deemed equivalent.
 - (8) Aversive interventions prohibited.
 - (i) Except as provided in section 200.22(e) of this Part, an approved private school serving school age students with disabilities, a State-operated school, or a State-supported school is prohibited from using aversive interventions to reduce or eliminate maladaptive behaviors of students.
 - (ii) An approved preschool program is prohibited from using aversive interventions with preschool students with disabilities without exception.
- (c) *Additional operational and administrative provisions related solely to private schools.*
- (1) Application. An application shall be made to the commissioner by the board of education for approval of the placement of a student with a disability in an approved private educational facility which has been determined to be the least restrictive environment for the student. An annual application for the continued placement of a student with a disability in such approved facility shall be submitted by the board of education to the department prior to June first preceding the school year for which such continued placement is sought.
 - (2) No student with a disability shall be removed or transferred from an approved in-state school without the approval of the school district contracting for education of such student pursuant to section 4402 of the Education Law. No student with a disability shall be removed or transferred from an approved out-of-state school without such recommendation by the committee on special education.
 - (3) Educational programs initially approved for reimbursement after September 1, 1981 shall provide instruction to a minimum of 16 students by September 1, 1982.

- (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.
 - (5) Residential schools may provide temporary care for persons over the age of 21 who are receiving transitional care pursuant to section 4402(1)(b)(4)(e) of the Education Law. When an individual receiving transitional care is about to be transferred from a residential school to an adult placement, a transfer plan shall be prepared by the residential school and forwarded to the receiving facility, the individual, and unless the individual objects, the parents, guardian or other family members prior to the transfer. The transfer plan shall include any information necessary to facilitate a safe transfer such as specific problems, a schedule for administering medications and behavior unique to the individual. In the event an individual receiving transitional care at a residential school is considered to adversely affect the health, safety or welfare of children residing in the facility, notification may be made by the residential school to the State Education Department to determine the need to discontinue the transitional placement.
 - (6) Policies and procedures relating to the use of aversive interventions. Not later than August 15, 2006, a private school that proposes to use or to continue to use aversive interventions in its program shall submit its written policies and procedures on behavioral interventions to the department. Only those private schools with policies and procedures that are approved pursuant to section 200.22(f)(8) of this Part on or before June 30, 2007 shall be authorized to use such interventions with New York State students. Failure to comply with the provisions of this paragraph may result in revocation of approval to accept new admissions of New York State students or termination of private school approval pursuant to paragraph (a)(3) of this section.
- (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) With respect to an application for admission to a State-operated school, the State-operated school shall notify the parents and commissioner of the results of such evaluation, and recommend appointment if appropriate in accordance with the procedures set forth below:
 - (a) Upon receipt of an application for admission of a student who has not been recommended for placement by the committee on special education or committee on preschool special education of the school district responsible for the student, the State-operated school shall immediately notify such school district of such application. The State-operated school shall, upon request, make available to such school district responsible for the student all records in its possession relating to the evaluation, placement and educational performance, including the results of any current evaluations, for each student who has applied for admission or is attending the school.
 - (b) Prior to any meeting of its multidisciplinary team to develop an individualized education program for a student, either upon initial admission to the school or in an annual review, the State-operated school shall notify the school district responsible for the student of such meeting and shall offer the district the opportunity to identify and present to the multidisciplinary team, an alternative placement recommendation for services in the least restrictive environment. In addition, such notice shall advise the school district of its right to appoint additional members to the multidisciplinary team pursuant to clause (c) of this subparagraph.
 - (c) If the school district responsible for the child elects to appoint additional members to the multidisciplinary team, it shall send written notice of such election to the State-operated school within seven business days of its receipt of notice pursuant to clause (b) of this subparagraph. A school district which fails to send such notice in a timely manner shall be deemed to have waived its right to appoint additional members pursuant to this clause. In addition to the members required for a committee on special education pursuant to Education Law section 4402(1), the State-operated school's multidisciplinary team shall include any additional members appointed by the board of education of the school district responsible for the student, except as provided in

section 200.3(f) of this Part. For each member appointed by the State-operated school, the school district may appoint a corresponding member, including a representative of the committee on special education who is qualified to teach or supervise special education and who is knowledgeable about general education curriculum and resources, a school psychologist, the student's special education teacher, a regular education teacher of the student whenever the student is or may be participating in the regular education environment, a parent member, an individual who can interpret the instructional implications of evaluations, others who are determined to have knowledge or special expertise regarding the student, a physician where the parent requests attendance of the physician member. The commissioner shall determine the location at which the multidisciplinary team meeting will be held. In the event the multidisciplinary team is unable to reach consensus and there is a tie vote on the multidisciplinary team, the parents of the student being discussed shall cast the deciding vote.

- (d) The multidisciplinary team shall state the reasons for its recommendation, and submit such recommendation to the commissioner for consideration with regard to the appointment or change in placement of the student at the State-operated school. The multidisciplinary team shall consider any alternative placement recommendation presented by the school district responsible for the student, and, if it rejects the alternative, shall include in its recommendation a statement of its reasons for doing so. If the representatives appointed by the school district responsible for the student disagree with the recommendation of the multidisciplinary team, they shall be entitled to prepare a dissenting opinion on the placement recommendation and to submit such opinion to the commissioner for consideration with regard to the appointment or change in placement of the student at the State-operated school.
- (e) The evaluation and placement of students in State-operated schools must be completed in accordance with the timelines established for such procedures in section 200.4 of this Part.
- (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(j) through (k) of this Part.

- (ii) With respect to an application for admission of a school-age student to a State-supported school, the school shall report the results of its evaluation to the committee on special education. Upon receipt of such report, the committee on special education shall conduct a meeting in accordance with the provisions of section 200.4(d)(4) of this Part, provided that appropriate representatives of the State-supported school shall be given the opportunity to attend and participate in the meeting which may be held at the State-supported school. 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 special education, they may request that the board of education appoint an impartial hearing officer to review that recommendation, and the hearing officer shall consider, together with all other relevant information, the evaluation conducted by the State-supported school. If the committee on special education has recommended a placement other than the State-supported school, and the hearing officer finds that such recommendation is inappropriate and that placement in the State-supported school would be appropriate, the 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 hearing officer may be appealed in accordance with section 4404 of the Education Law.
- (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 and/or submit a request for a due process impartial hearing pursuant to sections 200.5(i) and (j) of this Part to review that recommendation. 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) The approval of the commissioner in granting the State appointment, if appropriate, will be determined upon the following criteria:
 - (i) Students between the ages of 3 and 21 residing in New York State, who are profoundly deaf, *i.e.*, with a loss in excess of 80 db ISO in the better ear, or who are deaf and, based on a full and individual evaluation, are determined to be functionally profoundly deaf, who are deaf-blind, or who are severely physically disabled, may receive appointments to the State-operated or State-supported schools and be included for State support for their education.
 - (ii) Students residing in New York State who are between the ages of 3 and 21 and who are legally blind may receive appointments to the State-operated or State-supported schools and be included for State support for their education.
 - (iii) Students between the ages of 3 and 21 residing in New York State who are severely emotionally disturbed may receive appointments to the State-operated or State-supported schools and be included for State support for their education.
 - (iv) Deaf or blind students appointed on a day basis shall be appointed to the school for the deaf or blind nearest their place of residence; provided that, with the consent of the student's parent, a blind student may be appointed to the Lavelle School for the Blind in the City of New York or the New York Institute for Education of the Blind in the City of New York without regard to which such State-supported school is nearer to the student's place of residence. Students may be appointed to a school for the deaf or blind on a residential basis when daily transportation between the student's place of residence and such school is not feasible, or when it is established to the satisfaction of the commissioner that such placement is necessary to meet the individual educational needs of the student. Appointments for severely physically disabled students to attend the Henry Viscardi School shall be on a day basis only.
 - (v) The commissioner, or his or her designee, in determining whether to appoint the student to a State-operated school, shall consider whether

the placement at the State-operated school is an appropriate placement in the least restrictive environment, taking into account any alternative placement recommended by the school district responsible for the student.

- (3) If the commissioner, or his or her designee, determines that placement in the State-operated school is not in the least restrictive environment or otherwise disagrees with the recommendation of the State-operated school, the commissioner shall state his or her reasons in writing and shall send the recommendation back to the multidisciplinary team of the State-operated school for reconsideration, with notice to the parents and the school district responsible for the student. If the commissioner refers the recommendation back to the multidisciplinary team for reconsideration, the commissioner shall also notify the parents, the school district responsible for the student and the multidisciplinary team in writing of the need to schedule a meeting to ensure timely placement.
- (4) If the commissioner declines to make a State appointment of a student who has been recommended for appointment by a State-operated or State-supported school, or if the Commissioner seeks to change a student's classification or placement against the recommendation of the State-operated or State-supported school which such student attends, the parent may request mediation or file with the department a written request for a hearing before an impartial hearing officer who will be designated by the department. Such a hearing officer shall not be an employee of the department. The procedures relating to notice and review of a refusal of State appointment or of a change of classification or placement by the commissioner shall be comparable to those set forth in section 200.5(a) through (f) of this Part, and shall be provided by the Education Department. Review of the determination of the hearing officer shall be available by means of a proceeding pursuant to article 4 of the Civil practice Law and Rules or 20 U.S.C. 1415, and may be instituted by any party to the hearing.
- (5) State-appointed students shall be eligible for transfer between State-operated and/or State-supported schools upon the approval of the commissioner. State-appointed students being considered for transfer shall remain in the school they currently attend until an alternate school placement is finalized. Such transfers shall be subject to the applicable placement and review procedures set forth in paragraph (1) of this subdivision.
- (6) State-operated or State-supported schools may apply to the commissioner for the termination of the appointment of a student who had been admitted to the school pursuant to subparagraph (1)(i) of this subdivision. An application for this purpose shall set forth the basis for such action and shall be made only after compliance with the applicable notice and review procedures set forth in paragraph (1) of this subdivision. No placement of a school-age student in a State-supported school may be terminated prior to

review by the committee on special education. No appointment to a State-operated or State-supported school shall be terminated until the student can be transferred to a more appropriate program without interruption of the continuity of such student's education program.

- (7) The eligibility of deaf infants to receive educational services pursuant to section 4204-a of the Education Law, and the approval of educational facilities to provide such services, shall be determined in accordance with the provisions of this paragraph.

(i) For the purposes of this paragraph:

(a) *Deaf infant* means a child of less than three years of age who has a severe hearing loss which precludes the learning of spoken language through the sense of hearing alone except that, commencing July 1, 1991, a child who, as of his or her third birthday, is already receiving services pursuant to section 4204-a of the Education Law may, if the parent chooses, continue to receive such services through August 31st of the calendar year in which the child first becomes eligible to receive services pursuant to section 4410 of the Education Law. Infants who are unable to respond to sounds presented at intensities of 60 decibels (db) sound pressure level (SPL) shall be eligible for special educational assistance in order to develop spoken language. Infants of less than two years of age who are unable to respond at 60 decibels (db) sound pressure level (SPL) may be eligible for such services, provided that they have been recommended by a diagnostic agency.

(b) *Approved facilities* means the schools for the deaf which are enumerated in section 4201 of the Education Law, and other public and private agencies which have been approved by the commissioner in accordance with the provisions of subparagraph (iii) of this paragraph.

(ii) Eligibility of infant. An annual application for services shall be filed by the parents or legal guardians of deaf infants on forms prescribed by the commissioner. The initial application for each infant shall be accompanied by audiological, otological and other appropriate reports which will be used in determining eligibility for program assistance. If an infant is determined to be eligible, a referral will be made to an approved facility by the commissioner. Continuation in the program shall be dependent upon infant progress reports which shall be submitted quarterly by the facility which each infant attends. If a facility indicates that an infant cannot benefit from the educational program to which such infant has been admitted, the facility shall forward to the commissioner its recommendations for termination of

the infant's participation in such program and for any appropriate educational services for such infant.

- (iii) Eligibility of facilities. A facility shall be approved to provide educational services to such infants on an annual basis, following an inspection of such facility, provided that the plant, staff and program thereof meet the following standards:
 - (a) The facility shall provide an educational program, for both infant and parent or legal guardian, which shall include language development, auditory stimulation, speech and speech reading. Language development may include any system of oral or manual communication or combination of both. Such program shall also provide orientation to parents regarding the implications of deafness, developmental needs of deaf infants, and the psychosocial problems encountered by parents or legal guardians of deaf infants.
 - (b) An approved facility shall have a physical plant appropriately equipped to serve infants who are deaf, and shall be subject to a site visitation by the commissioner.
 - (c) An approved facility shall adhere to all provisions of paragraph (b)(7) of this section.
 - (d) An approved facility shall employ teachers of the deaf or teachers of the speech and hearing-handicapped who are certified or licensed pursuant to Part 80 of this Title.
 - (e) A register of approved facilities will be maintained by the Department.

- (e) *Notice of closing, transfer of ownership or voluntary termination of approval by approved private schools.* The owner or operator of an approved private residential or nonresidential school for students with disabilities that receives public funds pursuant to articles 81 and/or 89 of the Education Law, who intends to cease the operation of such school or chooses to transfer ownership, possession or operation of the premises and facilities of such school or to voluntarily terminate its status as an approved school, shall submit to the commissioner written notice of such intention not less than 90 days prior to the intended effective date of such action. Such notice shall set forth a detailed plan which makes provision for the safe and orderly transfer of each student with a disability who was publicly placed in such approved private school. The owner or operator of any such approved private school shall not cease to provide services to any student with a disability until the required notice and plan have been received, reviewed and approved by the commissioner, and a transfer of such student has been arranged in accordance with the approved plan.

200.8 State assistance for instruction of students with disabilities pursuant to sections 4406 and 4410 of the Education Law.

- (a) *Approval of orders of the Family Court.* An order of the Family Court which directs that special educational services be provided to a student with a disability may be approved by the commissioner, provided that satisfactory evidence is submitted to establish that:
- (1) for services provided during the months of July and August through August 1989, such student is a child with a disability, as defined by section 4401 of the Education Law, and is not eligible for educational services pursuant to article 73, 85, 87, 88 or 89 of the Education Law; or
 - (2) for services provided prior to September 1, 1989, such student meets all the criteria of section 4401(1) of the Education Law, except that the student is under school-age of five and is not entitled to attend public schools without the payment of tuition pursuant to section 3202 of the Education Law and such student is also not eligible for educational services pursuant to article 73, 85, 87, 88 or 89 of the Education Law; or
 - (3) for services provided on or after September 1, 1989, such student meets all the criteria of section 4401(1) of the Education Law, except that the student is under the age of three and is not entitled to attend a preschool program pursuant to section 4410 of the Education Law except that, commencing July 1, 1991, a student who, as of his or her third birthday, is already receiving services pursuant to section 236 of the Family Court Act may, if the parent chooses, continue to receive such services through August 31st of the calendar year in which the student first becomes eligible to receive services pursuant to section 4410 of the Education Law and such student is also not eligible for educational services pursuant to article 73, 85, 87, 88 or 89 of the Education Law.
- (b) No order of the Family Court shall be approved with respect to any student who has not previously received State assistance pursuant to the provisions of sections 4406 and 4407 of the Education Law to attend such school, or any student who is to be enrolled in a private school which has not been approved by the department in accordance with the provisions of section 200.7 of this Part, unless appropriate notification has been received by the department on or before June 30th in the school year for which special educational services are sought. The provisions of this subdivision shall not apply to a student enrolled in a school subject to visitation by the commissioner pursuant to article 85 of the Education Law.

- (c) *Submission of claims.* In order to be eligible for State assistance pursuant to Education Law, sections 4406 and 4410:
- (1) for services provided on or after July 1, 1983, payment by the county or city for such services shall be made not later than 12 months from the date on which a certificate of approval for State aid was issued, or 12 months from the last day of the school year within which special educational services were provided, whichever is later, and each voucher for payment by the State, pursuant to the provisions of subdivisions 2 and 3 of section 4406 of the Education Law, shall be submitted by a county or city not later than two months after issuance by the department of the automated voucher listing immediately following the later of the above two dates; or
 - (2) for services provided to a preschool student with a disability on or after September 1, 1989, payment by the county or city for such services shall be paid at least quarterly, pursuant to the provisions of section 4410 of the Education Law, upon vouchers presented by an approved provider which has contracted with the municipality to provide those services. Upon receipt of the form provided by the committee pursuant to section 200.16(d)(4) of this Part, the appropriate municipality in which the preschool student resides shall review and, if complete, shall sign the form, and shall send one copy to the department for approval and one to the approved evaluator. A municipality shall not, as a condition of approval of such claims for reimbursement, require any additional information other than the information required to be included on such form. Such vouchers shall be audited in the same manner as other claims against the municipality.
 - (3) Within 12 months from the end of the fiscal year in which special education programs and services were provided, the municipality shall request reimbursement from the department for approved costs. To request reimbursement, the municipality shall use a list provided by the commissioner of all preschool students with disabilities in that municipality who received programs and services pursuant to section 4410 of the Education Law. The municipality shall certify on such list the amount expended and dates of expenditure for such programs and services.
 - (4) Notwithstanding the provisions of paragraph (3) of this subdivision, upon application by a municipality with a documented justification, the commissioner may exercise a delay in submission of requests for reimbursement of approved costs for good cause shown.
 - (5) In the event of a rate increase or decrease recommended by the commissioner and approved by the Director of the Budget, the municipality shall request reimbursement for the new approved cost(s) from the commissioner within 12 months from the end of the fiscal year in which

services were provided, or 12 months from the end of the fiscal year in which the rate was increased or decreased, whichever is later.

- (6) Upon receipt of a certified statement from the municipality and a determination that all expenditures were made as required pursuant to section 4410 of the Education Law, the commissioner shall approve reimbursement of such costs pursuant to section 4410(11) of the Education Law and transmit such statement to the Comptroller for audit and payment.
- (7) Beginning with the 1989-90 school year, within 12 months from the end of the fiscal year in which special education programs and services were provided, the municipality may request reimbursement for necessary and allowable administrative costs, up to a maximum of \$50 per eligible preschool student placed pursuant to section 4410 of the Education Law. The municipality shall request reimbursement in a manner prescribed by the commissioner.

200.9 Tuition rates for approved programs educating students with disabilities ages 3 to 21 years old who have been enrolled pursuant to articles 81 and 89 of the Education Law.

(a) *Definitions.* As used in this section:

- (1) *Approved program* means a program that provides special education to students with disabilities requiring the establishment of a tuition rate, in accordance with sections 4003, 4401, 4403, 4405, 4408 and 4410 of the Education Law.
- (2) *Arm's length transaction* means one entered into by independent and unrelated persons in a good faith transaction between a willing buyer and a willing seller.
- (3) *Base year* means the July 1st through June 30th fiscal period that is used as the basis for tuition rate calculations. It is two years prior to the tuition rate year, as defined in paragraph (26) of this subdivision.
- (4) *Base year data* means the program and financial information that corresponds to the base year.
- (5) *Budget based rate* means a tuition rate calculated for an approved program based on budgetary information submitted by the program.
- (6) *Student with a disability* means a student with a disability, as such term is defined in section 200.1(zz) of this Part, or a preschool student with a disability, as such term is defined in section 200.1 (mm) of this Part.

- (7) *Compliance issue* means a condition identified by the commissioner's designated representative, whereby a program is determined to be out of compliance with one or more State or Federal statutes or regulations.
- (8) *Compliance review* means a review initiated by the commissioner's designated representative for the purpose of determining whether a compliance issue, as defined in paragraph (7) of this subdivision, exists.
- (9) *Corrected rate* means a tuition rate that has been adjusted due to a mathematical or reporting error either in the tuition rate calculation or an error in the financial report data submitted to the commissioner.
- (10) *Cost center* means revenues and expenses, as well as statistical and other information relating to a specific program or functional purpose.
- (11) *Direct care cost* means a cost associated with the provision of instruction and related services to students with disabilities.
- (12) *Full-time equivalent (FTE) enrollment* shall have the same meaning as such term is defined in section 175.6 of this Title.
- (13) *Insufficient resources* means a condition whereby a program as currently structured does not meet applicable State or Federal statutes or regulations for the population being served and that the reassignment of existing staff or reallocation of program resources currently allocated for other needs would not bring the program into compliance.
- (14) *Less-than-arm's-length* transaction means one between the program or related entity and anyone who serves as part of the management or as a volunteer or employee of the program or related entity, or any of the following relations of such persons: spouse, former spouse, child or descendant, parent or ancestor, sibling, or spouse of descendant, ancestor or sibling. Also included are dealings with partnerships of which such persons are partners or employees, or with corporations of which any such person is an officer, director or trustee, or in which any such person owns more than 10 percent of the stock.
- (15) *Nondirect care cost* means a cost that is attributable to the administration or the operation and maintenance of the physical plant, as each pertains to the approved special education program.
- (16) *Nondirect care cost parameter* means the limit on the reimbursable nondirect care costs before application of applied revenues and the total cost screen.

- (17) *Off-year* means the July 1st through June 30th fiscal year subsequent to the base year and preceding the tuition rate year.
 - (18) *Per diem rate* means a tuition rate, as defined in paragraph (25) of this subdivision, on a per care day basis. The per diem rate is calculated by dividing the total reimbursable costs by the total care days.
 - (19) *Rate based on audit* means a tuition rate that has been calculated based on a final audit of actual program expenses, revenues, enrollment data and other relevant program information performed by the commissioner, the State Comptroller, other State agencies or agencies or subdivisions of other states, or a municipality in accordance with section 200.18 of this Part.
 - (20) *Reconciliation rate* means a tuition rate that has been calculated using actual program and financial data with applicable reimbursement methodology applied.
 - (21) *Site visit* means an on-site programmatic review conducted by the commissioner's designated representative.
 - (22) *Special class* means a class, as such term is defined in section 200.1 (uu) of this Part.
 - (23) *Total care days* means the number of days a program operates in a given year multiplied by the full-time equivalent student enrollment in that year.
 - (24) *Total cost screen* means a control measure within the reimbursement methodology that controls material fluctuations in tuition rates from year to year. The two components of the total cost screen are the hold harmless component and the rate growth component.
 - (25) *Tuition rate* means the per pupil amount to be used for billing public tuition funding sources for full-time equivalent students enrolled in an approved special education program. The rate shall be established based on the requirements as stated in this section.
 - (26) *Tuition rate year* means the July 1st through June 30th fiscal year for which a tuition rate is calculated that is two years subsequent to the base year, unless it is a budget based rate, reconciliation rate or rate based on audit.
- (b) Tuition rates for approved programs receiving public funds for educating students with disabilities shall be calculated on a July 1st through June 30th basis and in accordance with the provisions contained in this section. For the purposes of this Part, programs that conform to the requirements of State or Federal laws or regulations governing the education of students with disabilities that have been approved by the commissioner shall include private providers, special act school

districts, boards of cooperative educational services (BOCES), and public school districts.

- (c) School district or local government reimbursement to approved programs shall conform to the provisions of this section and articles 81 and 89 of the Education Law.
- (d) *Accounting requirements for approved programs.* (1) Programs shall maintain accounts in accordance with generally accepted accounting principles.
 - (2) Programs shall use the accrual basis of accounting. Accounting books of original entry shall include asset, liability and fund balance or equity accounts, as well as expenditure and revenue accounts. Subsidiary revenue and expenditure accounts shall be maintained for each approved program requiring a tuition rate, for preschool evaluation costs, and for each government grant administered by the commissioner.
 - (3) Programs shall retain all pertinent accounting, allocation and enrollment/attendance records for a period of seven years following the end of each reporting year. Information relating to the acquisition of fixed assets, equipment, land or building improvements and any related financing arrangements and grants must be retained as long as the facility is used by any educational program the provider operates if this period exceeds seven years.
 - (4) Government grants received for costs of construction, renovation or acquisition of facilities or equipment shall be deducted from the original cost of such asset to determine the basis to be used for calculating depreciation or amortization of the asset.
 - (5) Special act school districts, BOCES, and public school districts shall maintain accounts in accordance with generally accepted accounting principles as determined for public entities by the State Comptroller in accordance with section 36 of the General Municipal Law.
- (e) *Financial reporting requirements for approved programs.* (1) Tuition rates for existing approved private programs and special act school districts shall be based on financial reports, as prescribed by the commissioner, supported by financial statements certified by a licensed or certified public accountant independent of the program's operation. Annual financial reports and financial statements for either the fiscal year, July 1st through June 30th, or for the calendar year, January 1st through December 31st, as applicable, shall be required to be submitted to the commissioner's designated representative. Tuition rates for existing approved BOCES' and public school district programs shall be based on financial reports as required by the commissioner and/or the State Comptroller.

- (i) Financial Reports.
 - (a) Financial reports for all programs shall provide information that will allow analysis of revenues and expenses by program including but not limited to enrollment and staffing data. Additionally, the following requirements shall apply:
 - (1) Private providers and special act school districts shall submit the New York State Consolidated Fiscal Report certified by a licensed or certified public accountant independent of the program's operation.
 - (2) BOCES shall submit the Annual Financial and Statistical Report of the BOCES (SA-111) in the format required by the commissioner, including an affidavit of the treasurer that the statements contained in the report are true.
 - (3) Public school districts shall submit the Annual Financial Report Based on Double-Entry Accounting (ST-3) in the format specified by the State Comptroller and the commissioner, including a certification by the district treasurer, the chief fiscal officer, or the president of the board, as applicable, that the information is a true and correct statement of the financial transactions of the school district for the applicable fiscal year.
 - (b) Financial reports for all programs shall be prepared on the accrual basis of accounting and in accordance with generally accepted accounting principles.
 - (c) Financial reports shall include separate cost centers for each special education program requiring the establishment of a tuition rate and for other programs and services receiving funding through the department.
 - (d) Evaluation costs and related statistical data for preschool students, as prescribed in section 4410 of the Education Law and sections 200.4 and 200.16 of this Part, must be reported in a separate cost center.
 - (e) Expenditures, revenues, and statistical data, as they pertain to each government grant administered by the commissioner, must be reported in separate cost centers for that grant.

- (f) The Consolidated Fiscal Report shall be submitted no later than October 31st following the close of the July 1st through June 30th fiscal year and no later than April 30th following the close of the calendar year, as applicable. The SA-111 shall be submitted no later than October 1st following the close of the school fiscal year and the ST-3 shall be submitted in accordance with the schedule established by the State Comptroller.
- (ii) Financial Statements.
- (a) The financial statements submitted by approved programs shall be certified by a licensed or certified public accountant independent of the program. In instances where the licensed or certified public accountant or accounting entity provides other nonaudit services to the program such as management consulting, automation consulting, or bookkeeping services, the provision of these services shall be fully disclosed via an explanatory note to the audited financial statements.
 - (b) The required financial statements for nonprofit providers shall include a balance sheet, a statement of activity and a statement of changes in financial position. The required financial documents for for-profit providers shall include a balance sheet, an income statement and a statement of cash flows. For nonprofit and for-profit providers, any notes that may be appropriate to explain the data collected in the above statements, a management letter if available, and a report on the reliability of the systems of internal control shall also be included.
 - (c) For private providers that are required to file a New York State Consolidated Fiscal Report with other State agencies on a calendar year, the financial statements shall be consistent with the financial reporting period of the Consolidated Fiscal Report whenever possible.
 - (d) All other private providers and special act school districts are required to file the Consolidated Fiscal Report and financial statement information on a July 1st through June 30th fiscal year.
 - (e) BOCES and public school districts shall submit financial statements to the commissioner and/or the State Comptroller in the required format.
 - (f) Financial statements shall be required to be submitted to the appropriate representative on the same schedule that the

financial reports, as prescribed in clause (i)(f) of this paragraph, are required.

- (2) Private providers may request one 30-day extension for filing complete financial statements and financial reports provided that they demonstrate in writing why the required information could not be provided prior to the established due date. Extension requests shall be approved or disapproved by the commissioner in writing.
 - (3) Programs seeking initial approval shall submit a programmatic application to the commissioner's designated representative, in accordance with section 200.7 of this Part.
 - (i) Tuition rates for at least the first two school years of operation for special class programs shall be established in the manner described in subparagraph (f)(2)(ix) of this section.
 - (ii) Tuition rates for the first two school years of operation for other than special class programs, shall be based on financial and related statistical information submitted to the commissioner on required budget forms.
- (f) *Principles governing reimbursement rates for approved programs.* (1) Reimbursement to special education programs shall be subject to the following principles:
- (i) Tuition rates shall include administration and direct care costs and the costs of operation and maintenance of instructional facilities, pursuant to section 4401 of the Education Law. Expenditures shall include but not be limited to: personal service costs, supplies, materials, equipment, and related debt service.
 - (ii) Evaluation costs will be reimbursed either as part of the tuition rate or through a separate evaluation rate, as warranted by the commissioner. Such separate evaluation rates shall be established by the commissioner and transmitted to the Director of the Budget for approval.
 - (iii) For the purposes of establishing tuition rates, program expenses shall be offset by revenues received for special education programs, as prescribed in subparagraph (2)(v) of this subdivision.
 - (iv) Adjustments shall be made to reported financial data. Such adjustments may include but not be limited to:

- (a) any reported cost not considered necessary or directly related to the operation of the specific approved special education program;
- (b) any reported cost that cannot be substantiated on field audit by adequate written documentation. Adequate documentation shall include but not be limited to: payroll records, allocation records, canceled checks, invoices, and depreciation schedules;
- (c) any reported costs incurred by the program as a result of unsound business practices or accounting practices not in accordance with generally accepted accounting principles;
- (d) excess depreciation or amortization costs incurred as a result of using accelerated methods or useful lives other than those required for the Consolidated Fiscal Report;
- (e) costs incurred in less-than-arm's-length transactions that are determined to be above the actual, documented costs of the owner. Costs above actual, documented costs of the owner shall be allowed only with written approval of the commissioner upon the establishment of the cost effectiveness resulting from the transaction;
- (f) interest expense on capital indebtedness or on working capital loans incurred in a less-than-arm's length transaction between the lender and the borrower in excess of the prime rate of the lending institution. Interest rates in excess of the prime rate shall be allowed only with the written approval of the commissioner upon establishment of the cost effectiveness resulting from the transaction; provided, however, that interest rates on working capital loans shall be allowable if not disapproved within five business days of receipt by the commissioner of a completed request for approval;
- (g) interest expense on capital indebtedness resulting from an interest rate in excess of the prime rate of the lending institution plus one percent. Interest rates in excess of the prime rate plus one percent shall be allowed only with prior written approval of the commissioner in cases where the program can establish that it was unable to secure a rate of prime plus one percent or lower despite its good faith efforts to do so;
- (h) interest expense on working capital loans in excess of the prime rate of the lending institution plus one percent. Interest rates in excess of the prime rate plus one percent shall be allowed only

with written approval of the commissioner in cases where the program can establish that it was unable to secure a rate of prime plus one percent or lower despite its good faith efforts to do so;

- (i) interest expense on working capital loans if conditions do not exist that warrant the loan. Documentation that the loan is warranted may include but not be limited to:
 - (1) documentation indicating that tuition billings or their equivalent were submitted to the appropriate funding sources by the program in a timely manner but tuition payments were not received in accordance with the written contract or payment schedule; and
 - (2) evidence indicating that required financial report and financial statement data was submitted in a timely manner and in the format required by the commissioner, as prescribed in subdivision (e) of this section.
- (2) Tuition reimbursement methodology. The commissioner shall develop and recommend the reimbursement methodology to be used in the calculation of tuition rates for programs approved under articles 81 and 89 of the Education Law to the Director of the Budget. In accordance with section 4410(10)(a)(i) of the Education Law, the commissioner's municipal task force shall submit an annual report by December 31st of each year to the commissioner providing recommendations on the preschool rate-setting methodology for the following school year. The Director of the Budget, in consultation with the commissioner, shall approve the reimbursement methodology. Any modification to the approved methodology, including but not limited to the nondirect care cost parameter, the hold harmless percentage, the rate of growth adjustment factor, the annual inflation factor and other factors to be applied in determining the tuition rate for the school year, shall require the approval of the Director of the Budget.
 - (i) The reimbursement methodology shall be applied to base year data and other information submitted in the required financial reports and financial statements, as prescribed in subdivision (e) of this section. The methodology shall also be applied to budget data used to calculate budget based rates, to actual data used to calculate reconciliation rates and to audit data used to calculate final rates based on audit.
 - (ii) The data in the financial reports shall be reviewed and adjustments shall be made in accordance with this section.

- (iii) Annual inflation factors shall be applied to the appropriate financial report data after adjustments, with the exception of budget based rates, reconciliation rates and final rates based on audit.
- (iv) The nondirect care cost parameter shall limit nondirect care costs as a percent of total reimbursable adjusted inflated costs before application of applied revenues and before application of the total cost screen.
- (v) Applied revenues, as reported on the financial reports and statements, shall include revenue that, to any extent, defrays expenses included in the tuition rate calculation either for the tuition rate year or for prior years, consistent with section 4001 of the Education Law. These revenues shall be subtracted from total costs after the application of the nondirect care cost parameter.
- (vi) Per diem rates shall be controlled by the total cost screen. The total cost screen calculation shall use a per diem rate for each education program for both the rate year and the previous year. A per diem rate shall be arrived at by dividing the total reimbursable costs by the total care days used in the tuition rate calculation. Total care days shall equal the number of days in session multiplied by the full-time equivalent (FTE) student enrollment. For 12 month programs, this will be the care days for 10 months plus the care days for the July and August component. The total cost screen shall consist of two types:
 - (a) The hold harmless screen provides that if a program's per diem rate is reduced by the nondirect care cost parameter, the final per diem rate shall not be reduced from the previous year's per diem rate by more than the hold harmless percentage unless the reimbursable costs have decreased by more than the hold harmless percentage.
 - (b) The rate growth screen provides that a program's per diem rate from one school year to the next shall be limited to the documented rate of growth of per pupil expenditures for all public school districts on a regional basis multiplied by the rate of growth adjustment factor. The data used to determine the rate of growth of per pupil expenditures for public school districts shall be derived from the department's Information Center on Education report entitled "Annual Education Summary."
- (vii) The tuition rate calculation shall use the following formula: Per diem rate, after offsetting revenues and the application of the nondirect care cost parameter and the total cost screen, times the number of days in session, equals the per child tuition rate. Separate rates for the 10-

month school year component and the July and August component shall be calculated using the same formula.

- (viii) The tuition rate for special class programs seeking initial approval shall be based on the regional weighted average per diem tuition rate for two years until such time that the required financial statements and reports of the new program are received by the commissioner. Separate regional weighted average per diem tuition rates shall be used for school age programs and for preschool programs. The tuition rate for the third and subsequent years will be calculated using the methodology described in this subdivision only if the actual full-time-equivalent enrollment for the base year reported on the financial reports equals or exceeds the minimum number of full-time-equivalent students required for program approval, as prescribed in section 200.7(c)(3) of this Part. If the reported base year full-time equivalent enrollment is less than the required minimum enrollment, then the program shall continue to receive the regional weighted average per diem tuition rate for the rate year until such time that the program's actual base year enrollment equals or exceeds the required minimum number of full-time-equivalent students.

- (ix) The tuition rate for programs for preschool students with disabilities receiving special education itinerant services pursuant to section 4410(1)(k) of the Education Law, shall be established using the reimbursement methodology as set forth in paragraph (1) of this subdivision and subparagraphs (i) through (viii) of this paragraph, with the following modifications:
 - (a) Expenditures for teacher salaries and fringe benefits, expenditures associated with substitute teachers, as well as expenditures for nondirect care costs as set forth in paragraph (1) of this subdivision, are reimbursable.

 - (b) The tuition rate for providers seeking initial approval to provide special education itinerant services shall have the established reimbursement methodology applied to the submitted budget and related statistical data. Historical costs submitted for other approved programs operated by a provider, such as data pertaining to a special class program, may also be used to establish rates for newly approved special education itinerant service programs.

 - (c) Rates for the certified special education teacher providing special education itinerant services shall be published as half hour rates and billing by providers to municipalities must be done in half hour blocks of time. Billable time includes time spent

providing direct and/or indirect special education itinerant services as defined in section 200.16(i)(3)(ii) of this Part in accordance with the student's individualized education program (IEP). The difference between the total number of hours employed in the special education itinerant teacher's standard work week minus the hours of direct and/or indirect special education itinerant service hours must be spent on required functions. Such functions include but are not limited to: coordination of service when both special education itinerant services and related services are provided to a student pursuant to section 4410(1)(j) of the Education Law; preparation for and attendance at committee on preschool special education meetings; conferencing with the student's parents; classroom observation; and/or travel for the express purposes of such functions as stated above. For the purpose of this subparagraph, parent conferencing may include parent education for the purpose of enabling parents to perform appropriate follow-up activities at home. Billable time shall not be less than 66 percent or more than 72 percent of any special education itinerant teacher's total employment hours. Providers shall maintain adequate records to document direct and/or indirect service hours provided as well as time spent on all other activities related to each student served.

- (d) Special education itinerant service rates will be calculated so that reimbursable expenditures shall be divided by the product of the number of days in session for which the program operates times the number of direct and/or indirect special education itinerant service hours per day times two. In instances where the special education itinerant services are provided in a group session, *i.e.*, two or more students with a disability within the same block of time, the half hour rate must be prorated to each student receiving services. Special education itinerant service rates shall be paid on the basis of enrollment as defined in section 175.6(a)(1) and (2) of this Title for the period of enrollment as defined by the student's IEP.
- (e) Actual expenditures, revenues and statistical data for special education itinerant teachers shall be reported to the commissioner as described in subparagraph (1)(i) of this subdivision.
- (f) Expenditures for related services as defined in section 4410(1)(j) of the Education Law and section 200.1(gg) of this Part are not reimbursable in the calculation of the tuition rate for special education itinerant services.

- (x) For the purposes of this subparagraph, *integrated special class programs* are defined as those programs employing a special education teacher and one or more supplementary school personnel in a classroom made up of no more than twelve preschool students with and without disabilities, or a classroom that is made up of no more than twelve preschool students with disabilities staffed by a special education teacher and one or more supplementary school personnel that is housed in the same physical space as a preschool class of students without disabilities taught by a nonspecial education teacher. The tuition rate for preschool programs operating a special class as defined in section 200.16 of this Part in an integrated setting serving students with and without disabilities shall be established in accordance with the provisions set forth in paragraph (1) of this subdivision and subparagraphs (i) through (viii) of this paragraph, with the following additional provisions:
 - (a) Expenditures, revenues, full-time equivalent (FTE) enrollment, based on 25 program hours per week, and related statistical data for the preschool students with disabilities and the other students who are enrolled in the same program shall be reported together in a single cost center.
 - (b) After application of the nondirect care cost parameter, reported expenditures shall be reduced by the greater of actual revenues received for students without disabilities or an amount calculated by multiplying the reported FTE enrollment of students without disabilities times the regional day care rate or a proration of the regional day care rate for children aged 3 to 5, as published in 18 NYCRR 415.9, applicable to the time period for which the program operated. The total cost screen is then applied to the resulting expenditures to determine the total reimbursable costs.
 - (c) The per diem rate for each preschool student with disabilities shall be determined by dividing the total reimbursable costs by the total care days for the FTE enrollment of preschool students with disabilities.
- (xi) Establishment of coordination rates by municipalities for service providers coordinating two or more related services pursuant to section 4410(10)(c) of the Education Law.
 - (a) A standardized method for calculating coordination rates for two or more related services established by the commissioner and approved in advanced by the Director of the Budget shall include the following provisions:

- (1) Rates shall be established on a half hour service block basis.
 - (2) The half hour rate shall be no greater than the related services rate per half hour established by the municipality and paid to the identified service provider.
 - (3) Periods of less than a half hour block of time may be aggregated into half hour service blocks of coordination services for billing purposes.
 - (4) The rate shall be paid for up to 10 sessions during the school year and up to two sessions during a summer program.
 - (5) In extraordinary instances, such as those instances where extended periods of time are necessary for the coordination of three or more related services, the municipality official may extend the number of service blocks for which the service provider will be paid. However, under no circumstances may the rate exceed the applicable related services rate. Municipalities must notify the commissioner in writing of each extension.
- (b) Municipalities must annually submit to the commissioner the coordination rates established, as well as documentation describing the method used to calculate such rates.
- (1) Rates calculated by a municipality using the standardized method as defined in clause (a) of this subparagraph will be deemed to be approved without further review by the commissioner and/or action by the Director of the Budget.
 - (2) Where municipalities use a method other than the one defined in clause (a) of this subparagraph, the alternative method must be reviewed by the commissioner and individually approved by the Director of the Budget.
- (3) Tuition rate adjustments may be made to an approved tuition rate for the following reasons:
- (i) Tuition rate appeals. A program may appeal the existing approved tuition rate for the current school year for the reasons specified in clauses (a) through (d) of this subparagraph if it can demonstrate that the program would have insufficient resources to meet the educational

needs of the student population being served. Programs shall submit rate appeals in writing, including supporting documentation, in the specific format required by the commissioner and may request an opportunity to make an oral appeal presentation. The commissioner shall provide programs with a specific response to each appeal issue. Programs may file a tuition rate appeal for the current school year for the following reasons:

- (a) Health and safety concerns relating to students or staff. This type of appeal may be filed at any time during the school year.
- (b) Compliance issues identified by the commissioner's designated representative in the current tuition rate year. If compliance issues are contained in a site visit written report that becomes final prior to January 1st, such issues shall be addressed in the current school year. Compliance appeals based on site visit reports received after December 31st shall be considered for inclusion in the subsequent school year's original rate. Appeal requests resulting from site visits must be submitted within 30 school workdays of receipt of the final site visit report issued by the commissioner's designated representative. Compliance issues must be adequately documented in all financial data submitted to the commissioner.
- (c) Compliance issues identified by the commissioner's designated representative during a compliance review. The criteria that shall be used to initiate a compliance review to determine whether the program is out of compliance with State or Federal statutes or regulations includes but is not limited to: complaints made by parents, school districts or any other party and/or requests made by a program for technical assistance regarding compliance. Appeal requests resulting from compliance review visits must be submitted within 30 school workdays of receipt of the letter from the commissioner's designated representative requiring the program to take corrective action. Compliance issues must be adequately documented in all financial information submitted to the commissioner.
- (d) Approved staff not hired. If staff was approved and funded on appeal but not hired in that year and the funding was subsequently removed during the reconciliation rate process, programs may file an appeal for reinstatement of such funding for the approved positions in the appropriate tuition rate year. Such appeals must be filed within 30 school workdays of receipt of the reconciliation tuition rate. The additional reimbursement in the tuition rate year will be limited to those appeal items originally

approved and only to the extent such monies are reflected in the base year financial statements as excess revenues. Programs must demonstrate that monies approved on appeal in the base year were not spent on any other type of expenditure and that the program has retained the approved appeal monies in a reserve or liability account.

- (ii) Corrected rates. Tuition rates shall be subject to correction when mathematical errors are found in the rate calculation or there are reporting errors in the base year data. Requests for rate corrections shall be filed within 30 school workdays of receipt of the tuition rate by the program.
- (iii) Reconciliation rates. (a) Prior to and including the 1994-95 base year. Annually, upon receipt of financial statement and financial report data submitted by the programs, tuition rates for the period represented by this data shall be amended, in whole or in part, using such financial statement and financial report data and applying the approved reimbursement methodology in effect for that financial reporting period.
 - (b) For the 1995-96 base year and thereafter.
 - (1) Annually, upon receipt of financial statement and financial report data submitted by the programs, tuition rates for the period represented by this data shall be recalculated in whole or in part, using such financial statement and financial report data and applying the approved reimbursement methodology in effect for that financial reporting period for the specific purpose of developing the dollar amount of an overpayment/underpayment adjustment. *Overpayment / underpayment adjustment* means the difference between the recalculated base year reimbursable costs and the previously established certified tuition rate for that base year multiplied by the actual enrollment for the base year.
 - (2) The overpayment or underpayment adjustment on a per diem basis shall be subtracted from, or added to, total costs per diem after the application of the total cost screen calculation and before the per diem rate is multiplied by the number of days in session in the formula set forth in subparagraph (2)(vii) of this subdivision.
 - (3) The per diem rates used in the total cost screen calculation, as set forth in subparagraph (2)(vi) of this

subdivision, shall exclude the overpayment/underpayment adjustment.

- (4) If a program will not be in operation in the tuition rate year and subsequent years, no overpayment/underpayment adjustment shall be calculated. Instead, a reconciliation rate for this program will be established for the base year in accordance with clause (iii)(a) of this paragraph.
 - (iv) Rates based on audit. Tuition rates shall be subject to adjustment based on a final audit of actual program expenses, revenues, enrollment and other relevant program information in accordance with section 200.18 of this Part.
 - (v) Rates for new special case programs. The department will accept a written request from a program to adjust rates established for the third year of operation which were based on a regional weighted average per diem, if the program demonstrates that the third year full-time-equivalent enrollment equals or exceeds the required minimum number of full-time-equivalent students in accordance with section 200.7(c)(3) of this Part.
- (4) Regional maximum per trip rates for students receiving transportation services under section 4410 of the Education Law.
- (i) Definitions. As used in this paragraph:
 - (a) *Base year* means the July 1st through June 30th school period that is two years prior to the school year for which the regional maximum per trip rates are calculated.
 - (b) *Base year data* means the financial information and relevant student statistics that correspond to the base year to be used as the basis for the regional maximum per trip rate calculations. However, if the commissioner in any given year determines that the base year data is materially incomplete, then the year prior to the base year data shall be used.
 - (c) *Student transportation expenses* means base year approved transportation. For the rates applicable to reimbursement in the 1997-98 and 1998-99 school years, such data shall be that reported from the Placement/Payment code 20 on the system to track and account for children which classifies data for preschool students receiving services pursuant to section 4410 of the Education Law; in future years, such data shall be from such

system or a successor system, as determined by the commissioner.

- (d) *Region* means a municipality, except that the five counties constituting the City of New York are considered one region.
 - (e) *Student* means a preschool student with a disability enrolled in an approved program pursuant to section 175.6 of this Title and section 4410 of the Education Law.
- (ii) Regional maximum per trip rate methodology.
- (a) Data reported in the manner prescribed by the Commissioner in support of the requirements of section 4410, relative to per student transportation expenses, shall be used to determine the regional maximum per trip rate.
 - (b) For the 1997-98 and 1998-99 school year, the basic formula to be used to calculate the regional average per trip rate is as follows: (the sum of base year transportation expenses of students enrolled for 210 days who are transported within the region divided by the number of students enrolled for 210 days who are transported within the region) divided by (210 transportation days times two trips per day); such result equals the base year regional average per trip rate before limiting. For the 1999-2000 school year and beyond, the basic formula to be used to calculate the regional average per trip rate is as follows: the sum of the base year transportation expenses claimed for students transported within the region divided by the one way trips within the region claimed on an enrollment basis; such result equals the base year regional average per trip rate before limiting.
 - (c) For the 1997-98 and 1998-99 school years, the statewide average per trip rate equals: (the sum of base year transportation expenses of students enrolled for 210 days who are transported within the state divided by the number of students enrolled for 210 days who are transported within the total state) divided by (210 transportation days times 2 trips per day). For the 1999-2000 school year and beyond, the basic formula to be used to calculate the state average per trip rate is as follows: the sum of the base year transportation expenses claimed for students transported within the state divided by the one way trips within the state claimed on an enrollment basis.

- (d) The regional average per trip rates will be calculated using twelve month (July to June) data for per student transportation expenses unless the regional average per trip rate separately calculated for the July/August component of the school year exceeds the regional average per trip rate for the twelve month school year by more than 15 percent, then separate July/August and September through June per trip rates will be calculated.
 - (e) The base year regional average per trip rate will be trended forward by the regional growth factor, which shall have been approved by the Director of the Division of the Budget, for the purposes of establishing tuition rates as described in clause (2)(vi)(b) of this subdivision.
 - (f) Regional maximum per trip rates shall equal the regional average per trip rate but shall not be more than 25 percent greater than the statewide average per trip rate.
 - (g) Regional maximum per trip rates shall be approved by the Director of the Division of the Budget.
- (iii) Recordkeeping and retention. Municipalities shall maintain detailed student records and accounting records to document and support their claims. At a minimum, such records shall include trip logs by type of placement, as prescribed by the commissioner, transporter name, vehicle classification (parent vehicle, taxi, yellow bus by capacity range, and public service), number of one way trips contracted for on an enrollment basis, number of students transported, total amount of the transportation expenses paid by the municipalities for each claiming period, date(s) paid, amount of the State's share being claimed, student identification numbers for students transported and proof of the committee on preschool special education placement for each child. The department will audit regional claims according to an established schedule. Municipalities must maintain all records until an audit by the department relating to the transportation expenses has been completed and is final, but for no longer than seven years following the end of the school year.
- (iv) Reimbursement. Municipalities shall be reimbursed on an aggregate basis for transportation expenses equal to the product of the regional maximum per trip rate and the number of trips claimed on an enrollment basis or the actual expenses claimed, whichever is less. In processing each claim for a school year, the Department shall compute the regional maximum allowable reimbursement based on the product of the year-to-date number of one way trips claimed on an enrollment basis by the municipality by the established regional

maximum per trip rate. Payment will be made for aggregate claims up to such regional maximum allowable reimbursement minus any payments previously made year-to-date for such school year.

- (v) Appeals. Upon submission of the final claim for a school year, municipalities may appeal the regional maximum per trip rate if the actual transportation expenses exceeded the regional maximum per trip rate times the number of one way trips, provided the reason for that excess was due solely to the increase in the number of students with unusual transportation related needs due to medical or behavior conditions. Municipalities must provide all relevant documentation to the appeal. Any regional transportation maximum per trip rate amended on appeal must be approved by the Director of the Division of the Budget.

- (g) *Procedures during close-down period.* The owner(s) or operator(s) of an approved private program electing to cease operation, transfer ownership or voluntarily terminate the status as an approved program shall comply with the requirements of section 200.7(e) of this Part. For purposes of this subdivision, the close-down period means the period of time beginning with the date of the commissioner's receipt of notice and ending on the date of the program's cessation of operation, transfer of ownership or voluntary termination of its status as an approved program. Reimbursement shall be determined in accordance with the provisions set forth in paragraphs (f)(1) and (2) of this section. Financial reporting requirements following close down shall be in accordance with the provisions set forth in paragraph (e)(1) of this section. Such financial reports and financial statements shall be submitted to the commissioner no later than 90 days following close down.

- (h) *State aid for maintenance payments to private schools.* (1) Prior to contracting with an approved private residential program for the instruction of a student with a disability, in accordance with the provisions of section 4402 of the Education Law, a board of education shall notify the commissioner of the name and the county of residence at the time of the commencement of the school year for which tuition is to be paid for such student, the name and address of such private residential program recommended, and the dates upon which such program will commence and terminate residential care of the student. Evidence shall also be submitted that there is no appropriate nonresidential program available.

(2) Upon approval of the proposed placement, the commissioner shall notify the appropriate social services district of the placement of a student in a private residential program and of its obligation to pay for the maintenance of such student at the approved rate established by the Department of Social Services pursuant to the provisions of section 4405 of the Education Law and section 153 of the Social Services Law.

200.10 Reimbursement to certain State-operated and State-supported schools for blind, deaf and severely disabled students pursuant to articles 85, 87 and 88 of the Education Law and chapter 1060 of the Laws of 1974 and to facilities approved pursuant to section 4204-a of the Education Law.

Aidable operating expenses means the necessary expenditures for approved educational programs provided to State-supported students, and shall be determined in accordance with the following provisions:

- (a) State-operated and State-supported schools and facilities approved to provide educational services to deaf infants under Education Law, section 4204-a, shall submit annually, at times designated by the commissioner, budget forms containing justification for all proposed expenditures for which State aid is required. Such budgets shall indicate by line item all positions and items of proposed expenditure. All budgets in connection with other than department-funded programs shall be reported on a supplemental sheet similar to the format for State-aided programs.
- (b) All annual expenditures shall be justified to the satisfaction of the commissioner in accordance with the instructions accompanying the annual year-end report forms submitted by the State-operated and State-supported schools.
- (c) All new positions requested in the annual budget shall be justified in a narrative statement attached to the budget request.
- (d) Review of all budgets submitted by the State-supported schools will be guided by the expenditures at the State-operated schools for the deaf and blind. The portion of the salary of each employee which exceeds the salary of an employee having similar duties at the State-operated schools for the deaf and blind shall not be an aidable operating expense of such State-supported private schools, except that a location pay differential, in the amount provided for in any contract or contracts between the State of New York and the certified or recognized employee organization or organizations representing State employees at the State-operated schools for the deaf and blind, will be included as an aidable operating expense of schools located in the geographical areas to which such location pay differential applies.
- (e) Budgets approved by the commissioner for a particular school year represent the maximum support for that year. State-supported schools shall limit items of expenditure and positions to those approved by the commissioner. Any transfer between line items of expenditure exceeding 10 percent or \$1,000, whichever is greater, of the approved budget authorization for the school year shall have prior approval of the commissioner.
- (f) Capital construction for new buildings, including related service facilities such as heating, sanitary and lighting facilities, and improvement of grounds, and

additions to accommodate growth of activity not a part of the State program, will not be approved as State-aidable operating expenses. Such equipment or furnishings as are necessary to accommodate or maintain the educational program for State-appointed students are aidable expenditures, with the prior approval of the commissioner. All necessary repairs, including replacement of roofs, boilers, plumbing systems, installations of safety devices in existing buildings, such as proper exits, fire safety systems and renovation, considered necessary for maintaining generally accepted standards of instruction, living arrangements outside of the classrooms, protection of the health and safety of State-appointed students and the preservation of the physical plant, may be approved, provided that application to the commissioner is made in advance of the incurring of any obligation. Emergency repairs not exceeding \$2,500 may be made without prior approval, but the nature and extent of such repairs shall be promptly reported to the commissioner.

- (g) Research activities, programs for nonstate-appointed students and all other activities with accompanying income and expenditures determined not to be a part of the educational program offered to State-appointed students will not be considered in determining State support.
- (h) The governing board, by resolution adopted during the fiscal year it received a gift or bequest, may restrict such funds for capital use or other programs which are not State-supported. The board may, by similar resolution, restrict such funds to provide merit supplements to the salaries of staff approved by the commissioner for State-appointed students. Such supplements shall be excluded from any overhead charges. Copies of the resolutions restricting the use of funds from private sources and annual income derived from such funds, and a designation of funds from private sources that have been restricted by the donor, shall be filed with the commissioner as part of the report of expenditures submitted for final payment.
- (i) The submission of the claim for final payment shall be accompanied by a report of income and expenditures. Income shall include all funds from governmental agencies and private sources, including income derived from capital assets. Expenditures shall include the cost of services and programs for State-appointed students as well as the cost of other services and programs administered by the school.
- (j) State-operated and State-supported schools shall maintain adequate accounting records clearly setting forth the expenses allocable to approved programs and to those additional programs which are not subject to reimbursement.
- (k) The accounting records of State-operated and State-supported schools shall be subject to audit and review at times designated by the commissioner and the Department of Audit and Control.

- (l) All payments made to the State-operated and State-supported schools and to approved facilities will be in accordance with actual expenditures incurred during the school year for which State payment is sought. Final expenditures are subject to audit by the Department of Audit and Control.
- (m) All facilities educating deaf infants pursuant to Education Law section 4204-a shall, in addition, submit quarterly reports of each deaf infant's attendance in accordance with Education Law section 4204-a(2) and semiannual reports of each deaf infant's progress.
- (n) All facilities educating deaf infants pursuant to Education Law section 4204-a which are eligible to receive financial assistance through the Department of Health for Medicaid patients or for infants approved under the medical rehabilitation program shall seek such assistance for each infant. Infants who are eligible for reimbursement under private insurance or other public health agencies shall not be eligible for tuition assistance. Where educational programming for the deaf infant includes parent orientation sessions which are not eligible for support by the Department of Health or other State or local agencies, the facility may claim that support from the Education Department providing that the facility is approved pursuant to section 200.7 of this Part.

200.11 Admission to public schools of students residing in facilities of OMH and OPWDD or child care institutions.

- (a) Students residing in hospitals of the Office of Mental Health (OMH) and schools of the Office for People With Developmental Disabilities (OPWDD) shall be identified, evaluated and provided with special education and related services in accordance with the provisions of section 116.6 of this Chapter.
 - (1) The committee appointed in each facility pursuant to section 116.6(a) shall recommend to the school district in which the facility is located that those students determined by the facility committee to be able to benefit from instruction in a public school program be admitted to the schools of such district.
 - (2) The school district committee on special education shall review the recommendation of the facility's committee, and all relevant supporting information and data, to determine whether the school district has an educational program appropriate to the needs of each student so recommended, or whether an appropriate program can be provided by a board of cooperative educational services or another school district by agreement with the school district in which the facility is located.
 - (i) If the committee on special education determines that the school district has an appropriate program for such a student, or can provide an appropriate program by agreement with a board of cooperative

educational services or with another school district, such committee shall recommend to the board of education that the student be admitted to such program.

- (ii) In the event that the committee on special education determines that there is no program appropriate to the needs of such a student in the schools of the district, or at a board of cooperative educational services or another school district, such committee shall report its findings to the board of education.
 - (iii) If the committee on special education concludes that placement in a private school for students with a disability is the appropriate educational placement for the student, the committee's report to the board of education may include a recommendation that the board of education recommend that the Office of Mental Health or the Office for People With Developmental Disabilities place such a student in a private, nonresidential school for students with disabilities.
- (b) Students residing in child care institutions shall be identified, evaluated and provided with suitable special education services in accordance with section 4005 of the Education Law.
- (1) The committee on special education of a child care institution having its own school shall recommend to the school district in which the facility is located, that those students determined by the facility committee to be able to benefit from instruction in a public school program be admitted to the schools of such district.
 - (2) The school district committee on special education shall review the recommendation of the facility's committee, and all relevant supporting information and data, to determine whether the school district has an educational program appropriate to the needs of each student so recommended.
 - (i) If the committee on special education determines that the school district has an appropriate program for such a student, such committee shall recommend to the board of education that the student be admitted to such program.
 - (ii) In the event that the committee on special education determines that there is no program appropriate to the needs of such a student in the schools of the district, such committee shall report its findings to the board of education.
- (c) If a board of education determines that there is no program appropriate to the needs of a student in the schools of the district, or at a board of cooperative

educational services or another school district, the board of education shall give notice of such determination to the parent, if the identity of the parent is available to the board, and to the chief administrator of the facility or child care institution in which the student resides. Such notice shall also inform the recipients that either the parent or the chief administrator of the facility may obtain review of the determination made by the board of education by a hearing officer appointed by the chief administrator of the facility or child care institution in accordance with the provisions of section 200.5 of this Part. For purposes of this subdivision, the duties of the school district committee on special education and board of education or trustees set forth in section 200.5 of this Part shall be the duties of the committee on special education and chief administrator of each facility or child care institution, respectively.

- (1) A parent who desires such a hearing shall so inform the chief administrator of the facility or the child care institution in writing. Written notice of the hearing shall be given by the chief administrator of the facility or the child care institution to the parent and to the board of education whose decision is sought to be reviewed. Such board of education shall be a necessary party to the hearing and shall bear the burden of proof with respect to the unavailability of an appropriate program for the student in the school district or at a BOCES or another school district.
- (2) Any party to the hearing may obtain review by the commissioner of the determination of the hearing officer in accordance with the procedures set forth in Part 279 of this Chapter, except that the responsibilities of and the provisions for service on the board of education set forth in sections 279.2 and 279.7 of this Chapter shall apply to the chief administrator of the facility or child care institution.

200.12 State assistance for transportation of students with disabilities pursuant to Education Law, section 4405.

An expenditure by a school district to provide suitable transportation during the period from July 1st through June 30th for a student with a disability to and from a private residential school located within or outside of the State, or to and from residential programs in schools enumerated in article 85, 87, 88 or 89 of the Education Law, shall be aidable, provided that:

- (a) the student was placed in such school in accordance with the provisions of article 85, 87, 88 or 89 of the Education Law; and the expenditure is for transportation of the student from the student's home to the school at the commencement of the school year, from the school to the student's home at the conclusion of the school year, and no more than three additional trips to and from school for students enrolled in a 10-month program, or four additional trips to and from school for students enrolled in receiving a 12-month special service and/or program, except as additional trips may need to be provided for the periods

during which residential care is not provided to the students attending such school; and

- (b) expenditures for the costs of travel, lodging and meals incurred by a volunteer escort shall also be aidable if the escort is required by the student's individualized education program and the escort is engaged pursuant to a transportation contract between the volunteer escort and the school district, subject to a test of reasonable cost by the commissioner.

200.13 Educational programs for students with autism.

- (a) The functioning levels of students with autism, based upon the criteria set forth in section 200.6(h)(2) of this Part, shall govern their individual or small group instruction.
 - (1) The continuum of special education programs and services as described in section 200.6 of this Part shall be available to students with autism as needed.
 - (2) The chronological age range of instructional groups serving students with autism shall not exceed 36 months for students under age 16 and shall not be limited for students 16 years of age or older.
 - (3) The class size for such students shall be determined in accordance with section 200.6(f) and (h) of this Part, provided that the class size of special classrooms composed entirely of students with autism shall be in accordance with section 200.6(h)(4)(ii)(a) of this Part.
 - (4) Instructional services shall be provided to meet the individual language needs of a student with autism.
 - (5) To the maximum extent appropriate, instructional provisions shall be instituted for eventual inclusion of students with autism into resource room programs for students with combined disabilities or placement in a regular classroom.
 - (6) In those instances where a student has been placed in programs containing students with other disabilities, or in a regular class placement, a special education teacher with a background in teaching students with autism shall provide transitional support services in order to assure that the student's special education needs are being met.
- (b) The length of the school day for students with autism shall be that set forth in section 175.5 of this Title.

- (c) All school districts are required to furnish appropriate educational programs for students with autism from the date they become eligible for a free appropriate public education until they obtain a high school diploma, or until the end of the school year in which they attain their 21st birthday, whichever occurs first.
- (d) Provision shall be made for parent counseling and training as defined in section 200.1 (kk) of this Part for the purpose of enabling parents to perform appropriate follow-up intervention activities at home.
- (e) Upon application and justification to the commissioner, approval may be granted for variance from special class sizes and the chronological age ranges specified in subdivision (a) of this section.

200.14 Day treatment programs certified by the Office of Mental Health.

Educational programs and services to students with disabilities enrolled in day treatment programs shall be provided in accordance with this section and those other applicable provisions of this Part that are not inconsistent with this section.

- (a) *Definitions.* As used in this section:
 - (1) *Day treatment programs* means nonresidential programs, certified by the Office of Mental Health, designed for the purpose of providing a comprehensive array of services for mentally ill students with disabilities through integrated mental health and special education programs.
 - (2) *Treatment planning* means the process of determining the student's need for mental health services and developing a specific treatment plan which includes provision of educational services.
 - (3) *Treatment team* means a team composed of professional and paraprofessional clinical staff members of the day treatment program, including the student's special education teacher.
- (b) *Eligibility of students with disabilities.* (1) A student with a disability who has been admitted to a day treatment program in accordance with such program's admission criteria is eligible for placement in the educational component of such day treatment program, if such placement is appropriate to such student's special educational needs.
 - (2) The determination of the existence of a disability and the recommendation of appropriate special education programs and services shall be the responsibility of the committee on special education of the school district of the student's residence. Such determinations and recommendations for students admitted to a day treatment program shall be based on consultation with the program's treatment team.

- (c) *Individual evaluation.* In addition to conducting an individual evaluation pursuant to the requirements of section 200.4(b) of this Part, the committee on special education shall assure that appropriate staff participate in the treatment planning conducted by the treatment team. The evaluation shall include an assessment by the day treatment program's special education teacher and other appropriate professional staff of the day treatment program.
- (d) *Recommendation.* (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 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. 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) Each student's individualized education program (IEP) shall be reexamined by the student's special education teacher and professional staff of the day treatment program at least once every three months for a period of one year after the student's enrollment and at least twice a year thereafter. Progress reports based on these reexaminations shall be forwarded to the committee on special education within 30 days of such review.
- (2) Referral to the committee on special education for review of the IEP shall be conducted pursuant to section 200.4(d)(2) of this Part and subdivision (d) of this section.
- (3) An annual review and reevaluation of each student's IEP shall be conducted pursuant to sections 200.4 (b) and (f) of this Part and subdivision (d) of this section.
- (f) *Grouping for instruction.* Students with disabilities enrolled in day treatment programs may be grouped for instruction based on similarity of individual mental health needs, when such needs prevent the student from benefiting from instructional groupings pursuant to section 200.6(h) of this Part, as determined by the professional staff of the day treatment program.

200.15 Standards for the protection of day and residential students who attend a residential school governed by this section. The purpose of this section is to protect students in residential schools against abuse, neglect and other conduct that may jeopardize their health, safety and welfare, consistent with the provisions of Chapter 501 of the Laws of 2012 “Protection of People with Special Needs Act,” including Article 20 of the Executive Law, Article 11 of the Social Services Law, and sections 4212, 4314, 4358 and 4403 of the Education Law.

- (a) *Applicability.* This section shall apply to residential schools, with respect to their day and residential components, including approved in-State residential schools, State-operated schools, State-supported schools which have a residential component, special act school districts as such term is defined in section 4001(8) of the Education Law and, except as otherwise indicated, approved out-of-State residential schools.
- (b) *Definitions.* As used in this section, the following terms shall have the following meanings, consistent with the definitions of such terms in Article 11 of the Social Services Law:
- (1) Custodian means a director, operator, employee or volunteer of a residential school; or a consultant or an employee or volunteer of a corporation, partnership, organization or governmental entity which provides goods or services to a residential school pursuant to contract or other arrangement that permits such person to have regular and substantial contact with individuals who are cared for by the residential school.
 - (2) Justice Center means the Justice Center for the Protection of People with Special Needs established pursuant to Article 20 of the Executive Law.
 - (3) Reportable incident means the following conduct that a mandated reporter is required to report to the Vulnerable Persons’ Central Register:
 - (i) Abuse means physical abuse, sexual abuse, psychological abuse, deliberate inappropriate use of restraints, unauthorized use of aversive interventions, obstruction of reports of reportable incidents, and unlawful use or administration of a controlled substance.
 - (a) Physical abuse means conduct by a custodian intentionally or recklessly causing, by physical contact, physical injury or serious or protracted impairment of the physical, mental or emotional condition of a student or causing the likelihood of such injury or impairment. Such conduct may include but shall not be limited to: slapping, hitting, kicking, biting, choking, smothering, shoving, dragging, throwing, punching, shaking, burning, cutting or the use of corporal punishment. Physical abuse shall not include

reasonable emergency interventions necessary to protect the safety of any person.

- (b) Sexual abuse means any conduct by a custodian that subjects a student to any offense defined in article 130 or sections 255.25, 255.26 or 255.27 of the Penal Law; or any conduct or communication by such custodian that allows, permits, uses or encourages a student to engage in any act described in articles 230 or 263 of the Penal Law, except as otherwise provided in section 488(1)(b) of the Social Services Law.
- (c) Psychological abuse means conduct by a custodian intentionally or recklessly causing, by verbal or non-verbal conduct, a substantial diminution of a student's emotional, social or behavioral development or condition, supported by a clinical assessment performed by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker or licensed mental health counselor, or causing the likelihood of such diminution. Such conduct may include but shall not be limited to intimidation, threats, the display of a weapon or other object that could reasonably be perceived by a student as a means for infliction of pain or injury, in a manner that constitutes a threat of physical pain or injury, taunts, derogatory comments or ridicule.
- (d) Deliberate inappropriate use of restraints means the use of a restraint when the technique that is used, the amount of force that is used or the situation in which the restraint is used is deliberately inconsistent with a student's individual treatment plan or behavioral intervention plan, generally accepted treatment practices and/or any applicable federal or state laws, regulations or policies including but not limited to the prohibition of the use of corporal punishment and aversive interventions in section 19.5 of this Title, except when the restraint is used as a reasonable emergency intervention to prevent imminent risk of harm to a person receiving services or to any other person. Restraint includes the use of any manual, pharmacological or mechanical measure or device to immobilize or limit the ability of a student to freely move his or her arms, legs or body.
- (e) Use of aversive interventions, as such term is defined in section 19.5(b) of this Title, means an intervention that is intended to induce pain or discomfort to a student for the purpose of eliminating or reducing maladaptive behaviors.

- (f) Obstruction of reports of reportable incidents means conduct by a custodian that impedes the discovery, reporting or investigation of the treatment of a student by falsifying records related to the safety, treatment or supervision of a student, actively persuading a mandated reporter from making a report of a reportable incident to the Vulnerable Persons' Central Register with the intent to suppress the reporting of the investigation of such incident, intentionally making a false statement or intentionally withholding material information during an investigation into such a report; intentional failure of a supervisor or manager to act upon such a report in accordance with governing regulations, policies or procedures; or for a mandated reporter who is a custodian, failing to report a reportable incident upon discovery.
- (g) Unlawful use or administration of a controlled substance means:
 - (1) any administration by a custodian to a student of a controlled substance as defined by article 33 of the Public Health Law, without a prescription;
 - (2) any administration by a custodian to a student of other medication not approved for any use by the United States Food and Drug Administration; or
 - (3) a custodian unlawfully using or distributing a controlled substance as defined by article 33 of the Public Health Law, at the workplace or while on duty.
- (ii) Neglect means any action, inaction or lack of attention that breaches a custodian's duty and that results in or is likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of a student. Neglect shall include, but is not limited to:
 - (a) failure to provide proper supervision, including lack of proper supervision that results in conduct between students that would, if committed by a custodian, constitute abuse as described in subparagraph (i) of this paragraph;
 - (b) failure to provide adequate food, clothing, shelter, medical, dental, optometric or surgical care, consistent with any rules and regulations governing the same, provided that the residential school has reasonable access to the provision of such services and that necessary consents to any such medical, dental, optometric or surgical treatment have been sought and obtained from the appropriate individuals; or

- (c) failure to provide access to educational instruction, by a custodian with a duty to ensure that an individual receives access to such instruction in accordance with the provisions of part one of article 65 of the Education Law and/or the student's individualized education program.
- (iii) Significant incident means an incident, other than an incident of abuse or neglect that because of its severity or the sensitivity of the situation may result in, or has the reasonably foreseeable potential to result in, harm to the health, safety or welfare of a student and shall include but not be limited to:
- (a) conduct between students that would, if committed by a custodian, constitute abuse as defined in subparagraph (i) of this paragraph; or
 - (b) conduct on the part of the custodian, which is inconsistent with a student's individual treatment plan or IEP, generally accepted treatment practices and/or applicable federal or state laws, regulations or policies and which impairs or creates a reasonably foreseeable potential to impair the health, safety or welfare of a student, including but not limited to:
 - (1) unauthorized seclusion, which shall mean the placement of a student in a room or area from which he or she cannot, or perceives that he or she cannot, leave at will, or the placement of the child unsupervised or unobserved in a room from which the student cannot exit without assistance;
 - (2) unauthorized use of time out, which means the use of a procedure in which a student is removed from regular programming and isolated in a room or area for the convenience of a custodian, or as a substitute for programming but shall not include the use of a time-out as an emergency intervention to protect the health or safety of the individual or other persons or the use of a time out room used in conjunction with a student's IEP or behavioral intervention plan pursuant to section 200.22(c) of this Part;
 - (3) except as provided for in subparagraph (5)(vii) of this subdivision, the administration of a prescribed or over-the-counter medication, which is inconsistent with a prescription or order issued for a student by a licensed, qualified health care practitioner, and which has an adverse

effect on a student. Adverse effect shall mean the unanticipated and undesirable side effect from the administration of a particular medication which unfavorably affects the well-being of the student; or

- (4) inappropriate use of restraints, which shall mean the use of a restraint when the technique that is used, the amount of force that is used or the situation in which the restraint is used is inconsistent with a student's individual treatment plan or behavioral intervention plan, generally accepted treatment practices and/or any applicable federal or state laws, regulations or policies including but not limited to the prohibition of the use of corporal punishment and aversive interventions in section 19.5 of this Title. Restraint includes the use of any manual, pharmacological or mechanical measure or device to immobilize or limit the ability of a student to freely move his or her arms, legs or body.
 - (4) Staff exclusion list means the register, developed and maintained by the Justice Center pursuant to section 495 of the Social Services Law, of subjects of reports who have been found to have a substantiated category one case of abuse or neglect.
 - (5) Subject of the report means a custodian who is reported to the Vulnerable Persons' Central Register for the alleged abuse or neglect of a student.
 - (6) Vulnerable Persons' Central Register means the statewide central register of reportable incidents established and operated in accordance with section 492 of the Social Services Law.
- (c) *Personnel screening procedures.* (1) Schools subject to the requirements of sections 4212, 4314, 4358 and 4403(11) of the Education Law and this section shall establish, subject to and consistent with provisions of the Civil Service Law, written procedures to review, evaluate and verify the backgrounds of, and information supplied by, all applicants for employment or voluntary work. Such procedures shall be subject to the review and approval of the commissioner, and shall include, but need not be limited to, the gathering of:
- (i) a statement or summary of the applicant's employment history, including, but not limited to, any relevant child-caring experience;
 - (ii) the names, addresses and telephone numbers of references who can verify the applicant's employment history, work record and qualifications;

- (iii) a statement or summary of the applicant's educational experience showing elementary school(s), secondary school(s), or college(s) attended, highest grade level or degree attained, any additional credits earned, and certifications and/or licenses awarded;
 - (iv) the names and addresses of elementary and secondary schools and other educational institutions that can verify the applicant's educational information;
 - (v) a listing of special skills or completed training courses which might aid in the performance of duties of the position for which he or she is applying;
 - (vi) the names, addresses and telephone numbers of at least two personal references, other than relatives, who can attest to the applicant's character, reputation and personal qualifications;
 - (vii) a sworn statement by the applicant, indicating whether, to the best of his or her knowledge, he or she has ever been convicted of a crime in this State or any other jurisdiction and that all statements in the application are true, to the best of his or her knowledge; and
 - (viii) for in-State residential schools, other information required by the Justice Center to determine whether the applicant is included on the staff exclusion list.
- (2) An in-state residential school shall check the staff exclusion list, pursuant to procedures developed by the Justice Center, before determining whether to hire or otherwise allow any person as an employee, administrator, consultant, intern, volunteer or contractor to have regular and substantial contact with a student. Consistent with applicable collective bargaining agreements, if a person is listed on the staff exclusion list, the school shall not hire such a person to have regular and substantial contact with a student. If the result of that inquiry is that the person about whom the inquiry is made is not on the staff exclusion list, the school shall make an inquiry of the Statewide Central Register of Child Abuse and Maltreatment pursuant to section 424-a of the Social Services Law.
- (3) For in-state residential schools, consistent with existing collective bargaining agreements and applicable provisions of the Civil Service Law, a custodian shall be subject to immediate termination if he or she is convicted of any crime as defined in subdivision six of section 10.00 of the Penal Law that relates directly to the abuse or neglect of a student, or is placed on the staff exclusion list. Nothing in this paragraph shall diminish the rights or remedies otherwise available under law, regulation or appropriate collective

bargaining agreements of any residential school with respect to the termination or discipline of employees.

- (d) *Personnel qualifications.* (1) All professional instructional and supervisory personnel employed at schools governed by this section shall be appropriately certified in accordance with the provisions of Part 80 of this Title and sections 200.6 and 200.7 of this Part.
- (2) Pursuant to sections 4314 and 4358 of the Education Law, all noninstructional personnel at State-operated schools for the blind and deaf shall meet the applicable experiential and educational qualifications established for their positions by the Department of Civil Service or, as appropriate, by the Office of Human Resources Management of the State Education Department.
- (3) Pursuant to section 4212 of the Education Law, State-supported schools for the blind and deaf shall establish, consistent with existing collective bargaining agreements, minimum experiential and educational qualifications for noninstructional personnel which are satisfactory to the commissioner. Such qualifications shall be consistent with applicable provisions of the Civil Service Law, and shall be submitted for review and approval within a time frame established by the commissioner.
- (4) Pursuant to section 4403 of the Education Law, approved private residential schools and special act school districts shall establish, consistent with existing collective bargaining agreements, minimum experiential and educational qualifications for noninstructional personnel which are satisfactory to the commissioner. Such qualifications shall be submitted for review and approval within a time frame established by the commissioner, provided that an exemption from this requirement may be granted, in whole or in part, upon submission of satisfactory proof that such qualifications have been approved by a State agency which licenses or certifies the residential component of the school or the child care institution affiliated therewith.
- (e) *Staff supervision.* Schools governed by this section shall develop written procedures for the supervision of employees and volunteers who have the potential for contact with students in residential care. Such procedures shall be submitted for review and approval within a time frame established by the commissioner. To be approved, such procedures shall be designed to protect students from abuse, neglect and significant incidents by providing for adequate supervision of such employees and volunteers, taking into consideration such factors as the student population served, architectural factors, and the size of the facility. Such procedures shall include, but need not be limited to, the following:
- (1) staffing patterns and the rationale for such;

- (2) responsibilities of supervisors;
 - (3) the method by which staff and volunteers will be made aware of the identity of all supervisors, including designated on-site supervisors;
 - (4) provision of written supervisory guidelines to employees and volunteers;
 - (5) periodic observations by supervisors of employees and volunteers in interaction with students;
 - (6) periodic supervisory conferences for employees and volunteers; and
 - (7) written performance evaluations of staff to be conducted by supervisors in a manner consistent with applicable provisions of the Civil Service Law and existing collective bargaining agreements.
- (f) *Procedures for the protection of students.* All residential schools subject to this section shall develop written procedures for the protection of students from abuse, neglect and significant incidents. Such procedures shall be submitted for review and approval within a time frame established by the commissioner and shall include, but need not be limited to, the following:
- (1) Duty to report. (i) Reporting incidents. Except as provided in subdivision (g) of this section, in-State residential schools shall:
 - (a) ensure that allegations of reportable incidents, including any death for which there is any reason to believe that abuse or neglect may be involved, shall be identified and immediately reported to the Vulnerable Persons' Central Register upon discovery by a mandated reporter in accordance with the provisions of sections 491 and 492 of the Social Services Law. Nothing in this paragraph shall be construed to prohibit a mandated reporter from contacting or reporting to law enforcement or an emergency services organization as defined in section 155.17(c)(5) of this Title, before or after reporting to the Vulnerable Persons' Central Register.
 - (b) provide a student's parents with written information explaining the reporting requirements and processes regarding allegations of reportable incidents consistent with Article 11 of the Social Services Law, at the time the student is placed in such school. Such information shall also be made available upon request to any person.

- (ii) Reporting deaths. The death of any New York State student attending an in-State or out-of-State residential school shall be immediately reported to the New York State Justice Center for the Protection of People with Special Needs, in the form and manner prescribed by the Center, and to the commissioner or his or her designee.
- (2) Safety. Upon notification that an allegation of a reportable incident has been made to the Vulnerable Persons' Central Register, the chief administrator of the residential school or his or her designee shall:
- (i) preserve any potential evidence through such actions as securing the area wherein the suspected reportable incident occurred;
 - (ii) obtain proper medical evaluation and/or treatment of a student, as needed, with documentation of any evidence of the reportable incident;
 - (iii) with consideration for causing as little disruption as possible to the daily routines of the students in the program, evaluate the situation and immediately take appropriate action to assure the health and safety of the student(s) involved in the report and of any other students similarly situated in the facility or program; and
 - (iv) take such additional action as is necessary to prevent future acts of abuse, neglect or significant incidents. Such action may include:
 - (a) consistent with appropriate collective bargaining agreements and applicable provisions of Civil Service Law:
 - (1) removal or transfer of the subject of the report;
 - (2) increasing the degree of supervision of the subject of the report; and/or
 - (3) initiation of appropriate disciplinary action against the subject of the report;
 - (b) provision of increased training and/or increased supervision to volunteers and staff pertinent to the prevention and remediation of abuse, neglect and significant incidents;
 - (c) temporary removal of the student(s) from a program and reassignment of the student(s) within the facility, as an emergency measure, if it is determined that there is a risk to the health or safety of such student(s) in remaining in that program. Whenever a student is removed, pursuant to this subparagraph,

from a special education program or service specified in his or her individualized education program, such action shall be immediately reported to the commissioner or his designee and referred to the appropriate committee on special education for review; and/or

- (d) provision of counseling to the student(s) involved in the report and any other students, as appropriate.

(3) Investigations and report of findings. The residential school shall:

- (i) take appropriate action to support a request for information from the Justice Center, its representative or designee, and/or the State Education Department when such requests are made in accordance with law and regulation;
- (ii) promptly report to the Justice Center the resignation or termination of a subject of a report of alleged abuse or neglect from his or her position while an investigation is pending;
- (iii) if so directed, consistent with guidelines issued by the Department, promptly investigate a report of a significant incident and, within 60 days of the Vulnerable Persons' Central Register accepting a report of a significant incident, submit a report of the findings in writing to the Department; and
- (iv) maintain all information, including information identifying the subject of the report of alleged abuse or neglect and other persons named in the report to the Vulnerable Persons' Central Register, in accordance with section 496 of the Social Services Law. All personally identifiable data information or records with respect to a student shall be subject to the requirements of section 200.2(b)(6) of this Part.

(4) Plans of Prevention and Remediation.

- (i) Upon receipt of an investigative report of abuse or neglect that identifies the need for corrective action, the chief administrator of the residential school, after consideration of any recommendations of the Justice Center, its representative or designee, and/or the State Education Department shall:
 - (a) unless immediate corrective action is warranted, within 10 days of receipt of such a report, develop, implement and submit to the appropriate designee of the commissioner for approval, a written plan of prevention and remediation to be taken with respect to an individual employee or volunteer and/or the residential school to

assure the continued health and safety of students and to provide for the prevention of future acts of abuse or neglect, which shall include, at a minimum, those actions previously taken pursuant to paragraph (2) of this subdivision; and

- (b) in the event a report of abuse or neglect determines that such abuse or neglect may be attributed in whole or in part to noncompliance by the facility with provisions of title 6 of article 11 of the Social Services Law, or sections 4212, 4314, 4358 or 4403(11)-(12) of the Education Law or the regulations of the Commissioner of Education, develop and implement a plan of prevention and remediation, which shall address, at minimum, those areas in which the facility has been found to be out of compliance and shall indicate the manner in which the facility will come into compliance. Such plan shall be developed and submitted for approval to the appropriate designee of the commissioner within 30 days of receipt of such a report.
- (ii) Significant incidents. Upon a determination of the need for preventative or remedial action associated with a report of a significant incident, the chief administrator of the residential school, after consideration of any recommendations of the State Education Department, shall develop and implement a written plan of prevention and remediation to address the investigative findings. Such plan shall be developed and submitted to the appropriate designee of the commissioner within 30 days of such determination.
- (iii) Plans of prevention and remediation required to be developed pursuant to subparagraphs (i) and (ii) shall be endorsed with the signature of the chief administrator of the residential school or his or her designee and address at minimum:
 - (a) the actions to be taken to address the investigative findings;
 - (b) the person(s) responsible for assessing the efficacy of the remedial action(s); and
 - (c) the monitoring dates or interval of monitoring dates, if appropriate.
- (g) Out-of-State residential schools. In addition to the provisions of subdivisions (c)(1)(i) through (vii), (d), (e), (f)(1)(ii), (f)(2), (f)(3)(i)-(ii), (f)(4), (h), (i)(1), (j), (l)(1) and (m) of this section, out-of-State residential schools shall comply with following requirements:

- (1) When there is an allegation of abuse or neglect of a New York State student, the residential school shall immediately notify the Justice Center, the State Education Department and any local social services district and/or school district who placed the student in the residential school or state agency funding the placement of that student.
 - (2) For allegations of abuse and neglect, the residential school shall comply with the procedures for the protection of students in subdivision 5 of section 490 of the Social Services Law and shall cooperate with any investigation conducted by the Justice Center.
 - (3) If the investigation is not conducted by the Justice Center, the out-of-State residential school shall forward the findings of such investigation to the Justice Center, the State Education Department, the committee on special education and the social services district in New York State no later than 90 days from the report of the allegation.
 - (4) Failure to comply with the requirements of this subdivision shall be grounds for revocation of approval to accept new admissions of New York State students or termination of private school approval pursuant to paragraph 200.7(a)(3) of this Part.
- (h) *Staff training.* To the extent required by the provisions of sections 4212, 4314, 4358 and 4403(11) of the Education Law, schools shall provide, or ensure the provision of, child abuse prevention training to all administrators, employees and volunteers on a regular, but at least annual, basis. A written description of such training plan shall be submitted for review and approval within a time frame established by the commissioner.
- (1) The purpose of such training shall be to increase the participants' level of awareness, encourage positive attitudes and enhance knowledge and skill development in areas including, but not limited to, the following:
 - (i) child abuse prevention and identification;
 - (ii) safety and security procedures;
 - (iii) principles of child development;
 - (iv) characteristics of children in care;
 - (v) techniques of group and child management, including crisis intervention and appropriate restraint training;

- (vi) laws, regulations and procedures, including appropriate reporting responsibilities, governing the protection of students from reportable incidents; and
 - (vii) any relevant information provided by the department.
 - (2) The department may exempt administrators from such training requirements upon demonstration of substantially equivalent knowledge or experience.
 - (3) Such training shall include but not be limited to live training and supplemental courses accessible via the internet.
- (i) *Staff orientation.*
- (1) Each new employee or volunteer shall, immediately upon commencement of duties, be provided an orientation to the procedures of the school and the policies and procedures of the department regarding the protection of students from reportable incidents.
 - (2) Each custodian shall, at the time of his or her initial employment and at least annually thereafter, be provided with a copy of the code of conduct developed by the Justice Center pursuant to article 20 of the Executive Law and acknowledge that he or she has read and understands such code of conduct. Such code of conduct shall govern the conduct of such custodians with respect to the safety, dignity and welfare of students in residential schools to whom they provide care and is enforceable consistent with appropriate collective bargaining agreements.
- (j) *Instruction of students.* To the extent required by the provisions of sections 4212, 4314, 4358 and 4403(11) of the Education Law, and in consideration of the needs and circumstances of the program, schools shall provide instruction to all students in techniques and procedures which will enable such students to advocate for and protect themselves from reportable incidents.
- (1) Such instruction shall be described in a written plan, and shall be:
 - (i) appropriate for the age, individual needs and particular circumstances of students;
 - (ii) provided at different times throughout the year in a manner which will ensure that all students receive such instruction; and
 - (iii) provided by individuals who possess appropriate knowledge and training, documentation of which shall be maintained by the school.

- (k) Incident Review Committees. All in-State residential schools subject to this section must establish an incident review committee pursuant to section 490(1)(f) of the Social Services Law for the purpose of reviewing individual reportable incidents and incident patterns and trends to identify and implement preventative and corrective actions, which may include, but shall not be limited to, staff retraining or any appropriate disciplinary action allowed by law or contract, as well as opportunities for improvement.
- (1) The incident review committee shall be composed of at least one member of the governing body of the residential school and other persons identified by the chief administrator of the residential school including but not limited to one representative of each of the following, but not the chief administrator of the residential school:
 - (i) direct support staff;
 - (ii) licensed health care practitioner;
 - (iii) students or service recipients; and
 - (iv) representatives of family, consumer and other advocacy organizations.
 - (2) Members of the incident review committee shall be trained in confidentiality laws and regulations, and shall comply with section seventy-four of the Public Officers Law.
 - (3) The incident review committee shall meet regularly to:
 - (i) review the timeliness, thoroughness and appropriateness of the residential school's response to reportable incidents;
 - (ii) recommend additional opportunities for improvement to the chief administrator of the residential school, if appropriate;
 - (iii) review incident trends and patterns concerning reportable incidents; and
 - (iv) make recommendations to the chief administrator of the residential school to assist in reducing reportable incidents.
 - (4) The chief administrator of the residential school shall submit a report of incident patterns and trends, and patterns and trends in the reporting and response to reportable incidents to the State Education Department in the form and manner required by the Justice Center.

- (l) Access to records and residential schools. (1) The residential school shall grant access to the Department, other State oversight agencies and the Justice Center at any and all times to the residential school, and, consistent with section 200.2(b)(6) of this Part and any applicable federal or State laws or regulations, to all books, records, and data pertaining to any such school deemed necessary for the Department, State oversight agency and the Justice Center to carry out its functions, powers and duties pursuant to article 11 of the Social Services Law.

(2) In accordance with section 490(6) of the Social Services Law, records of in-state residential schools not otherwise subject to article 6 of the Public Officers Law shall be made available for public inspection and copying, when such records relate to abuse and neglect of students, consistent with the requirements of section 200.2(b)(6) of this Part. Any request made to a residential school for records relating to abuse and neglect shall be referred to the Justice Center. The residential school shall cooperate with the Justice Center and provide any records that the Justice Center deems subject to disclosure, in accordance with the provisions of 14 NYCRR section 703.
- (m) *Variances.* Where the residential component of a school governed by this section is licensed or certified by a State agency other than the State Education Department, a variance may be granted, in whole or in part, from the requirements of subdivision (c), (e), (f), (h) (i) or (j) of this section with respect to employees or volunteers other than those employed in the educational component of such school, upon a finding that such employees or volunteers are subject to overlapping requirements imposed in regulations adopted by such other State agency for the protection of students from reportable incidents, or, in the event that such other State agency has not adopted regulations regarding a particular requirement, upon a finding that the school has procedures in place regarding such employees or volunteers which are substantially equivalent to those required by this section. The chief administrator of each such school shall submit an application, on a form and within a time frame prescribed by the commissioner, which shall include, but need not be limited to, a list of all licensing or certifying State agencies and an assurance by the chief administrator that the school is in compliance with the requirements imposed by such other licensing or certifying State agency or agencies, or has procedures in place which are substantially equivalent to those required by this section, regarding the protection of students from reportable incidents.

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) *Eligibility.* A preschool student with a disability shall be eligible for special education services and programs pursuant to section 4410 of the Education Law provided that the student has a disability as defined in section 200.1 (mm) of this Part.
- (b) (1) Referral.
 - (i) A preschool student suspected of having a disability shall be referred in writing to the chairperson of the district's committee on preschool special education. Such referral may be made by the persons specified in section 200.4(a)(1) of this Part.
 - (ii) If a referral is received by a professional staff member of the school district, it shall be forwarded to the chairperson of the committee on preschool special education immediately upon its receipt by such staff member.
 - (iii) A referral shall specify the extent to which the preschool student has received any services prior to referral.
 - (iv) A committee chairperson who receives a referral shall immediately notify the parent pursuant to paragraphs (h)(1) and (2) of this section that a referral has been received and shall request consent for evaluation of the preschool student.
 - (v) In the event that consent for an individual evaluation is not provided, the committee shall implement the district's practices and procedures for the purpose of ensuring that parents have received and understand the request for consent.
- (c) *Individual evaluation and reevaluation.* (1) Upon the consent and selection by the parent of an approved program with a multidisciplinary evaluation component to conduct an individual evaluation, as defined in section 200.1(aa) of this Part, the board shall arrange for such evaluation by the service provider selected by the parent. In addition, with the consent of the parents, approved evaluators and committees shall be provided with the most recent evaluation report for a child in transition from programs and services provided pursuant to title two-a of article 25 of the Public Health Law. Nothing herein shall be construed to prohibit an approved evaluator or the committee from reviewing other assessments or evaluations to determine if such assessments or evaluations fulfill the requirements of this Part.
 - (2) Except as provided in section 200.4(b)(7) of this Part, the initial individual evaluation shall be completed within 60 days of receipt of consent to evaluate and conducted in accordance with section 200.4(b) of this Part. The summary report shall include a detailed statement of the preschool

student's individual needs, if any. The summary report shall not include a recommendation as to the general type, frequency, location and duration of special education services and programs that should be provided; shall not address the manner in which the preschool student can be provided with instruction or related services in the least restrictive environment; and shall not make reference to any specific provider of special services or programs. Reports of the assessment and/or evaluation and a summary portion of the evaluation shall be provided to the members of the committee on preschool special education and to the person designated by the municipality in which the preschool student resides. An approved evaluator shall provide the parent with a copy of the statement and recommendation provided to the committee. Such statement and recommendation including the summary evaluation shall be provided in English and when necessary, in the native language of the parent or other mode of communication used by the parent unless it is not feasible to do so.

- (3) Prior to making any recommendation that would place a child in an approved program owned or operated by the same agency which conducted the initial evaluation of the child, the committee may exercise its discretion to obtain an evaluation of the child from another approved evaluator.
 - (4) For school years 1994-95 and thereafter, if the approved evaluator finds that the student requires evaluations beyond those previously authorized by the committee during the school year, or requires a reevaluation of any component, the committee must provide written authorization prior to the approved evaluator conducting the evaluation. The chairperson of the committee shall notify, at least five business days prior to the date of the evaluation, the representative of the municipality and other members of the committee of such request. The representative of the municipality or other members of the committee may request a meeting of the committee to determine the need for such an evaluation.
 - (5) Prior to the committee meeting, the committee shall provide the parent with a copy of the summary report of the findings of the evaluation in accordance with paragraph (2) of this subdivision. Upon request of the parent, the committee shall provide copies of all written documentation to be considered by the committee in the development of the preschool student's individualized education program.
- (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) 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.

- (3) If the parent disagrees with the evaluation, the parent may obtain an independent educational evaluation at public expense in accordance with section 200.5(g) of this Part and to the extent authorized by Federal law and regulation.
 - (4) The committee shall forward a request for approval of reimbursement of the cost of evaluations, on a form prescribed by the commissioner, to the appropriate municipality in which the preschool student resides within 30 days of the date of the committee meeting at which the evaluation was reviewed. The committee must also send a copy of such form to the approved evaluator or, in the alternative, may provide a copy of the form available for inspection and photocopying by the approved evaluator.
 - (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.
- (e) *Recommendation.* (1) The committee on preschool special education shall meet to review the results of the initial evaluation and develop a recommendation within 60 calendar days of the date of the receipt of consent to evaluate.
- (2) If the preschool student has been determined to be ineligible for special education, the recommendation shall indicate the reasons the student was found to be ineligible. A copy of such recommendation shall be provided to the parent consistent with the prior notice requirements in section 200.5(a) of this Part.
 - (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(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. In addition, the recommendation for special education programs and services for a preschool student with a disability shall:
 - (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

- (ii) only be made for a program which uses psychotropic drugs if such program has a written policy pertaining to such use. The parent of a student for whom such a recommendation is made must be provided with a copy of such written policy at the time such recommendation is made.
- (4) 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) In developing its recommendation for a preschool student with a disability to receive programs and services, the committee must identify transportation options for the student and encourage parents to transport their child at public expense where cost-effective.
 - (6) A written report of the recommendation, including the results of the evaluation, shall be forwarded to the board, the parent of the preschool student and to the municipality in which the preschool student resides. Such report shall include the reasons for such recommendation, including a statement of the reasons why less restrictive placements were not recommended, when the recommendation is for the provision of special education services in a setting with no regular contact where age-appropriate peers without disabilities are found and shall include all statements provided by the parent. If the recommendation of the committee differs from the expressed preference of the parent with respect to the frequency, duration or intensity of services, or with respect to more or less restrictive settings, the report shall include the reasons why the committee

recommended a different program or service other than that preferred by the parent.

(7) In the event that the parent does not choose to participate in the development of such recommendation, the committee shall forward its recommendation to the board of education and the parent as otherwise required in accordance with section 200.4(d)(5) of this Part.

(f) *Provision of services for preschool students with disabilities.* (1) Upon receipt of the recommendation of the committee, the board of education shall arrange for the preschool student with a disability to receive such programs and services commencing with the July, September or January starting date for the approved program, unless such services are recommended by the committee less than 30 school days prior to, or after, such appropriate starting date selected for such preschool student, in which case, such services shall be provided as soon as possible following development of the IEP, but no later than 30 school days from the recommendation of the committee and within 60 school days from receipt of consent to evaluate. If the board disagrees with the recommendation of the committee, it shall send the recommendation back to the committee with notice to the parent and the committee including a statement of the board of education's reasons and 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.

(2) The board of education shall notify the parent, the commissioner, the appropriate municipality and the preschool program or related services provider selected to provide the services of its approval. If the individualized education program (IEP) includes two or more related services, where possible, the board shall select from the list maintained by the municipality pursuant to section 4410(9) of the Education Law, such related services providers that are employed by a single agency for the provision of such services. The board shall provide each related service provider with a copy of the individualized education program and the name and location of each related service provider. The board shall designate one of the service providers to coordinate the provision of the related services. If the IEP includes special education itinerant services and one or more related services, the special education itinerant service provider shall be responsible for the coordination of such services.

(i) A statement of the reasons for such determination shall be provided to the parent and the municipality.

(ii) If the board's determination is different from the parent's preference or the recommendation of the committee, the board shall provide the parent and the municipality with the reasons the board determined to provide a different program.

(3) Upon receipt of the written notification of the approval by the board of education of the committee's recommendation, the municipality shall

contract with the designated preschool program provider in a manner approved by the commissioner, pursuant to section 4410 of the Education Law.

- (4) The board shall notify the parent, the appropriate municipality and the commissioner of its actions on behalf of a preschool student with a disability:
 - (i) if, based upon the recommendation of the committee, the board approved the preschool student's program or services;
 - (ii) if, based upon the recommendation of the committee the board approves that such program or services must be terminated because the preschool student with a disability has moved out of the school district; or
 - (iii) if, based upon the recommendation of the committee the board approves that a new municipality is responsible to contract with the provider for the same special education program and services because the preschool student with a disability has moved to a different municipality within the school district. The board shall issue a new written notice of determination for the same special education service or program effective the next school day which shall become the responsibility of the new municipality in which such student resides.
- (5) When a preschool student currently placed by another school district in an approved program moves into a new district, if the approved program is within a reasonable distance of such student's new school district of residence, the board of education shall issue a notice of determination to continue such program if the board approves the committee's recommendation that the program is appropriate to the student's needs.
- (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), (7), (8) and (9) of this Part, except that during the pendency of proceedings conducted pursuant to paragraphs (h)(9) and (10) of this section, the placement of a preschool student shall be as provided in paragraph (h)(3) of this section.
- (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) 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.
- (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) of this Part.

- (2) In addition to the requirements of paragraph (1) of this subdivision, the notice shall, for parents of preschool students referred to the committee for the first time, request parental consent to the proposed evaluation and advise the parent of the right to consent or withhold consent to an initial evaluation of the student or to the initial provision of special education services to a student who has not been previously identified as having a disability. Such notice shall also:
- (i) include a list containing a description of each preschool program which has been approved by the commissioner to provide evaluations, and is located within the county in which the preschool student resides and adjoining counties, or, for students residing in the City of New York, within the City of New York and adjoining counties, and the procedures which the parent should follow to select an available program to conduct a timely evaluation;
- (3) The procedural safeguards notice shall be provided to the parent in accordance with section 200.5(f) 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(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) indicate that during the pendency of any proceedings conducted pursuant to this Part on behalf of a preschool student not described in subparagraph (i) of this paragraph, if the commissioner or local board of education and the parent(s) or legal guardian agree, the preschool student may receive those special education programs and services approved pursuant to this section until all such proceedings have been completed;
 - (iii) indicate that if the parent does not provide consent for initial evaluation or 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; and
 - (iv) indicate that a preschool student who received services pursuant to section 236 of the Family Court Act or its successor during the previous year may continue to receive, from the provider of such

services, preschool special education services in an approved program appropriate to the needs of such student until all proceedings have been completed.

- (4) Notice of meetings. The meeting notice shall be provided in accordance with section 200.5(c) of this Part. In addition, such notice shall inform the parent of the opportunity to address the committee in person or in writing.
- (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) Board of education notice. The board of education shall notify the parent of the preschool student of its determination of placement pursuant to sections 200.2(d) and section 200.5(a) of this Part.
- (7) Consent to initial evaluation or initial placement. Written consent of the parent, as defined in section 200.1(l) of this Part, is required in accordance with section 200.5(b) of this Part.
- (8) Mediation. The board of education shall ensure that mediation sessions are available to the parent of a preschool child to resolve disputes in accordance with section 4404-a of the Education Law and section 200.5(h) of this Part.
- (9) Impartial due process hearings. Impartial due process hearings shall be conducted in accordance with section 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 time period pursuant to section 200.5(j)(5) of this Part.
- (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(k) of this Part.
- (11) State complaints. State complaint investigations shall be conducted in accordance with section 200.5(l) of this Part.
- (12) Surrogate parents. Surrogate parents shall be appointed in accordance with section 200.5(n) of this Part.
- (13) Confidentiality of personally identifiable information. Personally identifiable data, information or records pertaining to a preschool student with a

disability shall be maintained in accordance with section 200.2(b)(6) of this Part.

- (i) *Continuum of services.* (1) Provision of services. A preschool student with a disability shall be provided with special education programs and services in accordance with section 200.6(a) of this Part.
 - (2) Staffing requirements. All professional staff who provide or supervise special education programs and services shall be appropriately licensed or certified in accordance with section 200.6(b)(3) through (5) of this Part.
 - (3) Special education programs and services. Special education programs and services shall be provided as follows:
 - (i) related services shall be provided in accordance with section 200.6(e) of this Part. Such services shall be provided by an approved provider or, as authorized by section 4410 of the Education Law, such services shall be provided at a site determined by the board, including but not limited to an approved or licensed prekindergarten or head start program; the work site of the provider; the student's home; a hospital; a state facility; or a child care location as defined in section 4410 of the Education Law. If the board determines that documented medical or special needs of the preschool student indicate that the student should not be transported to another site the student shall be entitled to receive related services in the preschool student's home;
 - (ii) special education itinerant services as defined in Section 4410(1)(k) of Education Law are services provided by a certified special education teacher of an approved program on an itinerant basis at a site determined by the board including but not limited to an approved or licensed prekindergarten or head start program; the student's home; a hospital; a State facility; or a child care location as defined in section 4410 of the Education Law. If the board determines that documented medical or special needs of the preschool student indicate that the student should not be transported to another site, the student shall be entitled to receive special education itinerant services in the preschool student's home. Such services shall be for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities. *Indirect services* means consultation provided by a certified special education teacher to assist the child's teacher in adjusting the learning environment and/or modifying their instructional methods to meet the individual needs of a preschool student with a disability who attends an early childhood program. An *early childhood program*, for purposes of this paragraph, means a regular preschool program or day care program approved or licensed by a governmental agency in which a child under the age of five attends. Special education itinerant services shall be provided to a preschool student with a disability for whom such services have been recommended as follows:

- (a) the service shall be recommended by the Committee on Preschool Special Education and shall be included in the student's individualized education program;
 - (b) the level of this service should not be less than two hours per week;
 - (c) the total number of students with disabilities assigned to the special education teacher should not exceed 20;
 - (d) related services shall be provided in addition to special education itinerant services, in accordance with the student's IEP;
 - (e) in the event that the board selects a special service or program that will be provided in the preschool student's home or another care setting to which the parent has made or subsequently makes arrangements, no transportation shall be indicated.
- (iii) Special classes shall be provided on a half-day or full-day basis pursuant to section 200.1(p), (q) and (v) of this Part and in accordance with section 200.6(h)(2) and (3) or section 200.9(f)(2)(x) of this Part and shall assure that:
- (a) the chronological age range within special classes serving preschool students with disabilities shall not exceed 36 months, except that, upon application and documented educational justification to the commissioner, approval may be granted for variance from the special class chronological age range;
 - (b) the maximum class size shall not exceed 12 preschool students with at least one teacher and one or more supplementary school personnel assigned to each class:
 - (1) If a committee on preschool special education recommends a preschool student to an approved program which has no space available in the specific special class which will meet the student's unique needs as recommended on the IEP, the approved program may temporarily increase the enrollment of a class up to a maximum of 13 preschool students for the remainder of the school year, by a procedure to be established by the Commissioner, to ensure that the student receives a free appropriate public education. If the attendance during the instructional time exceeds 12 students, another staff member shall be assigned to the class. Other staff members may include related service providers and/or supplementary school personnel.

- (c) such services shall be provided for not less than two and one half hours per day, two days per week;
- (iv) in-state residential special education programs and services shall be provided to each preschool student with a disability for whom such services have been recommended for a minimum of five hours per day, five days per week. Placement in such residential programs shall be approved by the commissioner in accordance with section 200.6(j) of this Part;
- (v) 12-month special services and/or programs shall be provided to eligible preschool students with disabilities consistent with their individual needs, as specified in their individualized education programs. Preschool students with disabilities may be considered for such special services and/or programs in accordance with their need to prevent substantial regression if they are:
 - (a) preschool students whose management needs are determined to be highly intensive and require a high degree of individualized attention and intervention; or
 - (b) preschool students with severe multiple disabilities, whose programs consist primarily of habilitation and treatment; or
 - (c) preschool students whose special education needs are determined to be highly intensive and require a high degree of individualized attention and intervention or who have severe multiple disabilities and require primarily habilitation and treatment in the home; or
 - (d) preschool students whose needs are so severe that they can be met only in a seven-day residential program; or
 - (e) preschool students who are not described in clauses (a) through (d) of this subparagraph whose disabilities are severe enough to exhibit the need for a structured learning environment of 12 months duration to prevent substantial regression as determined by the preschool committee on special education.
- (vi) The commissioner may grant a waiver from any requirement in sections 200.1, 200.6, and 200.16 of this Part, upon a finding that such waiver will enable a preschool program, as defined in section 200.1(nn) of this Part, to implement an innovative special program that is consistent with State law, applicable Federal requirements and all other sections of this Part, and will enhance student development and/or increase opportunities for preschool students with disabilities to interact with students without disabilities.

- (a) Except as otherwise provided in clause (c) of this subparagraph, any preschool program as defined in section 200.1(nn) of this Part shall submit an application for a waiver at least 60 days in advance of the proposed starting date of the program. Such application shall be in a form prescribed by the commissioner.
- (b) Except as otherwise provided in clause (c) of this subparagraph, any preschool program as defined in section 200.1(nn) of this Part granted a waiver shall submit an annual report to the commissioner regarding the operation and evaluation of the program no later than 30 days after the end of each school year for which a waiver is granted.
- (c) Any preschool program as defined in section 200.1(nn) of this Part granted a waiver for three consecutive school years may be granted a permanent waiver, upon a finding by the commissioner that the program has resulted in improved student achievement and/or enhanced opportunities for preschool students with disabilities to interact with students without disabilities and is consistent with State law and Federal requirements and all other sections of this Part. A preschool program as defined in section 200.1(nn) of this Part that is granted a permanent waiver shall not be required to submit an annual application or an annual report. A permanent waiver shall continue until terminated in accordance with clause (d) of this subparagraph.
- (d) The commissioner may terminate a waiver granted pursuant to this subdivision upon a finding that the program has not met its stated objectives or upon a finding that the program is no longer consistent with any requirement of State or Federal law or provision of this Part not specifically waived in the approval granted pursuant to this subdivision. The commissioner shall provide at least 30 days notice of a proposed termination. The district, school or agency shall be afforded the opportunity to submit a written response to the proposed termination which addresses any deficiencies, provided that such response shall be submitted no later than five business days prior to the date of the proposed termination.
- (vii) Nothing herein shall be construed to prevent the committee from recommending or the board from selecting a special service or program for July and August, or the frequency, location or duration of a special service or program, which is different in type or intensity than the service or program that the child is provided between the months of September and June.

200.17 Reimbursement of public school district administrative costs and due process costs for education programs or educational services approved pursuant to section 4410 of the Education Law.

- (a) *Reimbursement of administrative costs.* (1) Allowable administrative costs for public school districts shall include, but need not be limited to:
- (i) all reasonable costs incurred by the school district committee on preschool special education for activities performed in accordance with section 4410 of the Education Law; and
 - (ii) all reasonable costs, other than due process costs, incurred by the board of education or trustees of the school district to fulfill their obligations under section 4410 of the Education Law.
- (2) The administrative costs described in paragraph (1) of this subdivision, when computed on a pro rata basis, shall be consistent with similar pro rata administrative costs associated with the operation of the committee on special education and school district activities for students with disabilities. Upon audit, significant differences between such per student costs will not be considered reasonable without an appropriate justification.
- (3) Reimbursement. (i) Allowable administrative costs incurred by a school district shall be fully reimbursable by the commissioner, using funds available for this purpose in accordance with Federal law and regulations governing the use of such funds, and by appropriate municipalities for that portion of such costs which exceeds the amount of Federal funds determined by the commissioner to be available.
- (ii) The commissioner shall annually determine an amount of Federal funds which may be used to reimburse school districts for allowable administrative costs incurred. The commissioner shall also calculate each school district's allocation from this amount, which shall be in the same ratio to this amount as the number of preschool students with disabilities residing in that district and served on December 1st of the most recent year for which satisfactory data are available bears to the total number of such students residing in the State on that date.
 - (iii) The commissioner shall, prior to July 1st of each school year, notify each district of its allocation and set forth procedures and forms for making application for the use of such funds.
 - (iv) Upon receipt and approval of such application, the commissioner shall forward to the applicant an advance payment of Federal funds which shall not exceed the approved amount budgeted by the applicant or the allocation, whichever is the lesser amount.

- (v) In January of any year in which additional Federal funds are determined by the commissioner to be available for this purpose during that year, the commissioner shall notify each district of its amended allocation and the opportunity to amend its application for approval to use such additional funds.
 - (vi) In January of any year for which adjustments for growth in the number of preschool students served under section 4410 of the Education Law from December 1st of a given year to December 1st of the next year, the commissioner shall notify each district determined to have contributed to such growth of its pro rata share of the amount of such award set aside by the commissioner for use to reimburse allowable administrative costs. Each such share shall be in the same ratio to the amount set aside by the commissioner as that school district's actual growth is to the sum of actual growths of all such districts in the State.
 - (vii) At the close of the school year for which the administrative funds were advanced as described in subparagraphs (i) through (vi) of this paragraph, each public school district shall submit, in a form prescribed by the commissioner, a statement of the administrative costs incurred in connection with this section. The prescribed form shall include, but not be limited to, a summary of the advance revenues received by the school district, a detailed accounting of expenditures for approval by the commissioner and a computation of the difference between actual expenditures and advanced revenues. The prescribed form shall be submitted to the commissioner not later than September 1st next following the end of the school year in which services were provided.
 - (viii) The appropriate municipality shall pay the school district within 30 days of receipt of a voucher from the district for excess administrative costs as determined by the commissioner. The appropriate municipality shall submit a State aid voucher in the manner prescribed by the commissioner for reimbursement of such costs pursuant to section 4410(11) of the Education Law within 30 days of the date on which the payment was made to the school district.
 - (ix) Due process costs shall not be included in allowable administrative costs.
- (b) *Reimbursement of due process costs.* (1) Allowable costs associated with due process proceedings for students eligible to receive services pursuant to section 4410 of the Education Law shall include all reasonable and appropriate costs incurred by the school district as determined by the commissioner. A detailed

accounting and itemization of all due process costs incurred may be submitted in a format prescribed by the commissioner no later than 30 days after the determination of the hearing officer has been received by the school district.

- (2) The commissioner shall review the due process costs and, if indicated, recommend a student specific tuition rate to the director of the budget for certification. Upon approval, the commissioner will notify the school district and the appropriate municipality of such student specific tuition rate.
- (3) The school district shall submit a voucher to the appropriate municipality for all approved due process costs within 30 days of the receipt of the certified student specific tuition rate notification.
- (4) The appropriate municipality shall reimburse the school district for all due process costs within 30 days of receipt of the voucher from the school district for such approved due process costs as required by the certified student specific rate notification.

200.18 Fiscal audits of approved programs operated by private providers, special act school districts, boards of cooperative educational services and public school districts receiving public funds for the education of students with disabilities ages 3 to 21 who have been enrolled pursuant to articles 81 and 89 of the Education Law.

- (a) Fiscal audits of all approved programs performed by the commissioner, the Office of the State Comptroller, other State agencies or agencies of other states.
 - (1) All approved programs shall be subject to audit by the State. All such audits performed by the department shall be conducted in accordance with generally accepted auditing standards. Where other State agencies or the agencies of other states are involved in the funding of approved programs, any audits conducted by such agencies, and available to the program, shall be made available to the department upon written request to the program.
 - (2) Access to all records, property and personnel related to approved programs shall be provided during an audit. Access shall also apply to program costs allocated to approved programs. Such cost allocations to related programs are also subject to audit.
 - (3) Approved programs shall be provided a draft report on the results of the audit for review and comment. The chief school official of the approved program or an individual designated by the official shall reply in writing to a draft State audit within 30 days of its receipt and may request a conference. The draft audit report shall be considered final if no reply is received within 30 days.

(b) *Fiscal audits of approved preschool programs and services approved under section 4410 of the Education Law performed by the municipality and accepted by the commissioner.*

- (1) Each municipality, or, in addition, in the case of a city having a population of one million or more, the board of education of the city school district of such city, may perform fiscal audits of approved preschool programs and services for which it bears fiscal responsibility. Access to all records, property and personnel related to approved programs shall be provided during an audit. Access shall also apply to program costs allocated to approved programs. Such cost allocations to related programs are also subject to audit.
- (2) Prior to conducting an audit of an approved preschool program, a municipality shall ascertain that neither the state nor any other municipality has performed a fiscal audit of the same services or programs within the current fiscal year for such program. If it is determined that no such audit has been performed, the municipality shall inquire with the department to determine which other municipalities, if any, bear financial responsibility for the services or programs to be audited and shall afford such other municipalities an opportunity to recommend issues to be examined through the audit. Municipalities completing such audits shall provide copies to the department, the provider of the services and programs and all other municipalities previously determined to bear financial responsibility for the audited services and programs. No other municipality may conduct an additional fiscal audit of the same services or programs during such current fiscal year for such program. Municipalities shall submit to the department for approval a detailed audit plan and audit program for the proposed audit; provided that for any audit commenced on or after May 28, 2013, municipalities shall submit to the department for approval a detailed audit plan and audit program which shall be consistent with guidelines on audit standards and procedures issued by the department on or after such date.
- (3) Upon approval of the audit program and audit plan by the commissioner, the municipality may conduct audits in conformance with generally accepted auditing standards. Commissioner approval of an audit program and audit plan shall be valid for a period of five years from the date of approval. Municipalities need not submit an audit program and audit plan for each audit to be performed during the five year approval period once approval has been granted by the commissioner. However, modifications to the approved audit plan and audit program shall be submitted to the department for review and approval and new approval must be obtained once the five year approval period has concluded.
- (4) Once the audit is completed, a draft of the audit report shall be submitted to the commissioner for review and/or resolution. In order to

be approved by the commissioner, the draft audit shall be consistent with guidelines on audit standards and procedures issued by the department. Upon approval, the audit shall be considered a State audit for the purposes of establishing the tuition rate based on audit.

- (5) Municipalities completing audits pursuant to this subdivision must provide copies to the department, the provider of the services and programs and all other municipalities previously determined to bear financial responsibility for the audited services and programs.
 - (6) No other municipality may conduct an additional fiscal audit of the same services or programs during such current fiscal year for such program.
- (c) *The establishment of tuition rates and repayment of funds resulting from audits performed in accordance with subdivision (a) or (b) of this section.* (1) A final audit report shall be issued for each such audit. The final audit report shall be used to establish tuition rates based on audit. The rates based on audit shall be developed by the commissioner and certified by the Director of the Budget.
- (2) Upon the certification of the rate based on audit, any overpayment will be reimbursed to the appropriate school district, local agency or municipality by the approved program, or any underpayment will be paid by the appropriate school district, local agency or municipality to the approved program. Any overpayment or underpayment to the appropriate school district, local agency or municipality by the State shall be adjusted accordingly upon certification of the rate based on audit.
 - (3) All such payments due between the approved program and the appropriate school district, local agency or municipality shall be paid as soon as notification of the final certified rate based on audit is received by the program, unless the program and the school district or local agency or municipality agree to a longer repayment period. If amounts that are to be repaid are substantial and result from good faith errors or interpretive differences relating to the audit findings, the school district, local agency or municipality may agree to such longer repayment periods as are reasonable under the circumstances.

200.19 Reimbursement to preschool programs approved under section 4410 of the Education Law.

- (a) For the 1989-90 school year, the commissioner shall establish interim tuition rates for approved preschool special education programs and services, including evaluation components, subject to the approval of the Director of the Budget.

- (b) The interim rates established by the commissioner for preschool special education programs and services in existence on June 30, 1989, shall be based upon the tuition rate in effect for each such approved preschool education program or service on June 30, 1989, subject to the approval of the Director of the Budget.
- (c) The commissioner shall establish interim tuition rates for newly approved preschool special education programs or services for which a tuition rate did not exist as of June 30, 1989, based on a budget submitted by the persons operating the approved preschool special education programs or services, subject to approval by the Director of the Budget.
- (d) Such interim rates, as calculated pursuant to subdivision (b) or (c) of this section shall be adjusted, to the extent the commissioner deems it necessary and reasonable, subject to the approval of the Director of the Budget.

200.20 Approval, operation, and administration of preschool programs funded pursuant to section 4410 of the Education Law.

- (a) The approval and operation of preschool programs for preschool students with disabilities shall be conducted in a manner consistent with section 200.7(a)(1) through (3) and (b)(3), (5) and (6) of this Part, except that the following requirements shall apply:
 - (1) Except as provided in paragraph (3) of this subdivision, upon application and review by the commissioner, a preschool program which meets the requirements of section 200.7(a)(2)(i)(a) through (d) of this Part shall be granted conditional approval, provided that no such conditional approval shall be granted for new or expanded programs subject to the moratorium established by subparagraph (iii) of paragraph a of subdivision 9 of section 4410 of the Education Law, except as authorized by such subparagraph.
 - (2) Each approved program shall apply to the commissioner for approval to provide special education itinerant services by February 3, 1997.
 - (3) Commencing July 1, 1996, a moratorium on the approval of any new or expanded programs in settings which include only preschool children with disabilities is established for three years. Exceptions may be made at the discretion of the commissioner for cases in which school districts document a critical need for a new or expanded program in a setting which includes only preschool children with disabilities, to meet the projected demand for services for preschool children in the least restrictive environment. Nothing shall prohibit the commissioner from approving the modification of a full-day program into half-day sessions.

- (4) Notwithstanding the provisions of section 200.7(a)(2)(i)(d)(1) of this Part, an in-state not-for-profit school operating a preschool program as a corporate entity on the effective date of this section may satisfy the requirements of section 200.7(a)(2)(i)(d) of this Part by submitting evidence of approval by the commissioner of the school's incorporation for the provision of special education.
- (5) Notwithstanding the provisions of section 200.7(a)(2)(ii) of this Part, final approval of preschool programs shall be based on at least one site visit by program or fiscal staff of the State Education Department during the period of conditional approval and will take effect as of the date that a final approval letter is issued by the commissioner, or the commissioner's designee. No such final approval shall be granted for new or expanded programs subject to the moratorium established by subparagraph (iii) of paragraph (a) of subdivision (9) of section 4410 of the Education Law, except as authorized by such subparagraph.
- (6) Each preschool program shall be in operation for not less than 180 days each year.
- (7) Approved preschool programs shall submit calendars of days of operation to the commissioner for approval by July 1st of the preceding school year.
- (8) Approved preschool programs shall make attendance registers available for inspection by appropriate personnel of the department and the school district in which each preschool student resides.
- (9) Each preschool student with a disability shall be provided with the extent and duration of services described in the student's individualized education program.
- (10) Advertising.
 - (i) As used in this paragraph, *false advertising* shall mean advertising containing false, misleading, deceptive or fraudulent information or as defined in section 350-a of the General Business Law.
 - (ii) Approved programs and evaluators shall not issue, or cause to be issued, false advertising with respect to the services to be provided to preschool children and their families.
 - (iii) On or before July 1, 1997 and on or before July 1 of each subsequent school year, each approved program and approved evaluator shall submit to the commissioner for review copies of any advertising published, broadcast or disseminated by or on behalf of such approved program or evaluator during the preceding school year. Radio advertising may be submitted in the form of a written transcript or an audiotape. Television advertising shall be submitted in a

standard videotape format. Where identical advertising is published, broadcast or otherwise disseminated on more than one occasion, a submission of a single copy shall be sufficient for purposes of this paragraph.

- (iv) At any time, the commissioner, upon a finding that a program or evaluator may have engaged in false advertising, may provide such program or evaluator with written notice of such finding and of the commissioner's intention to revoke the approval of such program or evaluator on the basis of such conduct in accordance with section 200.7(a)(3) of this Part. In addition, the commissioner shall review advertising as part of the regular reapproval process pursuant to subdivision (c) of this section.
 - (v) In a proceeding to revoke the approval of an approved program or evaluator based on false advertising, such approved program or evaluator may submit to the commissioner a response containing information and evidence to show why the approval of such program or evaluator should not be revoked for engaging in false advertising. Such response may include, among other things, information and evidence to show that the advertisement is subject to and complies with the rules and regulations of, and the statutes administered by the Federal Trade Commission or any official department, division, commission or agency of the State.
- (11) Business plan. (i) By January 1, 1997, each approved provider of special services and programs for preschool children with disabilities, including local educational agencies, shall develop and submit to the department, in a format prescribed by the department, a business plan in accordance with subdivision 9-d of section 4410 of the Education Law and this paragraph.
- (ii) The business plan shall include:
 - (a) a plan for the redirection of fiscal and personnel resources toward providing special education programs and services in settings with children who do not have disabilities rather than a program or setting which includes only preschool children with disabilities, by such means as:
 - (1) converting a full-day special education class to a half-day class, and/or
 - (2) replacing a full or half-day special education class with a program which serves preschool children with disabilities through special education itinerant (SEIT) services or a related services only model, and/or

- (3) for those programs serving preschool children with disabilities whose disabilities are of such nature or severity that they need a special education class because they are unable to benefit from education in a less restrictive setting with supplemental aids and services, other means to assure that such children have regular contact with their nondisabled peers.
 - (i) Examples of redirection of fiscal and personnel resources may include operating a different approved program model which would replace existing programs so that there is a reduced reliance on programs and settings which include only preschool children with disabilities to include, but not limited to:
 - (1) converting a full-day special education class to a half-day class, or
 - (2) ceasing operation of a full or half-day special education class to serve children through special education itinerant teacher (SEIT) services or a related services model.
 - (ii) Steps that the agency will take to involve representatives of agencies external to the preschool program to accomplish the purpose of the plans.
 - (iii) Expected outcomes, including the impact on improving the provision of special education programs and services and how the proposed plan will lead to more cost-effective services than the current program structure.
 - (iv) A fiscal analysis of how agency resources will be redirected to support the provision of programs and placements in the least restrictive environment. The commissioner shall approve and monitor the business plans and require updates of plans as deemed necessary.
- (b) Preschool programs funded pursuant to section 4410 of the Education Law shall also meet the following additional requirements:
 - (1) No preschool student with a disability shall be removed or transferred from an approved in-state preschool program without the approval of the school

district contracting for education of such student pursuant to section 4410 of the Education Law.

- (2) An educational progress report on each student shall be provided by the approved school to the committee on preschool 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 preschool program to the referring district or agency on request.
- (c) Reapproval review. Except as provided in paragraph (1) of this subdivision, commencing on January 15, 1997, the commissioner shall review and, if appropriate, reapprove in whole or in part each approved program, including the provision of evaluation services, in accordance with the provisions of this subdivision.
- (1) The reapproval review of an approved program shall not be conducted more than once every three years, unless the commissioner shall determine, on his own initiative or at the request of a municipality, that a reapproval review of such program is required earlier or more frequently.
 - (2) The commissioner shall conduct such reapproval review in accordance with the department's ongoing quality assurance procedures, including schedules, in order to determine that the program under review provides quality services in a necessary and cost-efficient manner and in the least restrictive environment. In reaching such determination, the commissioner shall consider factors which include, but are not limited to, the following:
 - (i) the percentage of children receiving services from the approved program which also conducted the initial evaluation of the child which was used to determine the child's eligibility for preschool special education programs and services;
 - (ii) whether there has been evidence of misleading or erroneous advertising;
 - (iii) the extent of progress in meeting the goals of the approved business plan;
 - (iv) evidence to document that the program has reduced the numbers of students served in settings which do not provide opportunity for interaction with age-appropriate peers without disabilities;
 - (v) whether the approved program or program component is in compliance with Federal and State law and regulations relating to the provision of special education programs and services for preschool students with disabilities;

- (vi) cost-effective program size;
 - (vii) samples of materials and procedures to provide information and training to parents and opportunities which encourage parent participation and involvement in the program;
 - (viii) the number and type of parent complaints, if any, regarding the program and review of the resolution of such issues; and
 - (ix) for purposes of reapproving a program component, (a) the extent to which the program offers services in settings with regular contact with age-appropriate peers, where appropriate to the needs of the population served and (b) whether there has been evidence of misleading or erroneous advertising.
- (3) At least 30 days prior to completion of the reapproval review, the municipality in which the program under review is located or for which the municipality bears fiscal responsibility shall be given an opportunity to submit written comments to the commissioner concerning the program under review.
- (4) Upon his or her initial determination that the program or program component under review has failed to meet the criteria for reapproval specified in paragraph (2) of this subdivision, the commissioner shall provide the program under review with written notice of such determination, together with the specific findings underlying such determination and, if applicable, recommended corrective and/or remedial actions.
- (5) Within 30 days of its receipt of such notice, the program under review may submit a written response which shall include:
- (i) a challenge of such findings together with sufficient evidence to establish that the program is in compliance; and/or
 - (ii) a proposed corrective action plan that is sufficient to correct and/or remedy each finding within a reasonable time, provided that the program submits a reasonable explanation for not immediately correcting and/or remedying such findings.
- (6) After receipt and consideration of such response, or after expiration of the 30 day time period without submission of a response, the commissioner shall:

- (i) reapprove the program or program component at issue, if sufficient evidence exists to establish that the program or component is in compliance; or
 - (ii) place the program on a corrective action plan sufficient to correct and/or remedy each outstanding finding within a specified time. A program placed on a corrective action plan shall provide the commissioner with requested information and reports on a timely basis to demonstrate compliance with each outstanding finding within the time frame specified in the plan;
 - (iii) if placement of the program on a corrective action plan is not feasible because the nature of the findings precludes corrective or remedial action, the commissioner shall proceed in accordance with the provisions of paragraph (8) of this subdivision.
- (7) If a program placed on a corrective action plan corrects or remedies each outstanding finding within the time frame specified in such plan, the commissioner shall issue reapproval of the program or component at issue.
- (8) If a program placed on a corrective action plan fails to correct or remedy such findings within the time specified in such plan, or if a corrective action plan was found to be infeasible pursuant to subparagraph (6)(iii) of this subdivision, the commissioner shall disapprove such program or component at issue and provide the program under review with written notice of such disapproval, including the specific findings underlying such determination.
- (9) Within 30 days of its receipt of the notice of disapproval, the program may appeal such disapproval by submitting written material to the commissioner which responds to the findings specified in the notice and presents the program's position and all evidence and information which the program believes is pertinent to the case.
- (10) After considering the evidence submitted by the department and the institution pursuant to the appeal, the commissioner shall issue a final determination on whether such program or component shall be disapproved.

200.21 Impartial hearing officer rates and procedures for suspension or revocation of certification.

- (a) *Impartial hearing officer rates.* Commencing July 1, 1995, impartial hearing officers shall be compensated in an amount not to exceed the applicable rate prescribed in a schedule of maximum rates approved by the Director of the Division of Budget.

- (b) *Procedures for suspension or revocation of impartial hearing officer certification.* The certification of impartial hearing officers is subject to suspension or revocation on the grounds of incompetence or misconduct.
- (1) Complaints alleging the misconduct or challenging the competence of an impartial hearing officer shall be made in a signed written statement to the commissioner and shall contain a concise statement and documentation of the facts upon which the complaint is based.
 - (2) Upon receipt of the complaint, the commissioner shall provide the impartial hearing officer with notice of the complaint and 30 days to respond thereto.
 - (3) The commissioner shall provide for review and, if warranted, further investigation of the complaint. The investigation process shall be conducted in accordance with the following:
 - (i) A summary of the complaint shall be sent to the impartial hearing officer and complainant.
 - (ii) Additional information may be requested from the complainant, as appropriate, which may include a request for a sworn affidavit.
 - (iii) The impartial hearing officer shall be provided an opportunity to respond in writing and provide documentation to the State Education Department. The response from the impartial hearing officer must be received not later than 30 days from the date the impartial hearing officer receives the complaint summary.
 - (iv) All relevant information shall be reviewed.
 - (v) A written final decision shall be sent to the impartial hearing officer and complainant that addresses each allegation in the complaint.
 - (vi) If, upon a review of the facts, the commissioner finds misconduct or incompetence on the part of the impartial hearing officer, the commissioner may issue a warning letter to the impartial hearing officer containing an order for corrective action, or, depending on such factors as the level of misconduct or incompetence and the number of prior findings of misconduct or incompetence against the impartial hearing officer, the certification of the impartial hearing officer may be suspended or revoked.
 - (4) In addition to complaints made to the commissioner in accordance with paragraph (1) of this subdivision, the commissioner, on his or her initiative,

may suspend, revoke or take such other appropriate action with respect to the certification of the impartial hearing officer upon a finding that:

- (i) the impartial hearing officer failed to comply with an order of the commissioner;
 - (ii) the impartial hearing officer failed to issue a decision in a timely manner where such delay was not due to extensions granted at the request of either party as documented in the record; or
 - (iii) the State Review Officer determined that an impartial hearing officer engaged in conduct which constitutes misconduct or incompetence.
- (5) The commissioner, upon a finding that good cause has been established of either misconduct or incompetence on the part of the impartial hearing officer, shall revoke or suspend the certification of the impartial hearing officer, except that the commissioner may, in his discretion, issue either a warning or a conditional suspension of certification pending completion of a specified course of training where the imposition of a more severe penalty would not be justified.

200.22 Program standards for behavioral interventions.

Behavioral interventions for students with disabilities shall be provided in accordance with this section and those other applicable provisions of this Part and/or Part 201 that are not inconsistent with this section.

- (a) *Assessment of student behaviors.* For purposes of this section, an *assessment of student behaviors* shall mean a functional behavioral assessment (FBA), as such term is defined in section 200.1(r) of this Part.
- (1) A FBA shall be conducted as required in section 200.4 of this Part and section 201.3 of this Title.
 - (2) The FBA shall, as appropriate, be based on multiple sources of data including, but not limited to, information obtained from direct observation of the student, information from the student, the student's teacher(s) and/or related service provider(s), a review of available data and information from the student's record and other sources including any relevant information provided by the student's parent. The FBA shall not be based solely on the student's history of presenting problem behaviors.
 - (3) The FBA shall provide a baseline of the student's problem behaviors with regard to frequency, duration, intensity and/or latency across activities, settings, people and times of the day and include the information required in section 200.1(r) of this Part in sufficient detail to form the basis for a

behavioral intervention plan for the student that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement.

- (b) *Behavioral intervention plan.* (1) The CSE or CPSE shall consider the development of a behavioral intervention plan, as such term is defined in section 200.1(mmm) of this Part, for a student with a disability when:
- (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions;
 - (ii) the student's behavior places the student or others at risk of harm or injury;
 - (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or
 - (iv) as required pursuant to section 201.3 of this Title.
- (2) In accordance with the requirements in section 200.4 of this Part, in the case of a student whose behavior impedes his or her learning or that of others, the CSE or CPSE shall consider strategies, including positive behavioral interventions and supports and other strategies to address that behavior. If a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate. A student's need for a behavioral intervention plan shall be documented on the IEP and such plan shall be reviewed at least annually by the CSE or CPSE.
- (3) Except as provided in subdivision (e) of this section, a behavioral intervention plan shall not include the use of aversive interventions.
- (4) The behavioral intervention plan shall identify:
- (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors. Such baseline shall, to the extent practicable, include data taken across activities, settings, people and times of the day. The baseline data shall be used as a standard to establish performance criteria and against which to evaluate intervention effectiveness;
 - (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and

- (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals.
- (5) Progress monitoring. The implementation of a student's behavioral intervention plan shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the behavioral intervention plan and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's behavioral intervention plan or IEP.
- (c) *Use of time out rooms.* A time out room is an area for a student to safely deescalate, regain control and prepare to meet expectations to return to his or her education program. Time out rooms are to be used in conjunction with a behavioral intervention plan in which a student is removed to a supervised area in order to facilitate self-control or to remove a student from a potentially dangerous situation and as provided in paragraph (3) of this subdivision.
 - (1) Each school which uses a time out room as part of its behavior management approach shall ensure that the school's policy and procedures on the use of the time out room are developed and implemented consistent with this subdivision, including the physical and monitoring requirements, parental rights and IEP requirements for students with disabilities. The school's policy and procedures shall minimally include:
 - (i) prohibiting placing a student in a locked room or space or in a room where the student cannot be continuously observed and supervised;
 - (ii) factors which may precipitate the use of the time out room;
 - (iii) time limitations for the use of the time out room;
 - (iv) staff training on the policies and procedures related to the use of time out room;
 - (v) data collection to monitor the effectiveness of the use of time out rooms; and
 - (vi) information to be provided to parents.
 - (2) A student's IEP shall specify when a behavioral intervention plan includes the use of a time out room for a student with a disability, including the maximum amount of time a student will need to be in a time out room as a behavioral consequence as determined on an individual basis in consideration of the student's age and individual needs.

- (3) Except for unanticipated situations that pose an immediate concern for the physical safety of a student or others, the use of a time out room shall be used only in conjunction with a behavioral intervention plan that is designed to teach and reinforce alternative appropriate behaviors.
 - (4) The school district shall inform the student's parents prior to the initiation of a behavioral intervention plan that will incorporate the use of a time out room for a student and shall give the parent the opportunity to see the physical space that will be used as a time out room and provide the parent with a copy of the school's policy on the use of time out rooms.
 - (5) The physical space used as a time out room shall provide a means for continuous visual and auditory monitoring of the student. The room shall be of adequate width, length and height to allow the student to move about and recline comfortably. Wall and floor coverings should be designed to prevent injury to the student and there shall be adequate lighting and ventilation. The temperature of the room shall be within the normal comfort range and consistent with the rest of the building. The room shall be clean and free of objects and fixtures that could be potentially dangerous to a student and shall meet all local fire and safety codes.
 - (6) The time out room shall be unlocked and the door must be able to be opened from the inside. The use of locked rooms or spaces for purposes of time out is prohibited.
 - (7) Staff shall continuously monitor the student in a time out room. The staff must be able to see and hear the student at all times.
 - (8) The school shall establish and implement procedures to document the use of the time out room, including information to monitor the effectiveness of the use of the time out room to decrease specified behaviors.
 - (9) For an education program operated pursuant to section 112 of the Education Law and Part 116 of this Title, if a provision of this section relating to use of time out rooms conflicts with the rules of the respective State agency operating such program, the rules of such State agency shall prevail and the conflicting provisions of this section shall not apply.
- (d) *Emergency Interventions.* (1) For purposes of this subdivision, *emergency* means a situation in which immediate intervention involving the use of reasonable physical force pursuant to section 19.5(a)(3) of this Title is necessary.
- (2) Use of emergency interventions. (i) Emergency interventions shall be used only in situations in which alternative procedures and methods not involving the use of physical force cannot reasonably be employed.
 - (ii) Emergency interventions shall not be used as a punishment or as a substitute for systematic behavioral interventions that are designed to change, replace, modify or eliminate a targeted behavior.

- (3) Staff training. Staff who may be called upon to implement emergency interventions shall be provided with appropriate training in safe and effective restraint procedures in accordance with section 100.2(l)(1)(i)(g) of this Title and section 200.15(h)(1) of this Part as applicable.
 - (4) Documentation. The school must maintain documentation on the use of emergency interventions for each student, which shall include the name and date of birth of the student; the setting and the location of the incident; the name of the staff or other persons involved; a description of the incident and the emergency intervention used, including duration; a statement as to whether the student has a current behavioral intervention plan; and details of any injuries sustained by the student or others, including staff, as a result of the incident. The parent of the student shall be notified and documentation of emergency interventions shall be reviewed by school supervisory personnel and, as necessary, the school nurse or other medical personnel.
 - (5) Applicability. For an education program operated pursuant to section 112 of the Education Law and Part 116 of this Title, if a provision of this section relating to emergency interventions conflicts with the rules of the respective State agency operating such program, the rules of such State agency shall prevail and the conflicting provision of this section shall not apply.
- (e) *Child-specific exception to use aversive interventions to reduce or modify student behaviors.* A child-specific exception to the prohibition of the use of aversive interventions set forth in section 19.5 of this Title may be granted for a school-age student, in accordance with the procedures outlined in this subdivision, only during the 2006-2007, 2007-2008 and 2008-2009 school years; provided that a student whose IEP includes the use of aversive interventions as of June 30, 2009 may be granted a child-specific exception in each subsequent school year, unless the IEP is revised to no longer include such exception. No child-specific exception shall be granted for a preschool student.
- (1) Aversive interventions shall be considered only for students who are displaying self-injurious and/or aggressive behaviors that threaten the physical well being of the student or that of others, and only to address such behaviors.
 - (2) No child-specific exception shall be granted for interventions used as a consequence for behavior which are intended to induce pain or discomfort that include ice applications, hitting, slapping, pinching, deep muscle squeezes, use of an automated aversive conditioning device, the combined simultaneous use of physical or mechanical restraints and the application of an aversive intervention; withholding of sleep, shelter, bedding, bathroom facilities, denial or unreasonable delays in providing regular meals to the student that would result in a student not receiving adequate nutrition; the placement of a child unsupervised or unobserved in a room from which the

student cannot exit without assistance or actions similar to these interventions at the discretion of the Commissioner.

- (3) Whenever a CSE is considering whether a child-specific exception is warranted, the school district shall submit an application to the commissioner in a form prescribed by the commissioner requesting a review of student specific information by an independent panel of experts.
- (4) The commissioner shall refer the application to an independent panel of experts appointed by the commissioner or commissioner's designee for a recommendation to the CSE as to whether a child-specific exception is warranted. The panel shall be comprised of three professionals with appropriate clinical and behavioral expertise to make such determinations.
- (5) The panel shall review the written application; the student's IEP; the student's diagnosis(es); the student's functional behavioral assessment; any proposed, current and/or prior behavioral intervention plans for the student, including documentation of the implementation and progress monitoring of the effectiveness of such plans; and other relevant individual evaluations and medical information that allow for an assessment of the student's cognitive and adaptive abilities and general health status, including any information provided by the student's parent.
- (6) The panel's recommendation to the CSE that a child-specific exception is warranted shall be based on the professional judgment of the panel that:
 - (i) the student is displaying self-injurious or aggressive behaviors that threaten the physical well being of the student or that of others and a full range of evidence-based positive behavioral interventions have been consistently employed over an appropriate period of time and have failed to result in sufficient improvement of a student's behavior; or
 - (ii) the student's self-injurious or aggressive behaviors are of such severity as to pose significant health and safety concerns that warrant the use of aversive interventions to effect rapid suppression of the behavior and a range of nonaversive prevention strategies have been employed and have failed to provide a sufficient level of safety.
- (7) The panel shall notify the school district and the commissioner of its recommendation as to whether a child-specific exception is warranted and the reasons therefor. For students whose current IEP does not include a child-specific exception, the panel shall provide such notice within 15 business days of receipt of an application.
- (8) The CSE shall determine, based on its consideration of the recommendation of the panel, whether the student's IEP shall include a child-specific exception allowing the use of aversive interventions. The determination to provide a child-specific exception shall be made by the

CSE and not by a subcommittee. The CSE shall request the participation of the school physician member in such determination. The school district shall notify and provide a copy of the student's IEP to the commissioner when a child-specific exception has been included in the student's IEP.

- (9) Any IEP providing for a child-specific exception allowing the use of aversive interventions shall identify the specific:
 - (i) self-injurious and/or aggressive targeted behavior(s);
 - (ii) aversive intervention(s) to be used to address the behavior(s); and
 - (iii) aversive conditioning device(s) and/or mechanical restraint device(s) where the aversive intervention(s) includes the use of such device(s).
 - (10) Nothing in this section shall authorize the use of aversive interventions without the informed written consent of the student's parent.
 - (11) Any such child-specific exception shall be in effect only during the time period the IEP providing such exception is in effect. If the continued use of an aversive intervention for a student is being considered for subsequent IEP(s), the CSE shall submit an annual application to the commissioner for each such IEP(s). If the student's IEP is amended or a subsequent IEP is adopted to no longer include a child-specific exception, the school district need not notify the panel but shall submit a revised copy of the student's IEP to the commissioner.
 - (12) For an education program operated pursuant to section 112 of the Education Law and Part 116 of this Title, if a provision of this section relating to the use of aversive interventions conflicts with the rules of the respective State agency operating such program, the rules of such State agency shall prevail and the conflicting provision of this section shall not apply.
 - (13) Coordination with licensing agencies. Nothing in this section shall authorize a school or agency to provide aversive interventions that are otherwise prohibited by the State agency licensing such program.
- (f) *Program standards for the use of aversive interventions.*
- (1) Applicability.
 - (i) The requirements in this subdivision shall apply to any public school, BOCES, charter school, approved private school, State-operated or State-supported school in this State and an approved out-of-State day or residential school that proposes to use aversive interventions subject to the approval of the Department.
 - (ii) For an education program operated pursuant to section 112 of the Education Law and Part 116 of this Title, if a provision of this section relating to the use of aversive interventions conflicts with the rules of

the respective State agency operating such program, the rules of such State agency shall prevail and the conflicting provision of this section shall not apply.

- (2) General requirements. Any program that employs the use of aversive interventions to modify an individual student's behavior as authorized pursuant to subdivision (e) of this section shall comply with the following standards:
- (i) The program shall provide for the humane and dignified treatment of the student. The program shall promote respect for the student's personal dignity and right to privacy and shall not employ the use of threats of harm, ridicule or humiliation, nor implement behavioral interventions in a manner that shows a lack of respect for basic human needs and rights.
 - (ii) Aversive intervention procedures may be used only if such interventions are recommended by the CSE consistent with the student's IEP and behavioral intervention plan as determined by the CSE.
 - (iii) Aversive intervention procedures shall not be the sole or primary intervention used with a student and shall be used in conjunction with other related services, as determined by the CSE, such as verbal or other counseling services, speech and language therapy and/or functional communication training.
 - (iv) Aversive interventions shall be combined with reinforcement procedures, as individually determined based on an assessment of the student's reinforcement preferences.
 - (v) Aversive interventions shall be implemented consistent with peer-reviewed research based practices and shall include individualized procedures for generalization and maintenance of behaviors and for the fading of the use of such aversive interventions.
 - (vi) The use of aversive interventions shall be limited to those self-injurious or aggressive behaviors identified for such interventions on the student's IEP.
 - (vii) Whenever possible, the use of aversive interventions shall apply the lowest intensity for the shortest duration and period of time that is effective to treat the problem behavior and employ strategies that increase the effectiveness of mild levels of aversive interventions. In the event the aversive intervention fails to result in a suppression or reduction of the behavior over time, alternative procedures shall be considered that do not include increasing the magnitude of the aversive intervention.

- (viii) The use of any aversive conditioning device used to administer an electrical shock or other noxious stimuli to a student to modify undesirable behavioral characteristics shall be limited to devices tested for safety and efficacy and approved for such use by the United States Food and Drug Administration where such approval is required by Federal regulation. The magnitude, frequency and duration of any administration of aversive stimulus from such a device must have been shown to be safe and effective in clinical peer-reviewed studies. The use of automated aversive conditioning devices is prohibited.
 - (ix) No program may combine the simultaneous use on a student of a physical or mechanical restraint device with another aversive intervention.
- (3) Human Rights Committee. (i) Each school that uses aversive interventions with students shall establish a Human Rights Committee to monitor the school's behavior intervention program for any student being considered for or receiving aversive interventions to ensure the protection of legal and human rights of individuals.
- (ii) Each Human Rights Committee shall be comprised of individuals not employed by the school or agency, which shall include at least one licensed psychologist with appropriate credentials in applied behavior analysis; one licensed physician, physician's assistant or nurse practitioner; one registered dietician or nutritionist; one attorney, law student or paralegal; and one parent or parent advocate and may include not more than two additional individuals selected by the school or agency. In addition, when the purpose of the Human Rights Committee meeting includes a review of an individual New York State student's program, a representative of the school district or agency placing the student in the program and a representative of the department shall be invited to participate.
 - (iii) The Human Rights Committee shall meet at least quarterly to review, monitor and investigate the implementation of students' behavioral intervention plans that include aversive interventions. A written report on the findings and recommendations of the Human Rights Committee regarding an individual student shall be provided to the CSE of the student and to the agency that placed the student in the program.
- (4) Supervision and training requirements. Aversive interventions shall be administered by appropriately licensed professionals or certified special education teachers in accordance with Part 80 of this Title and sections 200.6 and 200.7 of this Part or under the direct supervision and direct observation of such staff. Training shall be provided on a regular, but at least annual basis, which shall include, but not be limited to, training on:
- (i) safe and therapeutic emergency physical restraint interventions;

- (ii) data collection of the frequency, duration and latency of behaviors;
 - (iii) identification of antecedent behaviors and reinforcing consequences of the behavior;
 - (iv) approaches to teach alternative skills or behaviors including functional communication training;
 - (v) assessment of student preferences for reinforcement,
 - (vi) assessing and responding to the collateral effects of the use of aversive interventions including, but not limited to, effects on a student's health, increases in aggression, increases in escape behaviors and/or emotional reactions;
 - (vii) privacy rights of students; and
 - (viii) documentation and reporting of incidents, including emergency restraints and injuries.
- (5) Parent consent. Aversive interventions shall be provided only with the informed written consent of the parent and no parent shall be required by the program to remove the student from the program if he or she refuses consent for an aversive intervention. A parent shall be given a copy of the school's policies and procedures on the use of aversive interventions.
- (6) Quality assurance reviews. The program providing aversive interventions shall conduct periodic reviews of all incident reports relating to such interventions to ensure that practices are clinically sound, supported by proper documentation and consistent with these program standards and the school's policies and procedures as approved by the department.
- (7) Progress monitoring. (i) The program shall provide for ongoing monitoring of student progress, including the collection and review of data and information. Such information shall include reports on the assessment of and strategies used to address any indirect or collateral effects the use of aversive interventions may be having on the student, including, but not limited to, increases in aggressive or escape behaviors, health-related effects and/or emotional reactions. The program shall submit quarterly written progress reports on the implementation of the student's behavioral intervention program to the CSE and to the agency that placed the student in the program.
- (ii) A school district that places a student in a program that uses aversive interventions with such student shall be responsible to ensure that the student's IEP and behavioral intervention plan are being implemented. The CSE shall convene at least every six months, or more frequently as needed, to review the student's educational program and placement for any student for whom the CSE has recommended the

use of aversive interventions. Such review shall include the review of written progress monitoring and incident reports, documentation from observations of and, as appropriate, interviews with the student in the program and the concerns of the student's parent. A representative of the school district shall observe the student at least every six months and, as appropriate, interview the student in the program and communicate regularly with the student's parent and shall report the results thereof to the CSE.

- (8) Policies and procedures. Each school that proposes to use aversive interventions pursuant to a child-specific exception shall submit its policies and procedures consistent with this subdivision to the department for approval prior to the use of such interventions. Only those schools with policies and procedures approved by the department on or before June 30, 2007 shall be authorized to use such interventions.

December 2010

**REGULATIONS OF THE COMMISSIONER OF EDUCATION
Pursuant to Sections 207, 3214, 4403, 4404 and 4410 of the Education Law**

**PART 201 - PROCEDURAL SAFEGUARDS FOR STUDENTS WITH DISABILITIES
SUBJECT TO DISCIPLINE**

(Includes all Amendments through December 2010)

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**PART 201
PROCEDURAL SAFEGUARDS FOR
STUDENTS WITH DISABILITIES SUBJECT
TO DISCIPLINE**

201.1 Purpose.

The purpose of this Part is to implement the procedural protections of paragraph g of subdivision 3 of section 3214 and subdivision 1 of section 4404 of the Education Law relating to student discipline by coordinating the general procedures for suspension of students under Education Law section 3214 with the requirements of section 615(k) of the Individuals with Disabilities Education Act (20 U.S.C. section 1415[k]) and the Federal regulations implementing such statute.

201.2 Definitions.

As used in this Part, the following terms shall have the following meanings:

- (a) *Behavioral intervention plan* means a plan that is based on the results of the functional behavioral assessment and, at a minimum, includes a description of the problem behavior, global and specific hypotheses as to why the problem behavior occurs and intervention strategies that include positive behavioral supports and services to address the behavior.
- (b) *Committee on special education or CSE* means a committee on special education, subcommittee on special education, or other multidisciplinary team established in accordance with Education Law section 4402 or, in the case of a preschool student with a disability, the committee on preschool special education.
- (c) *Controlled substance* means 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) (United States Code, 2006 edition, volume 13 ; Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402-9328; 2008 - available at the Office of Counsel, New York State Education Department, State Education Building Room 148, 89 Washington Avenue, Albany, NY 12234).
- (d) *Day* shall mean a calendar day, except where a school day or business day is specified.
 - (1) *School day* means any day, including a partial day, that students are in attendance at school for instructional purposes. The term *school day* has the same meaning for all students in school, including students with and without disabilities.

- (2) *Business day* means Monday through Friday, except for Federal and State holidays (unless holidays are specifically included in the designation of business day).
- (e) *Disciplinary change in placement* means a suspension or removal from a student's current educational placement that is either:
 - (1) for more than 10 consecutive school days; or
 - (2) for a period of 10 consecutive days or less if the student is subjected to a series of suspensions or removals that constitute a pattern because they cumulate to more than 10 school days in a school year; because the student's behavior is substantially similar to the student's behavior in previous incidents that resulted in the series of removals; and because of such additional factors as the length of each suspension or removal, the total amount of time the student has been removed and the proximity of the suspensions or removals to one another. The school district determines on a case-by-case basis whether a pattern of removals constitutes a change of placement. This determination is subject to review through due process and judicial proceedings.
- (f) *Expedited due process hearing* means an impartial hearing conducted in an expedited manner under the circumstances and in accordance with the procedures specified in section 201.11 of this Part.
- (g) *Expedited evaluation* means an individual evaluation conducted in an expedited manner under the circumstances and in accordance with the procedures specified in section 201.6 of this Part.
- (h) *Functional behavioral assessment* means a functional behavioral assessment as defined in section 200.1(r) of this Title.
- (i) *Illegal drug* means a controlled substance, but does not include a controlled substance legally possessed or used under the supervision of a licensed health-care professional or a substance that is otherwise legally possessed or used under the authority of the Controlled Substances Act or under any other provision of Federal law.
- (j) *Impartial hearing officer* means an impartial hearing officer as defined in section 200.1(x) of this Title who is appointed to conduct an impartial hearing or expedited due process hearing pursuant to Education Law section 4404(1). Such term shall not include a hearing officer designated by a superintendent of schools to conduct a superintendent's hearing pursuant to Education Law section 3214(3)(c).

- (k) *Interim alternative educational setting or IAES* a temporary educational placement, other than the student's current placement at the time the behavior precipitating the IAES placement occurred. A student who is placed in an IAES shall:
- (1) continue to receive educational services so as to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP; and
 - (2) 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.
- (l) *Removal means:* (1) a removal of a student with a disability for disciplinary reasons from that student's current educational placement, other than a suspension as defined in subdivision (r) of this section; and
- (2) the change in placement of a student with a disability to an IAES by an impartial hearing officer pursuant to section 201.8 of this Part. Such term shall also include the change of placement of a student with a disability to an IAES pursuant to section 201.7(e) of this Part made in conjunction with a suspension.
- (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.
- (n) *Student presumed to have a disability for discipline purposes* means a student who the school district is deemed to have knowledge was a student with a disability before the behavior that precipitated disciplinary action under the criteria in section 201.5(b) of this Part.
- (o) *Student with a disability* means a student with a disability as defined in section 200.1(zz) of this Part or a preschool student with a disability as defined in section 200.1(mm) of this Part.
- (p) *Superintendent or superintendent of schools* means a superintendent of schools of a school district, including a community superintendent, or the chief school officer of an approved private school. Such term does not include a district superintendent of schools.
- (q) *Superintendent's hearing* means a disciplinary hearing conducted pursuant to Education Law section 3214(3)(c) and (g) by a superintendent of schools, or a hearing officer designated by a superintendent of schools, to determine whether

a student should be suspended from instruction for more than five consecutive school days.

- (r) *Suspension* means suspension pursuant to Education Law section 3214(3)(a) through (d).
- (s) *Weapon* means a weapon, device, instrument, material or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than two and one-half inches in length.

201.3 CSE responsibilities for functional behavioral assessments and behavioral intervention plans.

If the manifestation team pursuant to section 201.4 of this Part, makes the determination that the conduct subject to the disciplinary action was a manifestation of the student's disability, the CSE must either:

- (a) conduct a functional behavioral assessment, unless the school district had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the student; or
- (b) if a behavioral intervention plan has already been developed, review the behavioral intervention plan and modify it as necessary to address the behavior.

201.4 Manifestation determinations.

- (a) *General requirement for manifestation review.* 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) a decision is made by a superintendent of schools to change the placement of a student to an interim alternative educational setting pursuant to section 201.7(e) of this Part; or
 - (2) a decision is made by an impartial hearing officer to place a student in an interim alternative educational setting pursuant to section 201.8 of this Part; or
 - (3) a decision is made by a board of education, district superintendent of schools, building principal or superintendent pursuant to section 201.7(a) or (b) of this Part to impose a suspension that constitutes a disciplinary change in placement.

- (b) *Individuals to carry out review.* A review described in subdivision (a) of this section shall be conducted by 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 CSE 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 CSE participate at the parent's request.
- (c) *Conduct of review.* The manifestation team shall review all relevant information in the student's file including the student's IEP, any teacher observations, and any relevant information provided by the parents to determine if:
 - (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) *Determination.* (1) The conduct must be determined to be a manifestation of the student's disability if the manifestation team determines that a condition in either paragraph (c)(1) or (2) of this section was met.
 - (2) If the manifestation team determines that the conduct was a manifestation of the student's disability, the CSE shall:
 - (i) conduct a functional behavioral assessment and implement a behavioral intervention plan for such student in accordance with section 201.3 of this Part; and
 - (ii) except as provided in section 201.7(e) 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) *Deficiencies in IEP.* If the manifestation team determines the conduct in question was the direct result of the school district's failure to implement the IEP, the school district must take immediate steps to remedy those deficiencies.

201.5 Students presumed to have a disability for discipline purposes.

- (a) *General provision.* The parent of a student who has violated any rule or code of conduct of the school district and was not identified as a student with a disability at the time of such behavior may assert any of the protections set forth in this

Part, if the school district is deemed to have had knowledge as determined in accordance with subdivision (b) of this section, that the student was a student with a disability before the behavior that precipitated the disciplinary action occurred. Where the school district is deemed to have had knowledge that the student was a student with a disability before such behavior occurred, such student is a "student presumed to have a disability for discipline purposes."

- (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 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; or
 - (2) the parent of the student has requested an evaluation of the student pursuant to section 200.4 or 200.16 of this Title; or
 - (3) a teacher of the student, or other personnel of the school district, has expressed specific concerns about a pattern of behavior demonstrated by the student, directly to the director of special education of the school district or to other supervisory personnel of the school district.
- (c) *Exception.* A student 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:
- (1) the parent of the student has not allowed an evaluation of the student pursuant to section 200.4 of this Title; or
 - (2) the parent of the student has refused services under this Part; or
 - (3) it was determined that the student is not a student with a disability pursuant to section 200.4 or 200.16 of this Title.
- (d) *Responsibility for determining whether a student is a student presumed to have a disability.* If it is claimed by the parent of the student or by school district personnel that the school district had a basis for knowledge, in accordance with paragraph (b) of this section, that the student was a student with a disability prior to the time the behavior subject to disciplinary action occurred, it shall be the responsibility of the superintendent of schools, building principal or other school official imposing the suspension or removal to determine whether the student is a student presumed to have a disability.

- (e) *Conditions that apply if there is no basis for knowledge.* If the superintendent of schools, building principal or other school official imposing the disciplinary removal determines that there is no basis for knowledge that the student is a student with a disability prior to taking disciplinary measures against the student, the student may be subjected to the same disciplinary measures as any other nondisabled student who engaged in comparable behaviors. However, if a request for an individual evaluation is made while such nondisabled student is subjected to a disciplinary removal, an expedited evaluation shall be conducted in accordance with 201.6 of this Part.

201.6 CSE responsibilities for expedited evaluations.

- (a) If a request for an individual evaluation is made during the period that a nondisabled student, who is not a student presumed to have a disability for discipline purposes, is suspended pursuant to Education Law section 3214 or is subjected to a removal as defined in section 201.2(l) of this Part if imposed on a student with a disability, the evaluation must be conducted in an expedited manner in accordance with this section.
- (b) An expedited evaluation shall be completed no later than 15 school days after receipt of parent consent for evaluation, and shall be conducted in accordance with the procedural requirements of sections 200.4 and 200.5 of this Title. The CSE shall make a determination of eligibility of such student in a meeting held no later than five school days after completion of the expedited evaluation.
- (c) Until the expedited evaluation is completed, the nondisabled student shall remain in the educational placement determined by the school district, which can include suspension.
- (d) If, as a result of an expedited evaluation, the student is determined to be a student with a disability, the school district shall provide special education to the student pursuant to Part 200 of this Title and the provisions of this Part relating to students with disabilities shall apply.

201.7 General procedures for suspensions and removals of students with disabilities.

- (a) *Parental notice of disciplinary removal.* No later than the date on which a decision is made to change the placement of a student with a disability to an IAES pursuant to subdivision (e) of this section or pursuant to section 201.8 of this Part, or a decision is to impose a suspension or removal pursuant to this Subpart that constitutes a disciplinary change in placement, the parent shall be notified of such decision and shall be provided the procedural safeguards notice in accordance with section 200.5(f) of this Title.

- (b) *Five school day suspension or removal.* Except as otherwise provided in subdivision (d) of this section, the trustees or board of education of any school district, a district superintendent of schools or a building principal with authority to suspend students pursuant to Education Law section 3214(3)(b) and (g), shall have authority to order the placement of a student with a disability into an appropriate interim alternative educational setting, another setting or suspension for a period not to exceed five consecutive school days, and not to exceed the amount of time that a nondisabled student would be subject to suspension for the same behavior.
- (c) *Ten school day suspension or removal.* Except as otherwise provided in subdivision (d) of this section, 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) and (g), may order the placement of a student with a disability into an interim alternative educational setting, another setting or suspension for up to 10 consecutive school days, inclusive of any period in which the student has been suspended or removed pursuant to subdivision (b) of this section for the same behavior, where the superintendent determines in accordance with the procedures set forth in Education Law section 3214(3)(c) that the student has engaged in behavior that warrants a suspension, provided that the duration of any such suspension or removal shall not exceed the amount of time that a nondisabled student would be subject to suspension for the same behavior. Except as otherwise provided in subdivision (d) of this section, a superintendent of schools may order additional suspensions of not more than 10 consecutive school days in the same school year for separate incidents of misconduct.
- (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 suspension or removal would result in a disciplinary change in 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 manifestation team pursuant to section 201.4 of this Part has determined 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 201.2(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 under the jurisdiction of the educational agency; or
 - (iii) knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school, on school premises or at a school function under the jurisdiction of the educational agency.
- (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 a change in placement consistent with the other requirements of this Part is appropriate for a student with a disability who violates a school district's code of conduct.

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 determines that maintaining the current placement of the student is substantially likely to result in injury to the student or others.
- (b) The procedures established in this section may be repeated if the school district believes that returning the student to the original placement is substantially likely to result in injury to the student or others.
- (c) A school district shall not be required to commence disciplinary action against a student with a disability as a prerequisite for initiating an expedited due process hearing to obtain an order of an impartial hearing officer pursuant to this section.
- (d) A 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.

201.9 Coordination with superintendent's hearing and other due process procedures applicable to all students.

- (a) *Procedures for suspensions of five school days or less.* In the case of a suspension for five consecutive school days or less pursuant to paragraph b of subdivision 3 of section 3214 of the Education Law and section 201.7(b) of this Part, the parents or persons in parental relation to the student shall be provided an opportunity for an informal conference in accordance with paragraph d of subdivision 3 of section 3214 of the Education Law.
- (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 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 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 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 section 201.10 of this Part. 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 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 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 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 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.

201.10 Provision of services during suspensions.

- (a) During any period of suspension, a student with a disability shall be provided services to the extent required under this section and paragraph (e) of subdivision 3 of section 3214 of the Education Law. Nothing in this section shall be construed to confer a greater right to services than is required under Education Law, section 3214(3)(e) and Federal law and regulations.
- (b) During suspensions or removals for periods of up to 10 school days in a school year that do not constitute a disciplinary change in placement, students with disabilities of compulsory attendance age shall be provided with alternative instruction pursuant to Education Law, section 3214(3)(e) on the same basis as nondisabled students. Students with disabilities who are not of compulsory attendance age shall be entitled to receive services during such suspensions only to the extent that services are provided to nondisabled students of the same age who have been similarly suspended.
- (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 continue to participate in the general education curriculum and to progress toward meeting the goals set out in the student's IEP and to receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications that are designed to address the behavior violation so it does not recur. School personnel, in consultation with at least one of the student's teachers, shall determine the extent to which services are needed, so as to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress in meeting the goals set out in the student's IEP.
- (d) During suspensions or other disciplinary removals, including suspensions or removals pursuant to section 201.7(e) of this Part, for periods in excess of 10 school days in a school year which 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 continue to participate in the general education curriculum, to progress toward meeting the goals set out in the student's IEP, and to receive, as appropriate pursuant to section 201.3 of this Part, a functional behavioral assessment, behavioral intervention services

and modifications that are designed to address the behavior violation so it does not recur. The IAES and services shall be determined by the CSE.

201.11 Expedited due process hearings.

- (a) An expedited due process hearing shall be conducted pursuant to this Part under the following circumstances:
 - (1) the school district requests an expedited due process hearing to obtain an order of an impartial hearing officer placing a student with a disability in an IAES pursuant to section 201.8 of this Part where school personnel maintain that it is dangerous for the student to be in his or her current educational placement;
 - (2) the school district requests an expedited due process hearing to obtain an order of an impartial hearing officer placing a student with a disability in an IAES during the pendency of due process hearings where school personnel maintain that it is dangerous for the student to be in his or her current educational placement during such proceedings;
 - (3) the parent requests a hearing from a determination that the student's behavior was not a manifestation of the student's disability; or
 - (4) the parent requests a hearing relating to any decision regarding placement under section 201.7 of this Part, including but not limited to any decision to place the student in an IAES.

- (b) An expedited due process hearing shall be conducted in accordance with the procedures specified in section 200.5(j) of this Title, except as follows:
 - (1) Upon receipt of or filing of a due process complaint notice for an expedited hearing, the board of education shall arrange for an impartial hearing and the appointment of an impartial hearing officer using the list in accordance with the rotational selection process established in section 200.2(e)(l) of this Title and the administrative procedures established by the board of education pursuant to section 200.2(b)(9) of this Title.
 - (2) The impartial officer may not accept appointment unless available to hold the hearing and render the decision within the time period for expedited hearings pursuant to paragraph (3) of this subdivision.
 - (3) The school district shall arrange the expedited due process hearing according to the following time period, unless the parent and school district agree in writing to waive the resolution meeting or agree to use mediation:

- (i) A resolution meeting shall occur within seven days of receiving notice of the due process complaint.
 - (ii) The expedited due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 days of receipt of the due process complaint.
 - (iii) The expedited due process hearing shall occur within 20 school days of the date the complaint requesting the hearing is filed.
 - (iv) The impartial hearing officer shall make a determination within 10 school days after the hearing.
- (4) No extension to an expedited impartial hearing timeline may be granted.
- (5) The impartial hearing officer shall 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 the Office of Special Education of the New York State Education Department within 10 school days after the hearing.
- (c) 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, or regarding a change in placement 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 office or until expiration of the time period determined in accordance with section 201.7 or 201.8 of this Part, as applicable, whichever occurs first, unless the parents and the school district otherwise agree.
- (d) When an expedited due process hearing has been requested because of a disciplinary change in placement, the manifestation determination or because the school district believes that maintaining the student in the current placement is likely to result in injury to the student or others, the student shall remain in the IAES pending the decision of the impartial hearing officer or until the expiration of the period of removal, whichever occurs first, unless the parent and the school district agree otherwise.