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REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Sections 207, 3214, 4403, 4404 and 4410 of the Education Law

PART 200
Students with Disabilities

and

PART 201
Procedural Safeguards for Students with Disabilities Subject to Discipline

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Pursuant to Sections 207, 3214, 4403, 4404 and 4410 of the Education Law

PART 200 – STUDENTS WITH DISABILITIES
(Includes all Amendments through October 2016)

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200.1 Definitions.
As used in this Part:

(a) *Adaptive behavior* means the effectiveness with which the individual copes with the natural and social demands of his environment.

(b) *Adapted physical education* means a specially designed program of developmental activities, games, sports and rhythms suited to the interests, capacities and limitations of students with disabilities who may not safely or successfully engage in unrestricted participation in the activities of the regular physical education program.

(c) *Annual review* means an evaluation, conducted at least annually by the committee on special education, of the status of each student with a disability and each student thought to have a disability who resides within the school district for the purpose of recommending the continuation, modification or termination of the provision of special education programs and services for the student to the board of education.

(d) *Approved private school* means a private school which conforms with the requirements of Federal and State laws and regulations governing the education of students with disabilities, and which has been approved by the commissioner for the purpose of contracting with public schools for the instruction of students with disabilities.

(e) *Assistive technology device* means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a student with a disability. Such term does not include a medical device that is surgically implanted, or the replacement of such a device.

(f) *Assistive technology service* means any service that directly assists a student with a disability in the selection, acquisition, or use of an assistive technology device. The term includes:

(1) the evaluation of the needs of a student with a disability, including a functional evaluation of the student in the student's customary environment;

(2) purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by students with disabilities;

(3) selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;

(4) coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

(5) training or technical assistance for a student with a disability or, if appropriate, that student's family; and

(6) training or other technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of that student.

(g) *Change in program* means a change in any one of the components of the individualized education program of a student as described in section 200.4(d)(2) of this Part.

(h) *Change in placement* means a transfer of a student to or from a public school, BOCES or schools enumerated in articles 81, 85, 87, 88 or 89 of the Education Law or graduation from high school with a local high school or Regents diploma. For purposes of removal of a student with a disability from the student's current educational placement under Education Law section 3214, change of placement is defined in Part 201 of this Title.

(i) *Class size* means the maximum number of students who can receive instruction together in a special class or resource room program and the number of teachers and supplementary school personnel assigned to the class.

(j) *Committee on preschool special education (CPSE)* means a multidisciplinary team established in accordance with the provisions of section 4410 of the Education Law.

(k) *Committee on special education (CSE)* means a multidisciplinary team established in accordance with the provisions of section 4402 of the Education Law.

(l) *Consent* means:

(1) the parent has been fully informed, in his or her native language or other mode of communication, of all information relevant to the activity for which consent is sought, and has been notified of the records of the student which will be released and to whom they will be released;

(2) the parent understands and agrees in writing to the activity for which consent is sought; and

(3) the parent is made aware that the consent is voluntary on the part of the parent and may be revoked at any time except that, if a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked).

(m) *Consultant teacher services* means direct and/or indirect services, as defined in this subdivision, provided to a student with a disability in the student's regular education classes and/or to such student's regular education teachers.

(1) *Direct consultant teacher services* means specially designed individualized or group instruction provided by a certified special education teacher pursuant to subdivision (yy) of this section, to a student with a disability to aid such student to benefit from the student's regular education classes.

(2) *Indirect consultant teacher services* means consultation provided by a certified special education teacher pursuant to subdivision (yy) of this section to regular education teachers to assist them in adjusting the learning environment and/or modifying their instructional methods to meet the individual needs of a student with a disability who attends their classes.

(n) *Days* means calendar days unless otherwise indicated as school day or business day.

(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 disabilities and students without disabilities, except that, during the months of July and August, *school day* means every day except Saturday, Sunday and legal holidays.

(2) *Business day* means Monday through Friday, except for Federal and State holidays (unless holidays are specifically included in the designation of business day).

(o) *Fiscal year* means the period commencing on the 1st day of July in each year and ending on the 30th day of June next following.

(p) *Full-day preschool program* means an approved special education program for preschool students with disabilities that provides instruction for a full-day session as defined in subdivision (q) of this section, provided however that in the event a program is approved by the commissioner to provide instruction for less than a full-day session but more than a half-day session, such program shall be deemed a full-day program solely for purposes of development of a recommendation by the preschool committee on special education pursuant to subparagraph (i) of paragraph b of subdivision 5 of section 4410 of the Education Law and section 200.16(e)(3) of this Part.

(q) *Full-day session* means a school day with not less than five hours of instruction for preschool students with disabilities and for students whose chronological ages are equivalent to those of students in grades K through 6, and not less than

5 1/2 hours of instruction for students whose chronological ages are equivalent to those of students in grades 7 through 12.

(r) *Functional behavioral assessment* means the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment. The *functional behavioral assessment* shall be developed consistent with the requirements in section 200.22(a) of this Part and shall include, but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it.

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

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

(u) *Half-day preschool program* means an approved preschool special education program for preschool students with disabilities that provides instruction for a half-day session as defined in subdivision (v) of this section.

(v) *Half-day session* means a morning or afternoon session with not less than 2 1/2 hours of instruction for students whose chronological ages are equivalent to those of students in grades K through 6, and not less than three hours of instruction for students whose chronological ages are equivalent to those of students in grades 7 through 12, provided that for preschool students with disabilities such term shall mean a morning or afternoon session with not more than 2 1/2 hours of instruction per day.

(w) *Home and hospital instruction* means special education provided on an individual basis for a student with a disability confined to the home, hospital or other institution because of a disability.

(x) *Impartial hearing officer* means an individual assigned by a board of education pursuant to Education Law, section 4404(1), or by the commissioner in accordance with section 200.7(d)(1)(i) of this Part, to conduct a hearing and render a decision. No individual employed by a school district, school or program serving students with disabilities placed there by a school district committee on

special education may serve as an impartial hearing officer and no individual employed by such schools or programs may serve as an impartial hearing officer for two years following the termination of such employment, provided that a person who otherwise qualifies to conduct a hearing under this section shall not be deemed an employee of the school district, school or program serving students with disabilities solely because he or she is paid by such schools or programs to serve as an impartial hearing officer. An impartial hearing officer shall:

(1) be an individual admitted to the practice of law in the State of New York who is currently in good standing and who has a minimum of two years practice and/or experience in the areas of education, special education, disability rights or civil rights; or be an individual certified by the State of New York as an impartial hearing officer on September 1, 2001;

(2) have access to the support and equipment necessary to perform the duties of an impartial hearing officer;

(3) be independent, shall not be an officer, employee or agent of the school district or of the board of cooperative educational services of which such school district is a component, or an employee of the Education Department, shall not have a personal or professional interest which would conflict with his or her objectivity in the hearing, and shall not have participated in any manner in the formulation of the recommendation sought to be reviewed; and

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

(i) successfully complete a training program, conducted by the department, which program provides information regarding State and Federal laws and regulations relating to the education of students with disabilities, the needs of such students, and the procedures involved in conducting a hearing, and in reaching and writing a decision;

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

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

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

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

(vi) be willing and available to accept appointment to conduct impartial hearings. Notwithstanding the provisions of section 200.21 of this Part, unless good cause has been provided to the commissioner including, but not limited to, cause resulting from poor health as certified by a physician, active military services or other similar extenuating circumstances, the certification of an impartial hearing officer shall be rescinded upon a finding that the impartial hearing officer was not willing or available to conduct an impartial hearing within a two-year period of time.

(y) *Individualized education program* means a written statement, developed, reviewed and revised in accordance with section 200.4 of this Part, which includes the components specified in section 200.4(d)(2) of this Part to be provided to meet the unique educational needs of a student with a disability.

(z) *Independent educational evaluation* means an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student. Whenever an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, shall be the same as the criteria which the school district uses when it initiates an evaluation.

(aa) *Individual evaluation* means any procedures, tests or assessments used selectively with an individual student, including a physical examination in accordance with the provisions of sections 903, 904 and 905 of the Education Law, an individual psychological evaluation, except where a school psychologist has determined pursuant to section 200.4(b) of this Part that a psychological evaluation is unnecessary to evaluate a student of school age, a social history and other appropriate assessments or evaluations as may be necessary to determine whether a student has a disability and the extent of his/her special education needs, but does not include basic tests administered to, or procedures used with, all students in a school grade or class.

(bb) *Individual psychological evaluation* means a process by which a New York State-certified school psychologist or licensed psychologist uses, to the extent deemed

necessary for purposes of educational planning, a variety of psychological and educational techniques and examinations in the student's native language, to study and describe a student's developmental, learning, behavioral and other personality characteristics.

(cc) *Least restrictive environment* means that placement of students with disabilities in special classes, separate schools or other removal from the regular educational environment occurs only when the nature or severity of the disability is such that even with the use of supplementary aids and services, education cannot be satisfactorily achieved. The placement of an individual student with a disability in the least restrictive environment shall:

(1) provide the special education needed by the student;

(2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and

(3) be as close as possible to the student's home.

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

(ee) *Medical services* means only evaluative and diagnostic services provided by a licensed physician, or by another appropriately licensed or registered health professional in consultation with, or under the supervision of, a licensed physician, to determine whether a student has a medically related disability which may result in the student's need for special education and related services.

(ff) *Native language* means:

(1) if used with reference to an individual of limited English proficiency, the language normally used by that individual, or, in the case of a student, the language normally used by the parents of the student, except that, in all

direct contact with a student (including evaluation of the student), native language means the language normally used by the student in the home or learning environment; and

(2) for an individual with deafness or blindness, or for an individual with no written language, the mode of communication is that normally used by the individual (such as sign language, Braille, or oral communication).

(gg) *Occupational therapy* means the functional evaluation of the student and the planning and use of a program of purposeful activities to develop or maintain adaptive skills, designed to achieve maximal physical and mental functioning of the student in his or her daily life tasks.

(hh) *Supplementary school personnel* means a teacher aide or a teaching assistant as described in section 80-5.6(a) through (d) of this Title.

(ii) (1) *Parent* means a birth or adoptive parent, a legally appointed guardian generally authorized to act as the child's parent or authorized to make educational decisions for the child; a person in parental relationship to the child as defined in Education Law, section 3212; an individual designated as a person in parental relation pursuant to title 15-A of the General Obligations Law including an individual so designated who is acting in the place of a birth or adoptive parent (including a grandparent, stepparent, or other relative with whom the child resides); or a surrogate parent who has been appointed in accordance with section 200.5(n) of this Part. The term does not include the State if the student is a ward of the State.

(2) A foster parent may act as a parent unless State law, regulations or contractual obligations with a State or local entity prohibit the foster parent from acting as a parent.

(3) Except as provided in paragraph (4) of this subdivision, when one or more than one party is qualified under paragraph (1) of this subdivision to act as a parent, the birth or adoptive parent must be presumed to be the parent unless the birth or adoptive parent does not have legal authority to make educational decisions for the student.

(4) If a judicial decree or order identifies a specific person or persons to act as the parent or make educational decisions on behalf of the student, then such person or persons shall be determined to be the parent for purposes of this Part, except that a public agency that provides education or care for the student, or a private agency that contracts with a public agency for such purposes, shall not act as the parent.

(jj) *Participating agency* means a State or local agency, other than the public agency responsible for a student's education, that is financially and legally responsible for providing transition services to the student.

(kk) *Parent counseling and training* means assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program**.**

(ll) *Physical therapy* means a related service provided in accordance with section 6731(a) of the Education Law.

(mm) *Preschool student with a disability* is a preschool child as defined in section 4410(1)(i) of Education Law who is eligible to receive preschool programs and services, is not entitled to attend the public schools of the school district of residence pursuant to section 3202 of the Education Law and who, because of mental, physical, or emotional reasons, has been identified as having a disability and can receive appropriate educational opportunities from special programs and services approved by the department. Eligibility as a preschool student with a disability shall be based on the results of an individual evaluation which is provided in the student's native language, not dependent on a single procedure, and administered by a multidisciplinary team in accordance with all other requirements as described in section 200.4 (b) (1) through (5) of this Part.

(1) Commencing July 1, 1993, to be identified as having a disability a preschool student shall either:

(i) exhibit a significant delay or disorder in one or more functional areas related to cognitive, language and communicative, adaptive, socio-emotional or motor development which adversely affects the student's ability to learn. Such delay or disorder shall be documented by the results of the individual evaluation which includes but is not limited to information in all functional areas obtained from a structured observation of a student's performance and behavior, a parental interview and other individually administered assessment procedures, and, when reviewed in combination and compared to accepted milestones for child development, indicate:

(a) a 12-month delay in one or more functional area(s); or

(b) a 33 percent delay in one functional area, or a 25 percent delay in each of two functional areas; or

(c) if appropriate standardized instruments are individually administered in the evaluation process, a score of 2.0 standard

deviations below the mean in one functional area, or a score of 1.5 standard deviations below the mean in each of two functional areas; or

(ii) meet the criteria set forth in paragraphs (1), (2), (3), (5), (9), (10), (12) or (13) of subdivision (zz) of this section.

(2) Commencing July 1, 1991, in the calendar year in which such preschool student becomes three years of age, a student shall be first eligible for preschool programs and services on January 2nd of such calendar year, if the student's birthday falls before July 1st, otherwise a student shall be first eligible on July 1st of the calendar year; except that a student who, as of his or her third birthday, is already receiving services pursuant to section 236 of the Family Court Act or its successor, or section 4204-a of the Education Law, may, if the parent so 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. A student shall be deemed to be a preschool student with a disability through the month of August of the school year in which the student first becomes eligible to attend school pursuant to section 3202 of the Education Law.

(nn) *Preschool program* means a special education program approved pursuant to section 4410 of the Education Law to provide special education programs and services, from the continuum of services set forth in section 200.16(i) of this Part, and to conduct evaluations of preschool students with disabilities if such program has a multidisciplinary evaluation component.

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

(pp) *Regular education teacher* means:

(1) for a school-age student, a teacher qualified to serve nondisabled students who is providing regular education instruction to the student. If the student is not receiving instruction from one or more regular education teachers, a teacher qualified to provide regular education in the type of program in which the student may be placed may serve as the student’s regular education teacher;

(2) for a preschool child, a regular education teacher qualified to provide regular education services to nondisabled preschool or elementary-level students who is providing regular education instruction to the student. If the

student is not receiving instruction from one or more regular education teachers, a teacher qualified to provide regular education in the type of program in which the student may be placed may serve as the preschool student's regular education teacher.

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

(1) Services that apply to children with surgically implanted devices, including cochlear implants. Related services do not include a medical device that is surgically implanted, the optimization of that device's functioning (such as mapping), maintenance of that device, or the replacement of that device, provided that nothing in this paragraph:

(i) limits the right of a student with a surgically implanted device to receive related services that are determined by the CSE or CPSE to be necessary for the student to receive a free appropriate public education; or

(ii) limits the responsibility of a school district to appropriately monitor and maintain medical devices that are needed to maintain the health and safety of the student, including breathing, nutrition, or operation of other bodily functions, while the student is transported to and from school or is at school; or

(iii) prevents the routine checking of an external component of a surgically implanted device to make sure it is functioning properly.

(rr) *Resource room program* means a special education program for a student with a disability registered in either a special class or regular class who is in need of specialized supplementary instruction in an individual or small group setting for a portion of the school day.

(ss) *School health services and school nurse services.*

(1) *School health services* means health services provided by either a qualified school nurse or other qualified person that are designed to enable a student

with a disability to receive a free appropriate public education as described in the individualized education program of the student.

(2) *School nurse services* means services provided by a qualified school nurse pursuant to section 902(2)(b) of the Education Law that are designed to enable a student with a disability to receive a free appropriate public education as described in the individualized education program of the student.

(tt) *Social history* means a report of information gathered and prepared by qualified school district personnel pertaining to the interpersonal, familial and environmental variables which influence a student's general adaptation to school, including but not limited to data on family composition, family history, developmental history of the student, health of the student, family interaction and school adjustment of the student.

(uu) *Special class* means a class consisting of students with disabilities who have been grouped together because of similar individual needs for the purpose of being provided specially designed instruction as defined in subdivision (vv) of this section.

(vv) *Specially-designed instruction* means adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students.

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

(1) Such instruction includes but is not limited to that conducted in classrooms, homes, hospitals, institutions and in other settings.

(2) Such instruction includes specially designed instruction in physical education, including adapted physical education.

(3) For the purposes of this definition:

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

programs and services and development of an individualized education program for the student. The areas to be considered shall include:

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

(b) *social development* which shall mean the degree and quality of the student's relationships with peers and adults, feelings about self, and social adjustment to school and community environments;

(c) *physical development* which shall mean the degree or quality of the student's motor and sensory development, health, vitality, and physical skills or limitations which pertain to the learning process; and

(d) *management needs* which shall mean the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction. Management needs shall be determined in accordance with the factors identified in each of the three areas described in clauses (a)-(c) of this subparagraph.

(ii) *Group instruction* means instruction of students grouped together according to similarity of individual needs for the purpose of special education. The curriculum and instruction provided to such groups shall be consistent with the individual needs of each student in the group, and the instruction required to meet the individual needs of any one student in the group shall not consistently detract from the instruction provided other students in the group.

(xx) *Special education provider* means an individual qualified pursuant to section 200.6(b)(3) of this Part who is providing related services, as defined in paragraph (qq) of this section, to the student. If the student is not receiving related services, an individual qualified to provide related services needed by the student may serve as the related service provider of the student.

(yy) *Special education teacher* means a person, including an itinerant teacher, certified or licensed to teach students with disabilities pursuant to Part 80 of this Title who is providing special education to the student. For a student who is being considered for initial placement in special education, a teacher qualified to

provide special education in the type of program in which the student may be placed may serve as the student's special education teacher.

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

(1) *Autism* means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects a student's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. The term does not apply if a student's educational performance is adversely affected primarily because the student has an emotional disturbance as defined in paragraph (4) of this subdivision. A student who manifests the characteristics of autism after age 3 could be diagnosed as having autism if the criteria in this paragraph are otherwise satisfied.

(2) *Deafness* means a hearing impairment that is so severe that the student is impaired in processing linguistic information through hearing, with or without amplification, that adversely affects a student's educational performance.

(3) *Deaf-blindness* means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational needs that they cannot be accommodated in special education programs solely for students with deafness or students with blindness.

(4) *Emotional disturbance* means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a student's educational performance:

(i) an inability to learn that cannot be explained by intellectual, sensory, or health factors.

(ii) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(iii) inappropriate types of behavior or feelings under normal circumstances;

(iv) a generally pervasive mood of unhappiness or depression; or

(v) a tendency to develop physical symptoms or fears associated with personal or school problems.

The term includes schizophrenia. The term does not apply to students who are socially maladjusted**,** unless it is determined that they have an emotional disturbance.

(5) *Hearing impairment* means an impairment in hearing, whether permanent or fluctuating, that adversely affects the child's educational performance but that is not included under the definition of *deafness* in this section.

(6) *Learning disability* means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which manifests itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, as determined in accordance with section 200.4(j) of this Part. The term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia. The term does not include learning problems that are primarily the result of visual, hearing or motor disabilities, of an intellectual disability, of emotional disturbance, or of environmental, cultural or economic disadvantage.

(7) *Intellectual disability* means significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a student’s educational performance**.**

(8) *Multiple disabilities* means concomitant impairments (such as intellectual disability-blindness, intellectual disability-orthopedic impairment, etc.), the combination of which cause such severe educational needs that they cannot be accommodated in a special education program solely for one of the impairments. The term does not include deaf-blindness.

(9) *Orthopedic impairment* means a severe orthopedic impairment that adversely affects a student's educational performance. The term includes impairments caused by congenital anomaly (*e.g.*, clubfoot, absence of some member, etc.), impairments caused by disease (*e.g.*, poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (*e.g.*, cerebral palsy, amputation, and fractures or burns which cause contractures).

(10) *Other health-impairment* means having limited strength, vitality or alertness**,** including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems, including but not limited to a heart

condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, diabetes, attention deficit disorder or attention deficit hyperactivity disorder or tourette syndrome, which adversely affects a student's educational performance.

(11) *Speech or language impairment* means a communication disorder, such as stuttering, impaired articulation, a language impairment or a voice impairment, that adversely affects a student's educational performance.

(12) *Traumatic brain injury* means an acquired injury to the brain caused by an external physical force or by certain medical conditions such as stroke, encephalitis, aneurysm, anoxia or brain tumors with resulting impairments that adversely affect educational performance. The term includes open or closed head injuries or brain injuries from certain medical conditions resulting in mild, moderate or severe impairments in one or more areas, including cognition, language, memory, attention, reasoning, abstract thinking, judgement, problem solving, sensory, perceptual and motor abilities, psychosocial behavior, physical functions, information processing, and speech. The term does not include injuries that are congenital or caused by birth trauma.

(13) *Visual impairment including blindness* means an impairment in vision that, even with correction, adversely affects a student's educational performance. The term includes both partial sight and blindness.

(aaa) *Substantial regression* means a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year.

(bbb) *Supplementary aids and services* means aids, services, and other supports that are provided in regular education classes, other education-related settings and in extracurricular and nonacademic settings to enable students with disabilities to be educated with nondisabled students to the maximum extent appropriate in accordance with the least restrictive environment.

(ccc) *Surrogate parent* means a person appointed to act in place of parents or guardians when a student's parents or guardians are not known, or when after reasonable efforts, the board of education cannot discover the whereabouts of a parent, the student is an unaccompanied homeless youth or the student is a ward of the State and does not have a parent who meets the definition in subdivision (ii) of this section, or the rights of the parent to make educational decisions have been subrogated by a judge in accordance with State law.

(ddd) *Transitional support services* means those temporary services, specified in a student's individualized education program, provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment.

(eee) *Twelve-month special service and/or program* means a special education service and/or program provided on a year-round basis, for students determined to be eligible in accordance with sections 200.6(k)(1) and 200.16(i)(3)(v) of this Part whose disabilities require a structured learning environment of up to 12 months duration to prevent substantial regression. A special service and/or program shall operate for at least 30 school days during the months of July and August, inclusive of legal holidays, except that a program consisting solely of related service(s) shall be provided with the frequency and duration specified in the student's individualized education program.

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

(1) instruction;

(2) related services;

(3) community experiences;

(4) the development of employment and other post-school adult living objectives; and

(5) when appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.

(ggg) *Travel training* is a special education service that means providing instruction, as appropriate, to students with significant cognitive disabilities, and any other students with disabilities who require this instruction, to enable them to develop an awareness of the environment in which they live; and learn the skills to move effectively and safely from place to place within that environment (e.g., in school, in the home, at work, and in the community).

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

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

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

(kkk) *Ward of the State* means a child or youth under the age of 21:

(1) who has been placed or remanded pursuant to section 358-a, 384 or 384-a of the Social Services Law, or article 3, 7, or 10 of the Family Court Act, or freed for adoption pursuant to section 383-c, 384 or 384-b of the Social Services Law; or

(2) who is in the custody of the Commissioner of Social Services or the Office of Children and Family Services; or

(3) who is a destitute child under section 398(1) of the Social Services Law.

(lll) *Aversive intervention* means the same as such term is defined in section 19.5(b)(2) of this Title.

(mmm) *Behavioral intervention plan* means a plan that is based on the results of a 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.

(nnn) Interpreting services means oral transliteration services, cued language transliteration services, sign language transliteration and interpreting services and transcription services, such as communication access real-time translation (CART), C-Print and TypeWell for students who are deaf or hard of hearing; and special interpreting services for students who are deaf-blind.

(ooo) Declassification support services means those services provided by persons appropriately certified or licensed pursuant to Part 80 of this Title in the appropriate area of service, to a student or such student's teacher(s) to aid in such student's transition from special education to full-time regular education, including:

(1) for the student, psychological services, social work services, speech and language services, counseling (other than career counseling), and other appropriate support services; and

(2) for the student's teacher(s), the assistance of supplementary school personnel, and consultation with appropriate personnel.

200.2 Board of education responsibilities.

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

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

(a) student's name, address and birthdate;

(b) student's parents' names, address(es), and the native language of the student's home;

(c) student's suspected disability;

(d) dates of referral, evaluations, recommendations of the committee on special education, or committee on preschool special education, actual placement, and annual program reviews;

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

(f) other student information as required by the Individuals with Disabilities Education Act (20 U.S.C. 1400 *et seq.*) and Federal regulations, including but not limited to the student's race,

ethnicity, limited English proficiency status, gender and disability category; and

(g) if the student is not receiving an appropriate public education, the reason shall be described.

(ii) The data shall be organized so that it can readily be determined whether each student is receiving an appropriate public education, a partial education or no education at all.

(3) Data collection. All persons involved in the collection of data shall have received prior training and written information regarding the procedures to be followed in collecting the data.

(4) Data reporting. The reporting of data shall be conducted in accordance with the following policies and procedures:

(i) School districts shall prepare, and keep on file, summary reports of student data, including numbers of students who are:

(a) unserved and the reasons they are unserved; and

(b) served.

(ii) A summary report of the students served shall be submitted by local school districts to the State Education Department in a manner prescribed by the commissioner.

(5) The board of education or trustees of each school district shall keep on file the register and related summary reports which shall be available to the district superintendent of the supervisory district in which the district is located or other representatives of the State Education Department.

(6) Paragraphs (1)-(5) of this subdivision shall not apply to schools and students subject to the provisions of articles 81, 85, 87 and 88 of the Education Law and chapter 1060 of the Laws of 1974. Schools subject to the provisions of such articles and chapter shall keep their own census of students, and shall submit such census directly to the commissioner on forms prescribed by the commissioner.

(7) Procedures to locate, identify, and evaluate all nonpublic private elementary and secondary school students with disabilities, including religious-school children as required by the Education Law must be established to ensure the equitable participation of parentally placed private school students with disabilities and an accurate count of such students. The child find activities must be similar to activities undertaken for students with disabilities in

public schools and must be completed in a time period comparable to that for other students attending public schools in the school district. The school district shall consult with representatives of private schools and representatives of parents of parentally placed private school students with disabilities on the child find process.

(i) If a student is parentally-placed, or is going to be parentally-placed in a private elementary or secondary school that is not located in the student's school district of residence, parental consent, or consent of a student 18 years of age or older, must be obtained before any personally identifiable information about the student is released between officials in the district where the private school is located and officials in the parent's district of residence.

(ii) The school district shall maintain in its records and report to the commissioner, in a manner prescribed by the commissioner, on the number of students enrolled in such private schools by their parents who are evaluated to determine if they are students with disabilities, the number of such students who are determined to have a disability and the number of such students who received special education services under this Part.

(b) *Written policy.* Each board of education or board of trustees shall adopt written policy that establishes administrative practices and procedures:

(1) to ensure that students with disabilities residing in the district have the opportunity to participate in school district programs, to the maximum extent appropriate to the needs of the student including nonacademic and extracurricular programs and activities, which are available to all other students enrolled in the public schools of the district, which may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the school district, referrals to agencies that provide assistance to individuals with disabilities and employment of students, including both employment by the school district and assistance in making outside employment available;

(2) to ensure that each preschool student with a disability residing in the district has the opportunity to participate in preschool programs, including timely evaluation and placement;

(3) for appointing and training appropriately qualified personnel, including the members and chairpersons of the committee on special education and the committee on preschool special education, to carry out the functions identified in this Part;

(4) to implement the provisions of section 200.6(a) of this Part and to provide special services or programs, to the extent appropriate to the needs of the student, to enable the student to be involved in and progress in the general education curriculum;

(5) for the purpose of ensuring that parents have received and understand the request for consent for evaluation of a preschool student;

(6) for the purpose of ensuring the confidentiality of personally identifiable data, information or records pertaining to a student with a disability. Such personally identifiable information shall not be disclosed by any officer or employee of the State Education Department or any school district, or member of a committee on special education or committee on preschool special education to any person other than the parent of such student, except in accordance with sections 300.500 through 300.536 and sections 300.610 through 300.625 and Part 99 of title 34 of the Code of Federal Regulations (Code of Federal Regulations, 2009 edition, title 34, sections 300.500 - 300.536, sections 300.610 through 300.625, and Part 99, Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402-0001; 2009 - available at the Office of Counsel, New York State Education Department, State Education Building Room 148, 89 Washington Avenue, Albany, NY 12234);

(7) for implementing school-wide approaches, which may include a response to intervention process pursuant to section 100.2(ii) of this Title, and pre-referral interventions in order to remediate a student's performance prior to referral for special education;

(8) for the appropriate declassification of students with disabilities which must include:

(i) the regular consideration for declassifying students when appropriate;

(ii) a reevaluation of the student prior to declassification; and

(iii) the provision of educational and support services to the student upon declassification;

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

(10) and establishes a plan, pursuant to sections 1604(29-a), 1709(4-a), 2503(7-a) and 2554(7-a) of the Education Law, to ensure that all instructional materials to be used in the schools of the district are available in a usable alternative format, which shall meet the National Instructional Materials

Accessibility Standard; in accordance with appendix C to part 300 of title 34 of the Code of Federal Regulations (Code of Federal Regulations, 2009 edition, title 34, part 300, appendix C, Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402-0001; 2009 - available at the Office of Counsel, New York State Education Department, State Education Building Room 148, 89 Washington Avenue, Albany, NY 12234), for each student with a disability in accordance with the student's educational needs and course selections at the same time that such materials are available to nondisabled students. For purposes of this paragraph, alternative format is defined as any medium or format for the presentation of instructional materials, other than a traditional print textbook, that is needed as an accommodation for a student with a disability enrolled in the school district, including but not limited to Braille, large print, open and closed captioned, audio, or an electronic file. An electronic file must be compatible with at least one alternative format conversion software program that is appropriate to meet the needs of the individual student. The plan shall:

(i) ensure that the district gives a preference in the purchase of the instructional materials it has selected for its students to those vendors who agree to provide such instructional materials in alternative formats;

(ii) specify, when an electronic file is provided, how the format will be accessed by students and/or how the district will convert to an accessible format;

(iii) specify the process to be used when ordering materials to identify the needs of students with disabilities residing in the district for alternative format materials;

(iv) specify ordering timelines to ensure that alternative format materials are available at the same time as regular format materials are available; and

(v) include procedures so that when students with disabilities move into the school district during the school year, the process to obtain needed materials in alternative formats for such students is initiated without delay;

(11) to ensure that:

(i) each regular education teacher, special education teacher, related service provider and/or other service provider, as defined in clause (a) of this subparagraph, who is responsible for the implementation of a student’s individualized education program (IEP) is provided a paper

or electronic copy of such student's IEP, including amendments to the IEP, made pursuant to section 200.4(g) of this Part, prior to the implementation of such program or shall be able to access such student's IEP electronically. If the policy provides that students' IEPs are to be accessed electronically, then such policy shall also ensure that the individuals responsible for the implementation of a student's IEP shall be notified and trained on how to access such IEPs electronically:

(a) for purposes of this paragraph, *other service provider* means a representative of another public school district, charter school, Board of Cooperative Educational Services (BOCES), or school enumerated in article 81, 85 or 89 of the Education Law where the student receives or will receive IEP services;

(ii) any copy of a student's IEP provided pursuant to this paragraph shall remain confidential and shall not be disclosed to any other person, in accordance with paragraph (6) of this subdivision; an

(iii) the chairperson of the committee on special education designates for each student one, or as appropriate, more than one professional employee of the school district with knowledge of the student's disability and education program to, prior to the implementation of the IEP, inform each regular education teacher, special education teacher, related service provider, other service provider, supplementary school personnel, as defined in section 200.1(hh) of this Part, and other provider and support staff person of his or her responsibility to implement the recommendations on a student's IEP, including the responsibility to provide specific accommodations, program modifications, supports and/or services for the student in accordance with the IEP;

(12) that identify the measurable steps it shall take to recruit, hire, train and retain highly qualified personnel, as defined in section 120.6 of this Title and 34 CFR 300.18 (Code of Federal Regulations, 2009 edition, title 34, section 300.18, Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402-0001; 2009 - available at the Office of Counsel, New York State Education Department, Room 148, State Education Building 89 Washington Avenue, Albany, NY 12234), to provide special education programs and services;

(13) that describe the guidelines for the provision of appropriate accommodations necessary to measure the academic achievement and functional performance of the student in the administration of district-wide assessments;

(14) that identify how the district, to the extent feasible, will use universal design principles in developing and administering any district-wide assessment programs; and

(15) to ensure that the school district publicly reports on revisions to its policies, procedures and/or practices upon a finding by the Department that the district has inappropriate policies, procedures or practices resulting in a significant disproportionality by race/ethnicity in the suspension, identification, classification and/or placement of students with disabilities.

(c) *District plans.* (1) Each board of education which receives an apportionment for eligible students with disabilities, pursuant to section 3602 of the Education Law, or preschool students with disabilities pursuant to section 4410 of the Education Law shall use such apportionments for special education programs and services which are in accordance with the provisions of this Part. Each board of education which receives such apportionment shall keep on file and make available for public inspection and review by the commissioner an acceptable plan as required by subdivision 8(b) of section 3602 of the Education Law.

(2) Each such plan shall include, but need not be limited to, the following:

(i) a description of the nature and scope of special education programs and services currently available to students and preschool students residing in the district, including but not limited to descriptions of the district's resource room programs and each special class program provided by the district in terms of group size and composition;

(ii) identification of the number and age span of students and preschool students to be served by type of disability, and recommended setting;

(iii) the method to be used to evaluate the extent to which the objectives of the program have been achieved;

(iv) a description of the policies and practices of the board of education to ensure the continual allocation of appropriate space within the district for special education programs that meet the needs of students and preschool students with disabilities;

(v) a description of the policies and practices of the board of education to ensure that appropriate space will be continually available to meet the needs of resident students and preschool students with disabilities who attend special education programs provided by boards of cooperative educational services;

(vi) a description of how the district intends to ensure that all instructional materials to be used in the schools of the district will be made

available in a usable alternative format, as such term is defined in paragraph (b)(10) of this section, for each student with a disability at the same time as such instructional materials are available to nondisabled students. To meet this requirement, the district plan may incorporate by reference the plan established by the board of education pursuant to paragraph (b)(10) of this section;

(vii) the estimated budget to support such plan;

(viii) the date on which such plan was adopted by the board of education.

(3) Any change to the allocation of space for special education programs shall be made in consideration of the needs of participating students with disabilities for placement in the least restrictive environment and for the stability and continuity of their program placements.

(4) The district plan, with personally identifiable student information deleted, shall be filed and available for public inspection and review by the commissioner.

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

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

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

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

(i) certified by the Commissioner of Education pursuant to section 200.1(x)(4) of this Part and;

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

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

(3) preschool programs within the county in which the district is located and preschool programs in adjoining counties, or, in the case of districts located in the City of New York, preschool programs within the City of New York and preschool programs within counties adjoining the City of New York. The list of preschool programs shall be available for dissemination at appropriate sites including, but not limited to, pre-kindergarten, day care and head start programs within the district, and Early Childhood Direction Centers.

(f) *Responsibilities of boards of education which provide education pursuant to part II of article 41 of the Education Law (sections 2040-2045)*. Where a board of education provides for the education of all of its students, or of all of its students of any particular grade, by contracting with another board of education pursuant to section 2040 or 2045 of the Education Law, the committee on special

education of the receiving school district shall serve as the committee on special education for all students so placed in such receiving school district.

(g) Facilities for special education programs. The district superintendent of schools shall determine the adequacy and appropriateness of the facilities space available to house special education programs in the geographic area served by the board of cooperative educational services, consistent with the least restrictive environment requirement and to ensure the stability and continuity of program placements for students with disabilities, including procedures that ensure that special education programs and services located in appropriate facilities will not be relocated without adequate consideration of the needs of participating students with disabilities.

(h) The board of education or trustees of each school district and each board of cooperative educational services shall develop and implement a plan as part of the professional development plan pursuant to section 100.2(dd) of this Title that shall include, but is not limited to, a description of the professional development activities provided to all professional staff and supplementary school personnel staff who work with students with disabilities to assure that they have the skills and knowledge necessary to meet the needs of students with disabilities.

(i) *Responsibility of boards of cooperative educational services (BOCES)*. (1) Responsibility for ensuring the availability of instructional materials in alternative formats for students with disabilities. By July 1, 2002, each BOCES shall establish a plan to ensure that all instructional materials to be used in the programs of the BOCES are available in a usable alternative format, which shall meet National Instructional Materials Accessibility Standard in accordance with appendix C to part 300 of title 34 of the Code of Federal Regulations (Code of Federal Regulations, 2009 edition, title 34, part 300, appendix C, Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402-0001; 2009 - available at the Office of Counsel, New York State Education Department, State Education Building Room 148, 89 Washington Avenue, Albany, New York 12234), for each student with a disability in accordance with the student's educational needs and course selections at the same time that such materials are available to nondisabled students. For purposes of this subdivision, alternative format is defined as any medium or format for the presentation of instructional materials, other than a traditional print textbook, that is needed as an accommodation for a student with a disability enrolled in a program of the BOCES, including but not limited to Braille, large print, open and closed captioned, audio, or an electronic file. An electronic file must be compatible with at least one alternative format conversion software program that is appropriate to meet the needs of the individual student. The plan shall:

(i) ensure that the BOCES gives a preference in the purchase of the instructional materials it has selected for its students to those vendors

who agree to provide such instructional materials in alternative formats;

(ii) specify, when an electronic file is provided, how the format will be accessed by students and/or how the BOCES will convert to an accessible format;

(iii) specify the process to be used when ordering materials to identify the needs of students enrolled in the programs of the BOCES for alternative format materials;

(iv) specify ordering timelines to ensure that alternative format materials are available at the same time as regular format materials are available; and

(v) include procedures so that when students with disabilities enroll in a program of the BOCES during the school year, the process to obtain needed materials in alternative format is initiated without delay.

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

200.3 Committee on special education and committee on preschool special education.

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

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

(i) the parents or persons in parental relationship to the student;

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

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

(iv) a school psychologist;

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

(vi) an individual who can interpret the instructional implications of evaluation results. Such individual may also be the individual appointed as the regular education teacher, the special education teacher or special education provider, the school psychologist, the representative of the school district or a person having knowledge or special expertise regarding the student when such member is determined by the school district to have the knowledge and expertise to fulfill this role on the committee;

(vii) a school physician, if specifically requested in writing by the parent of the student or by a member of the school at least 72 hours prior to the meeting;

(viii) an additional parent member of a student with a disability residing in the school district or a neighboring school district, provided that the additional parent member may be the parent of a student who has been declassified within a period not to exceed five years or the parent of a student who has graduated within a period not to exceed five years, if specifically requested in writing by the parent of the student, the student or by a member of the committee at least 72 hours prior to the meeting;

(ix) other persons having knowledge or special expertise regarding the student, including related services personnel as appropriate, as the school district or the parent(s) shall designate. The determination of knowledge or special expertise of such person shall be made by the party (parents or school district) who invited the individual to be a member of the committee on special education; and

(x) if appropriate, the student.

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

(i) the parents of the preschool child;

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

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

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

(v) an additional parent member of a child with a disability residing in the school district or a neighboring school district and whose child is enrolled in a preschool or elementary level education program, if specifically requested in writing by the parent of the student or by a member of the committee at least 72 hours prior to the meeting;

(vi) an individual who can interpret the instructional implications of evaluation results, provided that such individual may also be the individual appointed as the regular education teacher, the special education teacher or special education provider, the school psychologist, the representative of the school district or a person having knowledge or special expertise regarding the student when such member is determined by the school district to have the knowledge and expertise to fulfill this role on the committee;

(vii) other persons having knowledge or special expertise regarding the child, including related services personnel as appropriate, as the school district or the parents shall designate. The determination of knowledge or special expertise of such person shall be made by the party (parents or school district) who invited the individual to be a member of the committee on special education;

(viii) for a child in transition from early intervention programs and services, at the request of the parent, the appropriate professional designated by the agency that has been charged with the responsibility for the preschool child; and

(ix) a representative of the municipality of the preschool child's residence, provided that the attendance of the appointee of the municipality shall not be required for a quorum.

(b) Each child care institution, as defined in Education Law, section 4001, maintaining a school, shall appoint a committee on special education in accordance with the provisions of Education Law, section 4402.

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

(1) The board of education shall determine the number of subcommittees to be appointed, upon the recommendation of the committee on special education.

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

(i) the parents of the student;

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

(iii) not less than one of the student's special education teachers or, if appropriate, not less than one special education provider of the student;

(iv) a representative of the school district who is qualified to provide, administer or supervise special education and who is knowledgeable about the general education curriculum and who is knowledgeable about the availability of resources of the school district, who may also fulfill the requirement of subparagraph (iii) or (v) of this paragraph. The representative of the school district shall serve as the chairperson of the subcommittee;

(v) a school psychologist, whenever a new psychological evaluation is reviewed or a change to a program option with a more intensive staff/student ratio, as set forth in section 200.6(h)(4) of this Part, is considered;

(vi) an individual who can interpret the instructional implications of evaluation results, who may be a member appointed pursuant to subparagraphs (ii) through (v) or (vii) of this paragraph;

(vii) such other persons having knowledge or special expertise regarding the student, including related services personnel as appropriate, as the committee or the parent shall designate. The determination of knowledge or special expertise of such person shall be made by the party (parents or school district) who invited the individual to be a member of the subcommittee on special education; and

(viii) the student, if appropriate.

(3) Each subcommittee may perform the functions of the committee on special education pursuant to the provisions of Education Law, section 4402, except as specified in paragraphs (4) and (5) of this subdivision.

(4) The subcommittee may perform the functions of the committee on special education pursuant to the provisions of Education Law, section 4402, except when a student is considered for initial placement in:

(i) a special class; or

(ii) a special class outside of the student's school of attendance; or

(iii) a school primarily serving students with disabilities or a school outside of the student's district.

(5) Upon receipt of a written request from the parent or legal guardian of a student, the subcommittee shall immediately refer to the committee for its review any recommendation of the subcommittee concerning the identification, evaluation, educational placement or provision of a free appropriate public education to a student that is not acceptable to the parent or person in parental relationship to such student.

(6) Each subcommittee shall report annually the status of each student with a disability within its jurisdiction to the committee on special education.

(d) The regular education teacher of the student with a disability must, to the extent appropriate, participate in the development, review and revision of a student's IEP, including assisting in the determination of:

(1) appropriate positive behavioral interventions and supports and other strategies for the student; and

(2) supplementary aids and services, program modifications and supports for school personnel that will be provided for the student, consistent with section 200.4(d) of this Part.

(e) Role of the chairperson of the committee. The chairperson of the committee on special education, committee on preschool special education and subcommittee on special education shall preside over a meeting of such committee and carry out the functions of a chairperson identified in this Part and in the Education Law, including but not limited to sections 200.2(b)(11)(iii), 200.4(a), 200.5(b)(1)(i)(c) and, as appropriate, 200.16(b)(1) of this Part, and sections 4401-a, 4402(7)(c) and, as appropriate, 4410(3) of the Education Law.

(f) Member attendance. Except as otherwise provided in this section, all members of a committee on special education, a committee on preschool special education, or a subcommittee on special education shall attend a meeting of such committee, except that the parent and the school district may agree that the attendance of a member is not necessary or that a member of the committee may be excused in accordance with the following procedures pursuant to sections 4308(2)(f) through (h), 4355(2)(f) through (h), 4402(1)(b)(1)(b-1) through (b-3), 4402(1)(b)(1)(d), and 4410(3)(a)(3) through (5) of the Education Law:

(1) A member of such committee or subcommittee is not required to attend a meeting of the committee, in whole or in part, if the parent and the school district agree, in writing, that the attendance of the member is not necessary because the member's area of the curriculum or related services is not being modified or discussed at the meeting.

(2) A member of such committee may be excused from attending a meeting of the committee or subcommittee, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services if the parent to the student and the school district consent, in writing, to the excusal and the excused member submits to the parent and such committee, written input into the development of the IEP, and in particular written input with respect to their area of curriculum or related services prior to the meeting.

(3) Requests for excusal of a member of a committee as provided for in paragraphs (1) and (2) of this subdivision, and the written input as provided for in paragraph (2) of this subdivision, shall be provided not less than five days prior to the meeting date, in order to afford the parent a reasonable time to review and consider the request. Provided however, that a parent shall retain the right to request and/or agree with the school district to excuse a member of the committee or subcommittee at any time including where the member is unable to attend the meeting because of an emergency or unavoidable scheduling conflict and the school district submits the written input for review and consideration by the parent within a reasonable time prior to the meeting and prior to obtaining written consent of the parent to such excusal.

(4) Requests for excusals do not apply to the parents of the student or the appointee of the municipality in the case of a committee on preschool special education.

200.4 Procedures for referral, evaluation, individualized education program (IEP) development, placement and review.

(a) *Referral*. A student suspected of having a disability shall be referred in writing to the chairperson of the district's committee on special education or to the building administrator of the school which the student attends or is eligible to attend for an individual evaluation and determination of eligibility for special education programs and services. The school district must initiate a referral and promptly request parental consent to evaluate the student to determine if the student needs special education services and programs if a student has not made adequate progress after an appropriate period of time when provided instruction as described in section 100.2(ii) of this Title.

(1) Referral for an initial evaluation. A referral may be made by:

(i) a student's parent as defined in section 200.1(ii) of this Part;

(ii) a designee of the school district in which the student resides, or the public school district the student legally attends or is eligible to attend;

(iii) the commissioner or designee of a public agency with responsibility for the education of the student; and/or

(iv) a designee of an education program affiliated with a child care institution with committee on special education responsibility pursuant to section 4002(3) of the Education Law.

(2) Request for referral for an initial evaluation. (i) A written request that the school district or agency refer the student for an initial evaluation pursuant to paragraph (1) of this subdivision may be made by:

(a) a professional staff member of the school district in which the student resides, or the public or private school the student legally attends or is eligible to attend;

(b) a licensed physician;

(c) a judicial officer;

(d) a professional staff member of a public agency with responsibility for welfare, health or education of children; or

(e) a student who is 18 years of age or older, or an emancipated minor, who is eligible to attend the public schools of the district.

(ii) A written request for referral of a student for an initial evaluation made to the school where the student resides or legally attends or is eligible to attend shall, if received by the building administrator or any other employee of the school, be forwarded to the committee chairperson immediately upon its receipt.

(iii) A written request for referral submitted by persons other than the student or a judicial officer shall:

(a) state the reasons for the referral and include any test results, records or reports upon which the referral is based that may be in the possession of the person submitting the referral;

(b) describe in writing, intervention services, programs or instructional methodologies used to remediate the student's performance prior to referral, including any supplementary aids or support services provided for this purpose, or state the reasons why no such attempts were made; and

(c) describe the extent of parental contact or involvement prior to the referral.

(iv) Upon receipt of a request for a referral that meets the requirements of subparagraph (iii) of this paragraph, the school district shall, within 10 school days, either:

(a) request parent consent to initiate the evaluation; or

(b) provide the parent with a copy of such request for referral; and

(1) inform the parent of his or her right to refer the student for an initial evaluation for special education programs and/or services; and

(2) offer the parent the opportunity to meet to discuss the request for referral and, as appropriate, the availability of appropriate general education support services for the student, with the building administrator or other designee of the school district authorized to make a referral pursuant to paragraph (1) of this subdivision, and the party making the request for referral if a professional staff member of the school district. Upon request of the parent or school

district, any other person making a request for referral shall have the opportunity to attend such meeting.

(3) The *date of receipt of a referral* means the date on which either the committee chairperson or the building administrator receives the referral, whichever is earlier.

(4) If a referral is received by the building administrator, it shall be forwarded to the committee chairperson immediately upon its receipt by the administrator.

(5) If a referral is received by the committee chairperson, a copy shall be forwarded to the building administrator within five school days of its receipt by the committee chairperson.

(6) A committee chairperson who receives a referral shall immediately notify the parent pursuant to section 200.5(a) of this Part.

(7) In the event that the parent and the person submitting the referral pursuant to subparagraphs (ii), (iii) and/or (iv) of paragraph (1) of this subdivision agree in writing pursuant to section 200.5(b)(1)(i)(c) of this Part that the referral shall be withdrawn, the chairperson of the committee on special education shall provide the parent and the referring person a copy of the agreement. Each such agreement shall specify any alternative methods suggested to resolve the identified learning difficulty of the student and shall provide the opportunity for a follow-up conference within an agreed period of time to review the student's progress. A copy of the agreement shall also be placed in the student's cumulative educational record file.

(8) Except as otherwise provided in section 200.5(b)(6) of this Part, in the absence of a written agreement to withdraw a referral, as described in paragraph (7) of this subdivision, and in the event that parental consent to an initial evaluation is not obtained within 30 days of the date of receipt of referral, the chairperson shall document attempts, including, but not limited to, telephone calls made or attempted and the results of those calls and correspondence sent to the parents and any responses received, made by the chairperson or other representatives of the committee to obtain parental consent, and shall notify the board of education that they may utilize the due process procedures described in section 200.5 of this Part to permit the district to conduct an evaluation of the student without the consent of the parent.

(9) The building administrator, upon receipt of a referral or copy of a referral, may request a meeting with the parent and the student, if appropriate, to determine whether the student would benefit from additional general education support services as an alternative to special education, including

the provision of support services, speech and language services, academic intervention services, and any other services designed to address the learning needs of the student and maintain a student's placement in general education with the provision of appropriate educational and support services.

(i) If a professional staff member requested the referral that person shall attend such meeting. The building administrator shall ensure that the parent understands the proceedings of the meeting and shall arrange for the presence of an interpreter, if necessary. If at such meeting the parent and the building administrator agree in writing that, with the provision of additional general education support services, the referral is unwarranted, the referral shall be deemed withdrawn, and the building administrator shall provide the chairperson of the committee on special education, the person who made the request for referral if a professional staff member of the school district, the parent, and the student, if appropriate, with copies of the agreement.

(ii) The copy of the agreement provided to the parent shall be in the native language of such person. Such agreement shall contain a description of the additional general education support services to be provided, instructional strategies to be used and student centered data to be collected and the proposed duration of such program. A copy of the agreement shall also be placed in the student's cumulative education record file.

(iii) The meeting:

(a) shall be conducted within 10 school days of the building administrator's receipt of the referral; and

(b) shall not impede a committee on special education from continuing its duties and functions under this Part.

(b) *Individual evaluation and reevaluation.* (1) Unless a referral for an evaluation submitted by a parent or a school district is withdrawn pursuant to paragraph (a)(7) or (9) of this section, after parental consent has been obtained or a parental refusal to consent is overridden, an individual evaluation of the referred student shall be initiated by a committee on special education. The initial individual evaluation shall be completed within 60 days of receipt of consent unless extended by mutual agreement of the student’s parents and the CSE pursuant to subparagraph (7)(i) and paragraph (j)(1) of this subdivision. The individual evaluation shall include a variety of assessment tools and strategies, including information provided by the parent, to gather relevant functional, developmental and academic information about the student that may assist in determining whether the student is a student with a disability and the content of

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

(i) a physical examination in accordance with the provisions of sections 903, 904 and 905 of the Education Law;

(ii) an individual psychological evaluation, except when a school psychologist determines after an assessment of a school-age student, pursuant to paragraph (2) of this subdivision, that further evaluation is unnecessary;

(iii) a social history;

(iv) an observation of the student in the student's learning environment (including the regular classroom setting) or, in the case of a student of less than school-age or out of school, an environment appropriate for a student of that age, to document the student's academic performance and behavior in the areas of difficulty; and

(v) other appropriate assessments or evaluations, including a functional behavioral assessment for a student whose behavior impedes his or her learning or that of others, as necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities.

(2) A determination by a school psychologist of the need to administer an individual psychological evaluation to a student of school age pursuant to Education Law, section 4402(1)(b)(3)(a) and section 200.1(aa) and (bb) of this Part, shall be based upon an assessment conducted by the school psychologist to substantiate his or her determination. Whenever a school psychologist determines that a psychological evaluation is unnecessary as a component of the initial evaluation, the psychologist shall prepare a written report of such assessment, including a statement of the reasons such evaluation is unnecessary, which shall be reviewed by the committee.

(3) Notwithstanding any provisions of this subdivision or section 200.1(aa) of this Part to the contrary, the committee on special education may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities.

(4) A committee on special education shall arrange for an appropriate reevaluation of each student with a disability if the school district determines

that the educational or related services needs, including improved academic achievement and functional performance of the student, warrant a reevaluation or if the student's parent or teacher requests a reevaluation, but not more frequently than once a year unless the parent and representatives of the school district appointed to the committee on special education agree otherwise; and at least once every three years, except where the school district and the parent agree in writing that such reevaluation is unnecessary. The reevaluation shall be conducted by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of the student's disability. In accordance with paragraph (5) of this subdivision, the reevaluation shall be sufficient to determine the student's individual needs, educational progress and achievement, the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education. The results of any reevaluations must be addressed by the committee on special education in a meeting to review and, as appropriate, revise the student's IEP. To the extent possible, the school district shall encourage the consolidation of reevaluation meetings for the student and other committee on special education meetings for the student.

(5) Determination of needed evaluation data.

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

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

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

(b) the present levels of academic achievement and related developmental needs of the student; including the four areas listed in section 200.1(ww)(3)(i) of this Part;

(c) whether the student needs special education, or, in the case of a reevaluation of a student, whether the student continues to need special education; and

(d) whether any additions or modifications to the special education services are needed to enable the student to meet the measurable annual goals set out in the IEP of the student and to participate, as appropriate, in the general curriculum.

(iii) The school district shall administer tests and other evaluation materials as may be needed to produce the data identified under subparagraph (ii) of the section.

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

(6) School districts shall ensure that:

(i) assessments and other evaluation materials used to assess a student under this section:

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

(b) are used for purposes for which the assessments or measures are valid and reliable;

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

(d) are selected and administered so as not to be discriminatory on a racial or cultural basis.

(ii) if an assessment is not conducted under standard conditions, a description of the extent to which it varied from standard conditions (e.g., the qualifications of the person administering the test, or the

method of test administration) must be included in the evaluation report;

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

(iv) assessments are selected and administered to ensure that, when an assessment is administered to a student with impaired sensory, manual or speaking skills, the assessment results accurately reflect the student's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the student's impaired sensory, manual or speaking skills, except where those skills are factors which the test purports to measure;

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

(vi) the evaluation is made by a multidisciplinary team or group of persons, including at least one teacher or other specialist with certification or knowledge in the area of the suspected disability;

(vii) the student is assessed in all areas related to the suspected disability, including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, vocational skills, communicative status and motor abilities;

(viii) students age 12 and those referred to special education for the first time who are age 12 and over, shall receive an assessment that includes a review of school records and teacher assessments, and parent and student interviews to determine vocational skills, aptitudes and interests;

(ix) the evaluation is sufficiently comprehensive to identify all of the student's special education needs, whether or not commonly linked to the disability category in which the student has been identified;

(x) technically sound instruments are used that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors;

(xi) assessment tools and strategies are used that provide relevant information that directly assists persons in determining the educational needs of the student;

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

(xiii) for purposes of eligibility and continuing eligibility determinations, a copy of the evaluation report and the documentation of determination of eligibility are provided at no cost to the parent;

(xiv) the procedures for evaluating students suspected of having a learning disability are in accordance with subdivision (j) of this section;

(xv) the procedures for conducting expedited evaluations are conducted pursuant to section 201.6 of this Title;

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

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

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

(i) a student enrolls in a school served by the school district after the relevant timeframe in this paragraph has begun and prior to a determination by the student's previous school district as to whether the student is a student with a disability, but only if the subsequent school district is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and subsequent school district agree in writing to a specific time when the evaluation will be completed; or

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

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

(9) No student shall be required to obtain a prescription for a drug or other substance identified under schedule I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812) as a condition of receiving an evaluation under this Part (United States Code, 2006 edition, volume 13; Superintendent of Documents, U.S. Government Printing Office, Stop SSOP, Washington, DC 20402-0001; 2008 - available at the Office of Counsel, New York State Education Department, State Education Building Room 148, 89 Washington Avenue, Albany, NY 12234).

(c) *Eligibility Determinations.* (1) In interpreting evaluation data for the purpose of determining if a student is a student with a disability, as defined in sections 200.1(mm) or (zz) of this Part, and determining the educational needs of the student, the committee on special education and other qualified individuals must draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the student's physical condition, social or cultural background, and adaptive behavior; and ensure that information obtained from all these sources is documented and carefully considered. The school district must provide a copy of the evaluation report and the documentation of eligibility to the student's parent.

(2) A student shall not be determined eligible for special education if the determinant factor is:

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

(ii) lack of appropriate instruction in math; or

(iii) limited English proficiency.

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

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

(5) A free appropriate public education must be available to any student with a disability who needs special education and related services, even though the student is advancing from grade to grade.

(6) The determination that a student has a learning disability as defined in section 200.1(zz)(6) of this Part shall be made pursuant to subdivision (j) of this section.

(d) *Recommendation.* For a student not previously identified as having a disability, the committee on special education shall provide a recommendation to the board of education which shall arrange for the appropriate special education programs and services to be provided to the student with a disability within 60 school days of the receipt of consent to evaluate. For a student with a disability referred for review pursuant to subdivision (f) of this section, a recommendation shall be provided to the board of education which shall arrange for the appropriate special education programs and services to be provided to the student with a disability within 60 school days of the referral for review of the student with a disability. Prior to the development of a recommendation, the committee shall ensure that the appropriateness of reading and math instruction and other resources of the regular education program, including support services and academic intervention services, has been considered.

(1) If the student has been determined to be ineligible for special education, the recommendation shall indicate the reasons the student was found ineligible.

(i) A copy of the recommendation and appropriate evaluation information shall be provided to the building administrator. The building administrator shall determine which support services, if appropriate, shall be provided to the student.

(ii) A copy of the recommendation shall be provided to the parent pursuant to section 200.5(a) of this Part.

(iii) If the student has been receiving special education services, but it is determined by the committee on special education that the student no longer needs special education services and can be placed in a regular educational program on a full-time basis, the recommendation shall:

(a) identify the declassification support services, as defined in section 200.1(ooo) of this Part, if any, to be provided to the student; and/or the student's teachers; and

(b) indicate the projected date of initiation of such services, the frequency of provision of such services, and the duration of such

services, provided that such services shall not continue for more than one year after the student enters the full-time regular education program.

(2) Individualized education program (IEP). If the student has been determined to be eligible for special education services, the committee shall develop an IEP. IEPs developed for the 2011-12 school year, and thereafter, shall be on a form prescribed by the Commissioner. In developing the recommendations for the IEP, the committee must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the results of the student's performance on any general State or district-wide assessment programs; and any special considerations in paragraph (3) of this subdivision. The IEP recommendation shall include the following:

(i) Present levels of performance. The IEP shall report the present levels of academic achievement and functional performance and indicate the individual needs of the student according to each of the four areas listed in section 200.1(ww)(3)(i) of this Part, including:

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

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

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

(iii) Measurable annual goals. (a) The IEP shall list measurable annual goals, including academic and functional goals, consistent with the student's needs and abilities. The measurable annual goals must relate to:

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

(2) meeting each of the student's other educational needs that result from the student's disability.

(b) Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with

placement and ending with the next scheduled review by the committee.

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

(iv) Short-term instructional objectives and benchmarks. For a student who takes a New York State alternate assessment and for each preschool student with a disability, the IEP shall include a description of the short-term instructional objectives and/or benchmarks that are the measurable intermediate steps between the student's present level of performance and the measurable annual goal.

(v) Special education program and services. (a) The IEP shall indicate the recommended special education program and services as defined in sections 200.1(qq) and (ww) of this Part from the options set forth in section 200.6 of this Part or, for preschool students from those options set forth in section 200.16(i) of this Part, and the supplementary aids and services as defined in section 200.1(bbb) of this Part that will be provided for the student:

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

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

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

(b) The recommended program and services shall, to the extent practicable, be based on peer-reviewed research, and as appropriate indicate:

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

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

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

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

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

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

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

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

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

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

(vii) Participation in State and districtwide assessments. If the student will participate in an alternate assessment on a particular State or districtwide assessment of student achievement, the IEP shall provide a statement of why the student cannot participate in the regular assessment and why the particular alternate assessment selected is appropriate for the student.

(viii) Participation in regular class. The IEP shall provide:

(a) an explanation of the extent, if any, to which the student will not participate with nondisabled students in the regular class and in the activities described in subparagraph (v) of this paragraph; or

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

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

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

(ix) Transition services. (a) For those students beginning not later than the first IEP to be in effect when the student is age 15 (and at a younger age, if determined appropriate), and updated annually, the IEP shall, under the applicable components of the student's IEP, include:

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

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

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

(4) needed activities to facilitate the student's movement from school to post-school activities, including instruction, related services, community experiences, the development of employment and other post-school adult living objectives

and, when appropriate, acquisition of daily living skills and functional vocational evaluation; and

(5) a statement of the responsibilities of the school district and, when applicable, participating agencies for the provision of such services and activities that promote movement from school to post-school opportunities, or both, before the student leaves the school setting.

(b) To ensure appropriate transition planning for the student, the development of transition goals and services pursuant to subclause (a) of this clause, shall include a discussion with the student's parents of:

(1) the graduation requirements that apply to the student depending upon the year in which he or she first enters grade nine;

(2) how the student is progressing toward receipt of a diploma including:

(i) the courses the student has passed and the number of credits the student has earned as required for graduation;

(ii) the assessments required for graduation that the student has taken and passed; and

(3) the appeal, safety net and superintendent determination pathway options that may be available to the student through section 100.5 of this Title to allow the student to meet the graduation assessment requirements.

(c) At the CSE meeting in which transition services will be discussed, the student's parents shall be provided with written information explaining the graduation requirements. Such information must include the eligibility criteria and processes for seeking an appeal to graduate with a lower score on a Regents examination and for requesting that a student be considered for a local diploma through the superintendent determination pathway pursuant to section 100.5 of this Title. Parents shall also be informed that graduation from high school with a local diploma or Regents diploma shall terminate their child's entitlement to a free public education pursuant to Education Law section 3202(1) and their eligibility for special education services pursuant to this Part.

(x) Twelve-month services. For students eligible for 12-month service and/or program, the IEP shall indicate the identity of the provider of services during the months of July and August, and, for preschool students determined by the committee on preschool special education to require a structured learning environment of 12 months duration to prevent substantial regression, a statement of the reasons for such recommendation.

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

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

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

(i) in the case of a student whose behavior impedes his or her learning or that of others, consider strategies, including positive behavioral interventions, and supports and other strategies to address that behavior that are consistent with the requirements in section 200.22 of this Part;

(ii) in the case of a student with limited English proficiency, consider the language needs of the student as such needs relate to the student's IEP;

(iii) in the case of a student who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the CSE determines, after an evaluation of the student's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the student's future needs for instruction in Braille or the use of Braille), that instruction in Braille or use of Braille is not appropriate for the student;

(iv) consider the communication needs of the student, and in the case of a student who is deaf or hard of hearing, consider the student’s language and communication needs, opportunities for direct communications with peers and professional personnel in the student’s language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the student’s language and communication mode;

(v) consider whether the student requires assistive technology devices and services, including whether the use of school-purchased assistive technology devices is required to be used in the student’s home or in other settings in order for the student to receive a free appropriate public education;

(vi) include a statement in the IEP if, in considering the special factors described in this paragraph, the committee has determined a student needs a particular device or service (including an intervention, accommodation, or other program modification) in order for the student to receive a free appropriate public education; and

(vii) prior to the IEP recommendation of assignment of additional supplementary school personnel (or one-to-one aide) to meet the individualized needs of a student with a disability, consider:

(a) the management needs of the student that would require a significant degree of individualized attention and intervention;

(b) the skills and goals the student would need to achieve that will reduce or eliminate the need for the one-to-one aide;

(c) the specific support (e.g., assistance with personal hygiene or behaviors that impede learning) that the one-to-one aide would provide for the student;

(d) other supports, accommodations and/or services that could support the student to meet these needs (e.g., behavioral intervention plan; environmental accommodations or modifications; instructional materials in alternate formats; assistive technology devices; peer-to-peer supports);

(e) the extent (e.g., portions of the school day) or circumstances (e.g., for transitions from class to class) the student would need the assistance of a one-to-one aide;

(f) staff ratios in the setting where the student will attend school;

(g) the extent to which assignment of a one-to-one aide might enable the student to be educated with nondisabled students and, to the maximum extent appropriate, in the least restrictive environment;

(h) any potential harmful effect on the student or on the quality of services that he or she needs that might result from the assignment of a one-to-one aide; and

(i) the training and support that shall be provided to the one-to-one aide to help the one-to-one aide understand the student's disability-related needs, learn effective strategies for addressing the student's needs, and acquire the necessary skills to support

the implementation of the student's individualized education program.

Nothing in this subparagraph shall be construed to prohibit or limit the assignment of shared one-to-one aides at the discretion of the school to meet the individualized needs of students whose IEPs include the recommendation for one-to one aides. The duties of a teacher aide or teaching assistant providing individualized support to a student with a disability shall be consistent with the duties prescribed pursuant to section 80-5.6 of this Title.

(4) Such recommendations shall:

(i) be developed in meetings of the committee on special education.

(a) If the recommended placement is to be in a school operated by an agency or school other than the school district in which the student would normally attend if the student did not have a disability or if the education of a student residing in a facility operated or supervised by a State department or agency is the responsibility of the school district, the school district must ensure that a representative of that agency or school attends. If the private school or facility representative cannot attend, the school district must use other methods to ensure participation by the private school or facility, including individual or conference telephone calls.

(b) where a child is determined to be at risk of a future placement in a residential school, the committee must, with parental consent or consent of a student 18 years of age or older, request in writing that a designee of the appropriate county or State agency participate in any proceeding of the committee to make recommendations concerning the appropriateness of residential placement and other programs and placement alternatives, including but not limited to, community support services that may be available to the family. The committee must notify the local social services district when a student who is in a foster care placement is at risk of a future placement in a residential school. A copy of such request must be forwarded to the Office of Mental Health and the Office for People With Developmental Disabilities. In the event that such persons are unable to attend such meetings, the committee shall attempt alternative means allowing for their participation, such as individual or conference telephone discussions, and such attempts shall be documented;

(c) if the purpose of the meeting is to consider the postsecondary goals for the student and the transition services needed to assist the student in reaching those goals, the school district shall invite the student. If the student does not attend, the district shall take steps to ensure that the student's preferences and interests are considered. To the extent appropriate and with parental consent or consent of a student 18 years of age or older, the school district must invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services. If an agency invited to send a representative to a meeting does not do so, the district should take steps to involve the other agency in the planning of any transition services;

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

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

(a) placement shall be based on the student's individualized education program and determined at least annually;

(b) placement shall be as close as possible to the student's home, and unless the student's individualized education program requires some other arrangement, the student shall be educated in the school he or she would have attended if not disabled;

(c) in selecting the least restrictive environment, consideration must be given to any potential harmful effect on the student or on the quality of services that he or she needs; and

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

(5) A report of the evaluation upon which the recommendation is based shall be forwarded to the board of education along with the recommendation.

(6) In the event that the parent does not choose to participate in the development of such recommendations, the committee shall forward its recommendation to the board of education and the parents as otherwise required by this subdivision.

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

(i) There may be no delay in implementing a student's IEP, including any case in which the payment source for providing or paying for special education to the student is being determined.

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

(2) If on review of the recommendation of a committee on special education or a subcommittee on special education, the board of education disagrees with such recommendation, the board of education shall follow one of the following procedures:

(i) The board may remand the recommendation to the committee or subcommittee with a statement of the board's objections or concerns and a request that a timely meeting be held to review and consider such objections or concerns. The committee or subcommittee shall consider the board's objections or concerns, revise the IEP where appropriate, and resubmit a recommendation to the board. If the board continues to disagree with the recommendation of the committee or subcommittee, the board may either continue to remand the recommendation to the original committee or subcommittee for additional reviews of its objections or concerns, or establish a second committee or subcommittee to develop a new recommendation in accordance with subparagraph (ii) of this paragraph, provided that the board arranges for the programs and services in accordance with the student's IEP within 60 school days of receipt of consent to evaluate for a student not previously identified as having a disability, or within 60 school days of the referral for review of the student with a disability; or

(ii) The board may establish a second committee on special education or subcommittee to develop a new recommendation for the student at a meeting held in accordance with the procedures prescribed in this Part. If the board disagrees with such new recommendation, the board may remand the recommendation to such second committee or subcommittee with a statement of the board's objections or concerns

and a request that a timely meeting be held to review and consider such objections or concerns. Such second committee or subcommittee shall consider the board's objections or concerns, revise the IEP where appropriate, and resubmit a recommendation to the board. If the board continues to disagree with the recommendation of such second committee or subcommittee, the board may continue to remand the recommendation for additional reviews of its objections or concerns by such second committee or subcommittee, provided that the board arranges for the programs and services in accordance with the student's IEP, as developed by such second committee or subcommittee, within 60 school days of receipt of consent to evaluate for a student not previously identified as having a disability, or within 60 school days of the referral for review of the student with a disability. Nothing in this paragraph shall be construed to authorize the board to select the recommendation of the original committee or subcommittee once it has established a second committee or subcommittee to make a new recommendation for the student pursuant to this subparagraph.

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

(i) ensuring that each regular education teacher, special education teacher, related service provider, and/or other service provider, as defined in section 200.2(b)(11)(i)(a) of this Part, who is responsible for the implementation of a student's IEP, is provided a paper or electronic copy of the IEP prior to the implementation of such IEP or shall be able to access such student's IEP electronically. If the board of education or board of trustees adopts a policy that the student's IEP is to be accessed electronically, then such policy shall also ensure that the individuals responsible for the implementation of a student's IEP shall be notified and trained on how to access such IEPs electronically;

(ii) ensuring that supplementary school personnel, as defined in section 200.1(hh) of this Part, and each other provider responsible for assisting in the implementation of a student's IEP, has the opportunity to review a copy of the student's IEP, prior to the implementation of such program, and has ongoing access to a copy of the IEP, which may be the copy provided to the student's special education teacher or the teacher or related service provider under whose direction such supplementary school personnel or other provider works;

(iii) ensuring that each regular education teacher, special education teacher, related service provider, other service provider,

supplementary school personnel as defined in section 200.1(hh) of this Part, and other provider and support staff person has been informed, prior to the implementation of the IEP, of his or her responsibility to implement the recommendations on the student's IEP, including the responsibility to provide specific accommodations, program modifications, supports and/or services for the student in accordance with the IEP; and

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

(4) If the student's parent, teacher or an administrator of the school or agency believes that the program or placement recommended in the IEP is no longer appropriate, such party may refer the student to the committee on special education for review, provided that the student shall remain in the current placement pending a new recommendation of the committee on special education, unless the board and parent otherwise agree.

(5) When consultant teacher services are specified in a student's IEP, the regular education teachers of the student for whom the service will be provided shall be given the opportunity to participate in the instructional planning process with the consultant teacher to discuss the objectives and to determine the methods and schedules for such services following the development of the IEP.

(6) If a participating agency fails to provide agreed-upon transition services contained in the student's IEP, the district responsible for the student's education shall, as soon as possible, initiate a meeting to identify alternative strategies to meet the transition objectives and, if necessary, revise the student's IEP. Nothing in this Part shall relieve any participating agency of its responsibility to provide or pay for any transition service that the agency would otherwise provide to students with disabilities who meet its eligibility criteria.

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

(8) Students with disabilities who transfer school districts. (i) Transfer within New York State. In the case of a student with a disability who had an IEP that was in effect in this State and who transfers from one school district and enrolls in a new school district within the same school year, the new

school district shall provide such student with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents, until such time as the school district adopts the previously held IEP or develops, adopts and implements a new IEP that is consistent with Federal and State law and regulations.

(ii) Transfer from outside New York State. In the case of a student with a disability who transfers school districts within the same school year, who enrolls in a new school district and who had an IEP that was in effect in another State, the school district shall provide such student with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents, until such time as the school district conducts an evaluation pursuant to this section, if determined to be necessary by such school district, and develops a new IEP, if appropriate, that is consistent with Federal and State law and regulation.

(iii) Transmittal of Records. (a) To facilitate the transition for a student described in this paragraph, the new school district in which the student enrolls shall take reasonable steps to promptly obtain the student's records, including the IEP and supporting documents and any other records relating to the provision of special education services to the student, from the previous school in which the student was enrolled pursuant to 34 C.F.R. section 99.31(a)(2) (Code of Federal Regulations, 2009 edition, Superintendent of Documents, U.S. Government Printing Office, Stop SSOP, Washington, DC 20402-0001: 2009 – available at the Office of Counsel, New York State Education Department, State Education Building Room 148, 89 Washington Avenue, Albany, NY 12234).

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

(9) The school district shall not require a student with a disability to obtain a prescription for a drug or other substance identified under schedule I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. section 812) as a condition of receiving services under this Part (United States Code, 2006 edition, volume 13; Superintendent of Documents, U.S. Government Printing Office, Stop SSOP, Washington, DC 20402-0001; 2008 – available at the Office of Counsel, New York State Education Department, State Education Building Room 148, 89 Washington Avenue, Albany, NY 12234).

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

(1) Such review shall consider the following factors:

(i) the strengths of the student;

(ii) the concerns of the parents for enhancing the education of their child;

(iii) the results of the initial or most recent evaluation of the student;

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

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

(vi) the special factors described in paragraph (d)(3) of this section; and

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

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

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

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

(iii) the student’s anticipated needs;

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

(3) Prior to the annual review, the committee on special education shall notify the parent of its intent to review the student's program and placement in accordance with section 200.5(c) of this Part.

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

(g) *Amendments to the IEP*.

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

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

(ii) the committee on special education shall be notified of any changes made to the IEP pursuant to paragraph (2) of this subdivision; and

(iii) the parent shall receive a copy of the document that amends or modifies the IEP or, upon request, the parent shall be provided a revised copy of the entire IEP with the amendments incorporated.

(2) In making changes to a student's IEP after the annual review has been conducted, consistent with the procedures established in sections 4308(2)(i), 4355(2)(i), 4402(1)(b)(3)(b) and 4410(3)(a)(6) of the Education Law, the parent and the school district may agree not to convene a meeting of the committee on special education for the purpose of making those changes, and instead may develop a written document to amend or modify the student's current IEP under the following circumstances:

(i) the parent makes a request to the school district for an amendment to the IEP and the school district and such parent agree in writing; or

(ii) the school district provides the parent with a written proposal to amend a provision or provisions of the IEP that is conveyed in language understandable to the parent and in such parent's native language or other dominant mode of communication, informs and allows the parent the opportunity to consult with the appropriate personnel or related service providers concerning the proposed changes and the parent agrees in writing to such amendments.

(3) Amendments to an IEP pursuant to paragraph (2) of this subdivision shall not affect the requirement that the committee on special education review the IEP at least annually, or more often if necessary.

(h) *Requests to the committee on special education pursuant to section 4005 of the Education Law.* (1) If, pursuant to section 4005 of the Education Law, a committee on special education receives a written request for evaluative information and program recommendations for a student from a Family Court judge, a probation department, a social services district, the Office of Children and Family Services, or a preadmission certification committee established pursuant to section 9.51(d) of the Mental Hygiene Law, the committee shall, with parental consent or consent of a student 18 years of age or older, provide such information and recommendation to the requesting agency within 42 days of the date of receipt of such a request, provided that the committee on special education can obtain the consent of the student's parent to conduct an evaluation.

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

(i) forward a copy of the agency's request, as well as a request for parental consent for an evaluation, to the parent of the student at the address indicated in the request from the agency;

(ii) in the event that the parent does not grant consent or fails to respond to a request for consent, the committee shall notify the board of education that they may utilize the procedures described in section 200.5 of this Part to permit the district to conduct an evaluation of the student without the consent of the parent;

(iii) if consent has been obtained, conduct an evaluation comparable to that described in subdivision (b) of this section; and

(iv) develop a written recommendation which:

(a) indicates the reasons for determining that no disability exists; or

(b) if the student is determined to have a disability, provides a recommendation in accordance with paragraphs (d)(2) through (4) of this section.

(3) The committee shall forward a copy of the evaluation and recommendation to the requesting agency and to the board of education.

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

educational services by reason of receipt of a high school diploma or in accordance with Education Law, section 4402(5), whichever is earlier.

(1) The notice shall be provided:

(i) by November 1st of the school year within which a student who is placed in an in-state or out-of-state residential school program in accordance with article 81 or 89 of the Education Law will attain the age of 18 or, if such student is over the age of 18 when placed in such a residential program, at the time of placement; and

(ii) upon the first annual review after attaining the age of 15 for a student who is receiving nonresidential special services or programs in accordance with article 89 of the Education Law, or is receiving special services or programs in a day program at the Henry Viscardi School, and who:

(a) is receiving such special services or programs 100 percent of the school day;

(b) is receiving individualized attention or intervention because of intensive management needs or a severe disability; and

(c) may need adult services as determined by the committee on special education or multidisciplinary team following appropriate review of the student's physical, mental, emotional and educational history.

(2) The notice, which shall be in a form prescribed by the Commissioner of Education, shall:

(i) describe in detail the opportunity and procedure for obtaining from a State agency specified in Education Law, section 4402(1)(b)(5)(a), at least six months before such student attains the age of 21, a determination of the student's need for adult services and a recommendation of all appropriate programs operated, approved, authorized, or licensed by that agency which may be available when the student becomes ineligible for tuition-free educational services;

(ii) provide that:

(a) (1) within 20 days of receipt of notice by a student 18 years of age or older, the committee on special education or multidisciplinary team shall give the student the opportunity to consent or withhold consent to the release of relevant information as such term is defined in section 4402(1)(b)(5)(a) of the Education Law; or

(2) within 20 days of receipt of notice by the parent or guardian of a student less than 18 years of age, the committee on special education or multidisciplinary team shall give the parent or guardian the opportunity to consent or withhold consent to the release of relevant information; or

(3) within 30 days after receipt of notice by a student over the age of 18 years, if such student exercises neither option set forth in subclause (1) of this clause and a designated staff member of the staff of the educational facility has reason to believe that the student may not be able to understand the purpose of the form, the committee on special education or the multidisciplinary team shall give the parent or guardian the opportunity to consent or withhold consent to the release of relevant information;

(b) the committee on special education or multidisciplinary team, upon receipt of consent, shall forward the student's name and other relevant information in a report to the Commissioner of Mental Health, Commissioner of the Office for People With Developmental Disabilities, Commissioner of Social Services or Commissioner of Education or their designees. The committee on special education or multidisciplinary team shall determine which commissioner shall receive the report; and

(c) such information shall be released to the Council on Children and Families if there is a dispute as to the appropriate agency;

(iii) state that:

(a) within 10 school days of the date of receipt of consent, the committee on special education or multidisciplinary team shall forward the report, including all relevant information in its possession, to the commissioner of the appropriate agency or such commissioner's designee; and

(b) in the event that the committee on special education or multidisciplinary team is notified by the commissioner of the State agency receiving the report that such agency is not responsible for determining the need for and recommending adult services for the student, the committee on special education or multidisciplinary team shall forward the report to another of the commissioners identified in clause (ii)(b) of this paragraph, or, if there exists a dispute as to which agency may be responsible, shall forward the report to the Council on Children and Families for resolution of the dispute; and

(iv) state that in the event that consent is withheld, the notice shall be renewed each year until consent is granted or until the student is no longer eligible for tuition-free educational services.

(3) In addition to the requirements of paragraph (2) of this subdivision, the notice to the parent, or student, where appropriate, shall:

(i) identify all the documents to be forwarded by the committee on special education or multidisciplinary team pursuant to paragraph (2) of this subdivision;

(ii) inform the person notified of the opportunity to review the information to be forwarded and to provide additional relevant information that may be in that person's possession; and

(iii) provide assurances of the confidentiality of personally identifiable data which shall be in accordance with section 200.5(e) of this Part and section 247.5 of this Title, as applicable.

(4) The committee on special education or the multidisciplinary team shall forward additional and updated relevant information to the Commissioner of Mental Health, Commissioner of the Office for People With Developmental Disabilities, Commissioner of the Office of Children and Family Services or Commissioner of Education, or their designees, upon the request for such information by such commissioner or designee, and upon obtaining appropriate consent.

(5) On or before October 1st of each year, the committee on special education or the multidisciplinary team shall prepare and submit an annual report to the State Education Department, the form and content of which shall be prescribed by the Commissioner of Education in accordance with the provisions of section 4402(1)(b)(5)(e) of the Education Law.

(j) Additional procedures for identifying students with learning disabilities.

(1) A student suspected of having a learning disability as defined in section 200.1(zz)(6) of this Part must receive an individual evaluation that includes a variety of assessment tools and strategies pursuant to subdivision (b) of this section. The CSE may not rely on any single procedure as the sole criterion for determining whether a student has a learning disability. The individual evaluation shall be completed within 60 days of receipt of consent, unless extended by mutual written agreement of the student's parent and the CSE.

(i) The individual evaluation must include information from an observation of the student in routine classroom instruction and monitoring of the student's performance that was either done before the student was referred for an evaluation or from an observation of the student's academic performance in the regular classroom after the student has been referred for an evaluation and parental consent, consistent with section 200.5(b) of this Part, is obtained. Such observation shall be conducted by an individual specified in paragraph (2) of this subdivision.

(ii) To ensure that underachievement in a student suspected of having a learning disability is not due to lack of appropriate instruction in reading or mathematics, the CSE must, as part of the evaluation procedures pursuant to section 200.4(b) and (c) of this Part, consider,

(a) data that demonstrate that prior to, or as part of, the referral process, the student was provided appropriate instruction in regular education settings, delivered by qualified personnel; and

(b) data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the student's parents.

(2) The determination of eligibility for special education for a student suspected of having a learning disability must be made by the CSE, which shall include the student's regular education teacher as defined in section 200.1(pp) of this Part and at least one person qualified to conduct individual diagnostic examinations of students (such as a school psychologist, teacher of speech and language disabilities, speech/language pathologist or reading teacher),

(3) A student may be determined to have a learning disability if, when provided with learning experiences and instruction appropriate for the student's age or State-approved grade-level standards, the student does not achieve

adequately for the student's age or to meet State-approved grade-level standards in one or more of the following areas: oral expression, listening comprehension, written expression, basic reading skills, reading fluency skills, reading comprehension, mathematics calculation, mathematics problem solving; and

(i) The student either:

(a) does not make sufficient progress to meet age or State-approved grade-level standards in one or more of the areas identified in this paragraph when using a process based on the student's response to scientific, research-based intervention pursuant to section 100.2(ii) of this Title; or

(b) exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development that is determined by the CSE to be relevant to the identification of a learning disability, using appropriate assessments consistent with section 200.4(b) of this Part; and

(ii) The CSE determines that its findings under this paragraph are not primarily the result of a visual, hearing, or motor disability; an intellectual disability; emotional disturbance; cultural factors; environmental or economic disadvantage; or limited English proficiency.

(4) In addition to the criteria in paragraph (3) of this subdivision, the CSE is not prohibited from considering whether there is a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading fluency skills, reading comprehension, mathematical calculation and/or mathematical problem solving; provided that effective on and after July 1, 2012, a school district shall not use the severe discrepancy criteria to determine that a student in kindergarten through grade four has a learning disability in the area of reading.

(5) Specific documentation for the eligibility determination.

(i) When determining eligibility for a student suspected of having a learning disability, the CSE shall prepare a written report containing a statement of:

(a) whether the student has a learning disability;

(b) the basis for making the determination, including an assurance that the determination has been made in accordance with section 200.4(c)(1) of this Part;

(c) the relevant behavior, if any, noted during the observation of the student and the relationship of that behavior to the student's academic functioning;

(d) the educationally relevant medical findings, if any;

(e) whether, consistent with paragraph (3) of this subdivision:

(1) the student does not achieve adequately for the student's age or to meet State-approved grade-level standards; and

(2) the student

(i) does not make sufficient progress to meet age or State-approved grade-level standards; or

(ii) exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade level standards or intellectual development;

(f) the determination of the CSE concerning the effects of a visual, hearing, or motor disability; an intellectual disability; emotional disturbance; cultural factors; environmental or economic disadvantage; or limited English proficiency on the student's achievement level; and

(g) if the student has participated in a process that assesses the student's response to scientific, research-based intervention pursuant to section 100.2(ii) of this Title:

(1) the instructional strategies used and the student-centered data collected; and

(2) the documentation that the student's parents were notified in accordance with section 100.2(ii)(1)(vi) of this Title.

(ii) Each CSE member must certify in writing whether the report reflects the member's conclusion. If it does not reflect the member's conclusion, the CSE member must submit a separate statement presenting the member's conclusions.

200.5 Due process procedures.

(a) *Prior written notice (notice of recommendation) and other written notifications.* (1) Prior written notice (notice of recommendation) that meets the requirements of section 200.1(oo) of this Part must be given to the parents of a student with a disability a reasonable time before the school district proposes to or refuses to initiate or change the identification, evaluation, educational placement of the student or the provision of a free appropriate public education to the student. Prior written notices issued during the 2011-12 school year, and thereafter, shall be on a form prescribed by the commissioner.

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

(3) The prior written notice must include:

(i) a description of the action proposed or refused by the district;

(ii) an explanation of why the district proposes or refuses to take the action;

(iii) a description of other options that the CSE considered and the reasons why those options were rejected;

(iv) a description of each evaluation procedure, assessment, record, or report the CSE used as a basis for the proposed or refused action;

(v) a description of other factors that are relevant to the CSE's proposal or refusal;

(vi) a statement that the parents of a student with a disability have protection under the procedural safeguards of this Part, and, if this notice is not an initial referral for an evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and

(vii) sources for parents to contact to obtain assistance in understanding the provisions of this Part.

(4) The prior written notice must be written in language understandable to the general public, and provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so. If the native language or other mode of communication of the parent is not a written language, the school district shall take steps to ensure that the notice is translated orally or by other means to the parent in

his or her native language or other mode of communication; that the parent understands the content of the notice; and that there is written evidence that the requirements of this section have been met.

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

(i) Upon receipt of a referral for initial evaluation or prior to conducting a reevaluation, such prior written notice shall include a description of the proposed evaluation or reevaluation and the uses to be made of the information and indicate that the parent may submit evaluation information which, if submitted, shall be considered by the committee on special education as part of its evaluation or review.

(ii) Prior to the student's graduation with a local high school or Regents diploma, such prior written notice must indicate that the student is not eligible to receive a free appropriate public education after graduation with the receipt of the local high school or Regents diploma.

(iii) Prior to the student's graduation with an individualized education program (IEP) diploma or, beginning with the 2013-14 school year, prior to a student's exit with a skills and achievement commencement credential or a career development and occupational studies commencement credential as set forth in section 100.6 of this Title, such prior written notice must indicate that the student continues to be eligible for a free appropriate public education until the end of the school year in which the student turns age 21 or until the receipt of a Regents or local high school diploma.

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

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

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

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

(iii) For students described in section 200.4(i)(1), notice must be provided to the parent and, beginning at age 18 to the student, in accordance with section 200.4(i)(2) and (3) of this Part.

(iv) For a student whom the committee on special education has determined to be at risk of a future residential placement, information must be provided to the parent on community support services that may be available to the family, including the name and address of agencies which can perform an assessment of a family's community support needs, where such list has been made available to the committee.

(v) For students recommended for an approved private school, a copy of the approved private school's policy on the use of psychotropic medication must be provided to the student's parents if the school uses psychotropic medication.

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

(b) *Consent.* (1) The school district must make reasonable efforts to obtain written informed consent of the parent, as such term is defined in section 200.1(l) of this Part, and must have a detailed record of its attempts, and the results of those attempts. Written consent of the parent is required:

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

(a) parental consent is not required before reviewing existing data as part of an evaluation or a reevaluation or administering a test or other evaluation that is administered to all students unless, before administration of that test or evaluation, consent is required of parents of all students;

(b) parental consent need not be obtained for a reevaluation if the school district can demonstrate that it has made reasonable efforts to obtain that consent, and the student's parents failed to respond;

(c) in the event the parent of the student to be evaluated does not grant consent for an initial evaluation, such parent shall be informed by the committee chairperson that, upon request, the

parent will be given an opportunity to attend an informal conference with the committee or designated professionals most familiar with the proposed evaluation, the person who referred the student for such an evaluation pursuant to section 200.4(a)(1)(ii), (iii) and/or (iv) of this Part, and counsel or an advisor of the parent's choice, at which time the parent shall be afforded an opportunity to ask questions regarding the proposed evaluation. If at this meeting the parent and such person initiating the referral agree in writing that the referral is not warranted, the referral shall be withdrawn. Except in the case of a preschool child, a student who is home instructed pursuant to section 100.10 of this Title or a student placed in a private school by the parents at their own expense, if the parent does not request or attend such a conference, or continues to withhold consent for evaluation otherwise required for a period of 30 days after the date of receipt of a referral, the board of education may pursue the initial evaluation of the student by utilizing the due process procedures described in this section;

(ii) prior to the initial provision of special education to a student who has not previously been identified as having a disability. Consent for initial evaluation may not be construed as consent for initial provision of special education services; and

(iii) prior to releasing any personally identifiable information as described in subdivision (e) of this section, in accordance with sections 200.2(b)(6) and 200.4(h) of this Part;

(2) A school district may not use a parent's refusal to consent to one service or activity under paragraph (1) of this subdivision to deny the parent or child any other services, benefit, or activity of the school district, except for the conditions under paragraph (1) of this subdivision for which consent is required.

(3) If the parents of a student with a disability refuse to give consent for an initial evaluation or reevaluation or fail to respond to a request to provide consent for an initial evaluation, the school district may, but is not required to, continue to pursue those evaluations by using the due process procedures described in subdivisions (h) through (k) of this section. The school district does not violate its obligation to locate, identify, and evaluate a student in accordance with sections 200.2(a) and 200.4(b) and (c) of this Part if it declines to pursue the evaluation.

(4) If the parent of the student refuses to consent or fails to respond to a request to provide such consent to the initial provision of special education programs and services, the school district shall not provide the special

education programs and services to the student and shall not use the due process procedures described in subdivisions (h) through (k) of this section to challenge the parent's refusal to consent.

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

(ii) the school district shall not be required to convene a meeting of the committee on special education or develop an IEP under section 200.4 of this Part for the student.

(5) If, at any time subsequent to the initial provision of special education programs and services, the parent of a student revokes consent in writing for the continued provision of special education programs and services, the school district;

(i) shall not continue to provide any special education programs and services to the student, but must provide prior written notice in accordance with subdivision (a) of this section before ceasing the provision of special education programs and services;

(ii) shall not use the due process procedures described in subdivisions (h) through (k) of this section to obtain agreement or a ruling that the services may be provided to the student;

(iii) shall not be considered to be in violation of the requirement to make available a free appropriate public education to the student because of the failure to provide the student with further special education programs and services;

(iv) is not required to convene a meeting of the committee on special education or develop an IEP for the student for further provision of special education programs and services; and

(v) is not required to amend the student’s education records to remove any references to the student’s receipt of special education programs and services because of the revocation of consent.

(6) Consent for a ward of the State. If the student is a ward of the State and is not residing with the student's parent, the school district shall make reasonable efforts to obtain the informed consent from the parent of the student for an initial evaluation to determine whether the student is a student with a disability. The school district is not required to obtain

informed consent from the parent of a student, as defined in section 200.1(ii) of this Part, for an initial evaluation to determine eligibility for special education services if:

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

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

(iii) the rights of the parent to make educational decisions have been subrogated by a judge in accordance with State law and consent for an initial evaluation has been given by an individual appointed by the judge to represent the student.

(7) Consent for a student who is home instructed, pursuant to section 100.10 of this Title, or placed in a private school by parents at their own expense. If a parent of student who is home instructed or placed in a private school by their parents at their own expense does not provide consent for an initial evaluation or reevaluation, or the parent fails to respond to a request to provide consent, the school district may not continue to pursue those evaluations by using the due process procedures described in this section; and the school district is not required to consider the student as eligible for special education services.

(8) Students with disabilities who are covered by public benefits or insurance.

(i) Consent. Prior to accessing a student's or parent's public benefits or insurance for the first time, after providing notification to the student's parents consistent with subparagraph (ii) of this paragraph, the school district must obtain the written consent of the parent, consistent with the confidentiality requirements of sections 99.30 and 300.622 of the Code of Federal Regulations (Code of Federal Regulations, 2013 edition, title 34, sections 99.30 and 300.622, Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402-0001; 2013 - available at the Office of Counsel, New York State Education Department, State Education Building Room 148, 89 Washington Avenue, Albany, NY 12234), which consent must specify the personally identifiable information that may be disclosed (e.g., records or information about the services that may be provided to a particular student), the purpose of the disclosure (e.g., billing for special education services), and the agency to which the disclosure may be made (e.g., the State's public benefits or insurance program, such as Medicaid or Supplemental Security Insurance); and specify that the parent understands and agrees that the public agency may

access the parent's or student's public benefits or insurance to pay for services under this Part.

(ii) Notification. Prior to accessing a student's or parent's public benefits or insurance for the first time, and annually thereafter, the school district must provide the student's parents with written notification, consistent with the requirements of subdivision (a)(4) of this section, that includes:

(a) a statement of the parental consent provisions in subparagraph (i) of this paragraph;

(b) a statement that the parents are not required to sign up for or enroll in public benefits or insurance programs in order for their child to receive a free appropriate public education under Part B of the Individuals with Disabilities Education Act;

(c) a statement that the parents are not required to incur an out-of-pocket expense, such as the payment of a deductible or co-pay amount, incurred in filing a claim for services pursuant to this Part;

(d) a statement that the school district may not use the student's benefits under a public benefits or insurance program if that use would:

(1) decrease available lifetime coverage or any other insured benefit;

(2) result in the family paying for services that would otherwise be covered by the public benefits or insurance program and that are required for the student outside of the time the student is in school;

(3) increase premiums or lead to the discontinuation of benefits or insurance; or

(4) risk loss of eligibility for home and community-based waivers, based on aggregate health-related expenditures;

(e) a statement that the parents have the right, pursuant to Parts 99 and 300 of Title 34 of the Code of Federal Regulations, to withdraw their consent to disclosure of their child's personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (e.g., Medicaid) at any time; and

(f) a statement that the withdrawal of consent or refusal to provide consent under Parts 99 and 300 of Title 34 of the Code of Federal Regulations to disclose personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (e.g., Medicaid) does not relieve the school district of its responsibility to ensure that all required services are provided at no cost to the parents.

(9) Students with disabilities who are covered by private insurance. With regard to services required to provide a free appropriate public education to an eligible student under this Part, a school district may access the parents' private insurance proceeds only if the parents provide consent consistent with section 200.1(l) of this Part. Each time the school district proposes to access the parents' private insurance proceeds, the school district must obtain such parental consent, and inform the parents that their refusal to permit the school district to access their private insurance does not relieve the school district of its responsibility to ensure that all required services are provided at no cost to the parents.

(c) *Meeting notice.* (1) Whenever the committee on special education proposes to conduct a meeting related to the development or review of a student's IEP, or the provision of a free appropriate public education to the student, the parent must receive notification in writing at least five days prior to the meeting. The meeting notice may be provided to the parent less than five days prior to the meeting to meet the timelines in accordance with Part 201 of this Title and in situations in which the parent and the school district agree to a meeting that will occur within five days. The parent may elect to receive the notice of meetings by an electronic mail (e-mail) communication if the school district makes such option available. Meeting notices issued during the 2011-12 school year, and thereafter, shall be on a form prescribed by the commissioner.

(2) Such notice shall:

(i) inform the parent(s) of the purpose, date, time, and location of the meeting and the name and title of those persons who will be in attendance at the meeting;

(ii) indicate that the parent(s) has the right to participate as a member of the committee on special education with respect to the identification, evaluation and educational placement of his or her child;

(iii) state that the parent(s) has the right to invite such individuals with knowledge or special expertise about his or her child, including related service personnel as appropriate, as determined by the parent(s);

(iv) for meetings of the committee on special education, inform the parent(s) of his or her right to request, in writing at least 72 hours before the meeting, the attendance of the school physician member and an additional parent member of the committee on special education at any meeting of such committee pursuant to section 4402(1)(b) of the Education Law and include a statement, prepared by the State Education Department, explaining the role of having the additional parent member attend the meeting;

(v) for meetings of the committee on preschool special education, inform the parent(s) of his or her right to request, in writing at least 72 hours before the meeting, the attendance of an additional parent member at any meeting of such committee pursuant to section 4410(3)(a)(1) of the Education Law and include a statement, prepared by the State Education Department, explaining the role of having the additional parent member attend the meeting;

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

(vii) if the purpose of the meeting is to consider postsecondary goals and transition services, the meeting notice must also:

(a) indicate this purpose;

(b) indicate that the district will invite the student; and

(c) identify any other agency that will be invited to send a representative.

(viii) in the case of a child who was previously served under Part C (early intervention services), inform the parent(s) of his or her right to request an invitation to an initial CPSE meeting be sent to the early intervention service coordinator or other representatives of the early intervention system to assist with the smooth transition of services.

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

(i) notifying the parent(s) of the meeting, consistent with subdivision (c) of this section prior to the meeting to ensure that he or she will have an opportunity to attend;

(ii) scheduling the meeting at a mutually agreed on time and place and in a location that is physically accessible to the parents; and

(iii) using other methods to ensure parent participation, including individual or conference telephone calls pursuant to paragraph (7) of this subdivision.

(2) A meeting does not include informal or unscheduled conversations involving school personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities that school personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.

(3) A school district may conduct a CSE meeting without a parent in attendance if the school is unable to convince the parents that they should attend. In this case, the school must have a detailed record of its attempts, and the results of those attempts to arrange a mutually agreed on time and place.

(4) A decision may be made by the committee on special education without the involvement of the parents, if the school is unable to obtain the parents' participation in the decision. In this case, the school must have a record of its attempt to ensure their involvement.

(5) The school district must take whatever action is necessary to ensure that the parent understands the proceedings at the meetings of the committee on special education, including arranging for an interpreter for parents with deafness or whose native language is other than English.

(6) The parents of a student with a disability must be afforded an opportunity to inspect and review all education records with respect to the identification, evaluation, and educational placement of the student and the provision of a free appropriate public education to the student, in accordance with the requirements of 34 C.F.R. sections 300.613 through 300.625 (Code of Federal Regulations, 2009 edition, title 34, sections 300.613 – 300.625, Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402-0001; 2009 - available at the Office of Counsel, New York State Education Department, State Education Building Room 148, 89 Washington Avenue, Albany, NY 12234).

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

(e) *Confidentiality of personally identifiable data*. (1) *Personally identifiable* means:

(i) the name of the student, the student's parent, or other family member;

(ii) the address of the student;

(iii) a personal identifier, such as the student's social security number or student number; or

(iv) a list of personal characteristics or other information that would make it possible to identify the student with reasonable certainty.

(2) Each public school, public agency and approved private school subject to the provisions of this Part shall preserve the confidentiality of personally identifiable data, information or records pertaining to students with disabilities. Such confidentiality must be preserved in a manner consistent with the procedures adopted pursuant to section 200.2(b)(6) of this Part and/or in accordance with 20 USC 1232g and the provisions of part 99 of title 34 of the Code of Federal Regulations or its successor and sections 300.610 through 300.625. (United States Code, 2006 edition, volume 12; 2008; Superintendent of Documents, U.S. Government Printing Office, Stop SSOP Washington, DC 20402-9328: 2004; Code of Federal Regulations, 2009 edition, title 34, part 99, Superintendent of Documents, U.S. Government Printing Office, Stop SSOP, Washington, DC 20402-0001; Code of Federal Regulations, 2009 edition, title 34, sections 300.610-300.625, Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402-0001; 2009 – available at the Office of Counsel, New York State Education Department, State Education Building Room 148, 89 Washington Avenue, Albany, NY 12234).

(f) *Procedural safeguards notice*. (1) A school district must use the procedural safeguards notice prescribed by the Commissioner of Education.

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

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

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

(ii) upon the first filing of a due process complaint notice to request mediation or an impartial hearing as described in subdivisions (h) and (j) of this section;

(iii) upon request by a parent;

(iv) upon a decision to impose a suspension or removal that constitutes a disciplinary change in placement pursuant to section 201.2(e) of this Title; and

(v) upon first receipt of a State complaint pursuant to section 200.5(l) of this Part.

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

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

(g) *Independent educational evaluations*. (1) Requests by parents. If the parent disagrees with an evaluation obtained by the school district, the parent has a right to obtain an independent educational evaluation at public expense. A parent is entitled to only one independent educational evaluation at public expense each time the school district conducts an evaluation with which the parent disagrees.

(i) If requested by the parent, the school district shall provide to parents, information about where an independent educational evaluation may be obtained, and the school district's criteria applicable for independent educational evaluations, as described in subparagraph (ii) of this section.

(ii) The criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, shall be the same as the criteria which the school district uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation. A school district may not impose additional conditions or timelines related to obtaining an independent educational evaluation at public expense.

(iii) If a parent requests an independent educational evaluation at public expense, the school district may ask for the parent's reason why he or she objects to the public evaluation.

(a) The explanation by the parent in subparagraph (iii) of this paragraph may not be required and the school district may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint notice to request a hearing to defend the public evaluation.

(iv) If a parent requests an independent educational evaluation at public expense, the school district must, without unnecessary delay, either ensure an independent educational evaluation is provided at public expense or file a due process complaint notice to request a hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria.

(v) If the school district files a due process complaint notice to request an impartial hearing and the final decision is that the school district's evaluation is appropriate, or that the evaluation obtained by the parent did not meet school district criteria, the parent has the right to an independent educational evaluation, but not at public expense.

(vi) If the parent obtains an independent educational evaluation at public expense or shares with the school district an evaluation obtained at private expense, the results of the evaluation:

(a) must be considered by the school district, if it meets the school district's criteria, in any decisions made with respect to the provision of a free appropriate public education for the student; and

(b) may be presented by any party as evidence at an impartial hearing for that student.

(2) Requests for evaluations by hearing officers. If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

(h) *Mediation.* (1) Each school district must ensure that procedures are established and implemented to allow parties to resolve disputes involving any matter for which an impartial due process hearing may be brought through a mediation process, including matters arising prior to the filing of a due process complaint notice. Such procedures must ensure that:

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

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

(iii) the mediation session is conducted by a qualified and impartial mediator, as defined in section 200.1(dd) of this Part, who is trained in effective mediation techniques, is knowledgeable in laws and regulations relating to the provision of special education services and who is selected by the community dispute resolution center on a random, i.e., rotation basis or, if not selected on a random basis, then by mutual agreement of both parties. An individual who serves as a mediator may not be the employee of any school district or State agency that is involved in the education or care of the student and must not have a personal or professional interest that conflicts with the individual's objectivity;

(iv) each session in the mediation process is scheduled in a timely manner and is held in a location that is convenient to the parties to the dispute;

(v) discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings; and

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

(2) Opportunity to meet with a disinterested party. A school district may establish procedures that provide parents and schools who elect not to use the mediation process the opportunity to meet, at a time and location convenient to the parents, with a disinterested party who is from a community dispute resolution center who would explain the benefits of the mediation process, and encourage the parents to use the process; except that, a school district may not deny or delay a parent's right to a due

process hearing under this section if the parent elects not to participate in this meeting.

(3) If the written agreement reached by the parties in mediation is inconsistent with the student's IEP then the student's IEP must be immediately amended to be consistent with the mediation agreement.

(4) Mediation, including meetings with the parent(s) described in paragraph (2) of this subdivision, shall be provided by community dispute resolution centers through a contract with the State Education Department.

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

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

(i) the name of the student;

(ii) the address of the residence of the student or in the case of a homeless student as defined in section 200.1(hhh) of this Part, available contact information for the student and the name of the school the student is attending;

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

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

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

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

(3) The due process complaint notice shall be deemed to be sufficient unless the party receiving the notice notifies the impartial hearing officer, appointed

in accordance with the rotational selection process in section 200.2(e)(1) of this Part and the requirements in subparagraphs (3)(i) and (ii) of subdivision (j) of this Part, and the other party in writing, within 15 days of the receipt of the due process complaint notice, that the receiving party believes the notice has not met the requirements of paragraph (1) of this subdivision. No party may challenge the sufficiency of a due process complaint using this procedure for expedited impartial hearings conducted pursuant to section 201.11 of this Title.

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

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

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

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

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

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

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

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

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

(7) Amended due process complaint notice. (i) A party may amend its due process complaint notice only if:

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

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

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

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

(i) Timeline for requesting an impartial hearing. The request for an impartial due process hearing must be submitted within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, except that the two-year timeline shall not apply to a parent if the parent was prevented from requesting the impartial hearing due to specific misrepresentations by the school district that it had resolved the problem forming the basis of the complaint or the school district's withholding of information from the parent that was required to be provided to the parent under this Part or under Part 201 of this Title.

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

(iii) The school district shall inform the parent in writing of the availability of mediation and of any free or low-cost legal and other relevant services, such as parent centers, available in the area:

(a) when an impartial due process hearing is requested; or

(b) at the parent's request.

(2) Resolution process. (i) Resolution meeting. Prior to the opportunity for an impartial due process hearing under paragraph (1) of this subdivision, the school district shall, within 15 days of receiving the due process complaint notice from the parent, convene a meeting with the parents and the relevant member or members of the committee on special education, as determined by the school district and the parent, who have specific knowledge of the facts identified in the complaint, which shall include a representative of the school district who has decision-making authority on behalf of the school district and may not include an attorney of the school district unless the parent is accompanied by an attorney, where the parents of the student discuss their complaint and the facts that form the basis of the complaint, and the school district has the opportunity to resolve the complaint. The school district shall take steps to ensure that one or both of the parents of the student with a disability are present at the resolution meeting, including notifying parents of the meeting early enough to ensure that they will have the opportunity to attend and scheduling the resolution meeting at a mutually agreed on time and place and in a location that is physically accessible to the parents.

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

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

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

(v) Resolution period. If the school district has not resolved the due process complaint to the satisfaction of the parents within 30 days of the receipt of the due process complaint notice, the impartial due process hearing may occur consistent with the time period provided in section 200.5(j)(3)(iii) of this Part.

(vi) Failure to convene or participate. Except where the parties have jointly agreed to waive the resolution process or use mediation, the failure of a parent filing a due process complaint to participate in the resolution meeting will delay the timeline for the resolution process and due process hearing until the meeting is held.

(a) If the school district is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made (and documented), the school district may, at the conclusion of the 30-day period, request that an impartial hearing officer dismiss the parents' due process complaint.

(b) If the school district fails to hold the resolution meeting within 15 days of receipt of the parents' due process complaint or fails to participate in the resolution meeting, the parent may seek the intervention of the impartial hearing officer to begin the due process hearing timeline.

(3) Initiation of an impartial due process hearing. Upon receipt of the parent's due process complaint notice, or the filing of the school district's due process complaint notice, the board of education shall arrange for an impartial due process hearing to be conducted in accordance with the following rules:

(i) Except as provided in subparagraph (ii) of this paragraph and paragraph (6) of this subdivision, appointment from the impartial hearing officer list must be made in accordance with the rotational selection process established in section 200.2(e)(1) of this Part and the administrative procedures established by the board of education pursuant to section 200.2(b)(9) of this Part.

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

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

time period specified in clause (a) or (b) of subparagraph (iii) of this paragraph.

(c) The impartial hearing officer shall not accept appointment if he or she is serving as the attorney in a due process complaint in the same school district or has served as the attorney in a due process complaint in the same school district within a two-year period of time preceding the offer of appointment; or if he or she is an individual with special knowledge or training with respect to the problems of children with disabilities who has accompanied and advised a party from the same school district in a due process complaint within a two-year period.

(ii) The board of education or trustees shall immediately appoint an impartial hearing officer to conduct the hearing. A board of education may designate one or more of its members to appoint the impartial hearing officer.

(a) Consolidation and multiple due process hearing requests. For a subsequent due process complaint notice filed while a due process complaint is pending before an impartial hearing officer involving the same parties and student with a disability:

(1) Once appointed to a case in accordance with the rotational selection process established in section 200.2(e)(1) of this Part, the impartial hearing officer with the pending due process complaint shall be appointed to a subsequent due process complaint involving the same parties and student with a disability, unless that impartial hearing officer is unavailable.

(2) The impartial hearing officer may consolidate the new complaint with the pending complaint or provide that the new complaint proceed separately as an individual complaint before the same impartial hearing officer.

(3) Consolidation of such complaints or the denial of such consolidation shall be by written order.

(4) When considering whether to consolidate one or more separate requests for due process, in the interests of judicial economy and the interests of the student, the impartial hearing officer shall consider relevant factors that include, but are not limited to:

(i) the potential negative effects on the child's educational interests or well-being which may result from the consolidation;

(ii) any adverse financial or other detrimental consequence which may result from the consolidation of the due process complaints; and

(iii) whether consolidation would:

(a) impede a party's right to participate in the resolution process prescribed in paragraph (2) of this subdivision;

(b) prevent a party from receiving a reasonable opportunity to present its case in accordance with subparagraph (xiii) of this paragraph; or

(c) prevent the impartial hearing officer from timely rendering a decision pursuant to paragraph (5) of this subdivision.

(5) If the due process complaints are consolidated, the timeline for issuance of a decision in the earliest pending due process complaint shall apply.

(6) Nothing in this section shall be construed to preclude a parent from filing a due process complaint on an issue separate from a due process complaint already filed.

(iii) Timeline for commencing the hearing or pre-hearing conference. Unless an extension is granted pursuant to subparagraph (5)(i) of this subdivision:

(a) when a school district files a due process complaint notice, the hearing or pre-hearing conference shall commence within the first 14 days after the date upon which the impartial hearing officer is appointed.

(b) when a parent files a due process complaint notice, the hearing or a pre-hearing conference shall commence within the first 14 days after:

(1) the date upon which the impartial hearing officer receives the parties' written waiver of the resolution meeting; or

(2) the impartial hearing officer receives the parties' written confirmation that a mediation or resolution meeting was held but no agreement could be reached; or

(3) the expiration of the 30-day resolution period, whichever shall occur first, unless

(4) the parties agree in writing to continue mediation at the end of the 30-day resolution period, in which case, the hearing or pre-hearing conference shall commence within the first 14 days after the impartial hearing officer is notified in writing that either party withdrew from mediation.

(iv) The impartial hearing officer shall be authorized to administer oaths and to issue subpoenas in connection with the administrative proceedings before him/her.

(v) A written or, at the option of the parents, electronic verbatim record of the proceedings before the impartial hearing officer shall be maintained and made available to the parties.

(vi) At all stages of the proceeding, where required, interpreters of the deaf, or interpreters fluent in the native language of the student's parent, shall be provided at district expense.

(vii) The parties to the proceeding may be accompanied and advised by legal counsel and by individuals with special knowledge or training with respect to the problems of students with disabilities. At all stages of the proceeding, the impartial hearing officer may assist an unrepresented party by providing information relating only to the hearing process. Nothing contained in this subparagraph shall be construed to impair or limit the authority of an impartial hearing officer to ask questions of counsel or witnesses for the purpose of clarification or completeness of the record.

(viii) In the event the impartial hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

(ix) In the event the impartial hearing officer determines that the interests of the parent are opposed to or are inconsistent with those of the student, or that for any other reason the interests of the student would best be protected by appointment of a guardian *ad litem*, the impartial hearing officer shall appoint a guardian *ad litem* to protect the interests of such student, unless a surrogate parent shall have previously been assigned. The impartial hearing officer shall ensure that the

procedural due process rights afforded to the student's parent pursuant to this section are preserved throughout the hearing whenever a guardian *ad litem* is appointed.

(x) The hearing shall be conducted at a time and place which is reasonably convenient to the parent and student involved and shall be closed to the public unless the parent requests an open hearing.

(xi) A prehearing conference with the parties may be scheduled. Such conference may be conducted by telephone. A transcript or a written summary of the prehearing conference shall be entered into the record by the impartial hearing officer. A prehearing conference is for the purposes of:

(a) simplifying or clarifying the issues;

(b) establishing date(s) for the completion of the hearing;

(c) identifying evidence to be entered into the record;

(d) identifying witnesses expected to provide testimony; and/or

(e) addressing other administrative matters as the impartial hearing officer deems necessary to complete a timely hearing.

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

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

(b) The impartial hearing officer, wherever practicable, shall enter into the record a stipulation of facts and/or joint exhibits agreed to by the parties.

(c) The impartial hearing officer may receive any oral, documentary or tangible evidence except that the impartial hearing officer shall exclude evidence that he or she determines to be irrelevant, immaterial, unreliable or unduly repetitious. The impartial hearing officer may receive testimony by telephone, provided that such testimony shall be made under oath and shall be subject to cross-examination.

(d) The impartial hearing officer may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious.

(e) The impartial hearing officer may limit the number of additional witnesses to avoid unduly repetitious testimony.

(f) The impartial hearing officer may take direct testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross-examination.

(g) The impartial hearing officer may receive memoranda of law from the parties not to exceed 30 pages in length, with typed material in minimum 12-point type (footnotes minimum 10 point type) and not exceeding 6 1/2 by 9 1/2 inches on each page.

(xiii) Each party shall have up to one day to present its case unless the impartial hearing officer determines that additional time is necessary for a full, fair disclosure of the facts required to arrive at a decision. Additional hearing days, if required, shall be scheduled on consecutive days wherever practicable.

(xiv) The parents shall have the right to determine whether the student shall attend the hearing.

(xv) If, by mutual agreement of the parties, the impartial hearing officer is deemed incapacitated or otherwise unavailable or unwilling to continue the hearing or issue the decision, the board of education shall rescind the appointment of the impartial hearing officer and appoint a new impartial hearing officer in accordance with the procedures as set forth in this subdivision.

(xvi) Commencing July 1, 2002, each board of education shall report information relating to the impartial hearing process, including but not limited to the request for, initiation and completion of each impartial hearing, to the Office of Special Education of the State Education

Department in a format and at an interval prescribed by the commissioner.

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

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

(ii) Procedural issues. In matters alleging a procedural violation, an impartial hearing officer may find that a student did not receive a free appropriate public education only if the procedural inadequacies impeded the student's right to a free appropriate public education, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parent's child, or caused a deprivation of educational benefits. Nothing in this paragraph shall be construed to preclude an impartial hearing officer from ordering a school district to comply with procedural requirements under this Part and Part 201 of this Title.

(iii) Settlement agreements. An impartial hearing officer shall not issue a so-ordered decision on the terms of a settlement agreement reached by the parties in other matters not before the impartial hearing officer in the due process complaint or amended due process complaint. Nothing in this subdivision shall preclude a party from seeking to admit a settlement agreement or administrative decision into evidence.

(5) Timeline to render a decision. Except as provided in section 200.16(h)(9) of this Part and section 201.11 of this Title, if a school district files the due process complaint, the impartial hearing officer shall render a decision, and mail a copy of the written, or at the option of the parents, electronic findings of fact and the decision to the parents and to the board of education not later than 45 days from the day after the public agency's due process complaint is received by the other party and the State Education Department. Except as provided in section 200.16(h)(9) of this Part and section 201.11 of this Title, if the parent files the due process complaint notice, the decision is due not later than 45 days from the day after one of the following events, whichever shall occur first: (a) both parties agree in writing to waive the resolution meeting; (b) after either the mediation or resolution meeting starts but before the end of the 30-day period, the

parties agree in writing that no agreement is possible; (c) if both parties agree in writing to continue the mediation at 13 the end of the 30-day resolution period, but later, the parent or public agency withdraws from the mediation process or (d) the expiration of the 30-day resolution period . In cases where extensions of time have been granted beyond the applicable required timelines, the decision must be rendered and mailed no later than 14 days from the date the impartial hearing officer closes the record. The date the record is closed shall be indicated in the decision. After a final decision has been rendered, the impartial hearing officer shall promptly transmit the record to the school district together with a certification of the materials included in the record. The record of the hearing and the findings of fact and the decision shall be provided at no cost to the parents. Within 15 days of mailing the decision to the parties, the impartial hearing officer shall submit the decision to the Office of Special Education of the State Education Department. All personally identifiable information, in accordance with the guidelines provided by the commissioner, shall be deleted from the copy forwarded to the Office of Special Education.

(i) An impartial hearing officer may grant specific extensions of time beyond the periods set out in this paragraph, in subparagraph (3)(iii) of this subdivision, or in section 200.16(h)(9) of this Part at the request of either the school district or the parent. The impartial hearing officer shall not solicit extension requests or grant extensions on his or her own behalf or unilaterally issue extensions for any reason. Each extension shall be for no more than 30 days. Not more than one extension at a time may be granted. The reason for each extension must be documented in the hearing record.

(ii) The impartial hearing officer may grant a request for an extension only after fully considering the cumulative impact of the following factors:

(a) whether the delay in the hearing will positively contribute to, or adversely affect, the child's educational interest or;

(b) whether a party has been afforded a fair opportunity to present its case at the hearing in accordance with the requirements of due process;

(c) any adverse financial or other detrimental consequences likely to be suffered by a party in the event of delay; and

(d) whether there has already been a delay in the proceeding through the actions of one of the parties.

(iii) Absent a compelling reason or a specific showing of substantial hardship, a request for an extension shall not be granted because of

school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, avoidable witness scheduling conflicts or other similar reasons. Upon a finding of good cause based on the likelihood that a settlement may be reached, an extension may be granted for settlement discussions between the parties. The impartial hearing officer shall not rely on the agreement of the parties as a basis for granting an extension. No extension shall be granted after the record close date.

(iv) The impartial hearing officer shall promptly respond in writing to each request for an extension and shall set forth the facts relied upon for each extension granted. The response shall become part of the record. The impartial hearing officer may render an oral decision to an oral request for an extension if the discussions are conducted on the record, but shall subsequently provide that decision in writing and include it as part of the record. For each extension granted, the impartial hearing officer shall set a new date for rendering his or her decision, and notify the parties in writing of such date, and as required, revise the schedule of remaining hearing dates set forth in the written prehearing order issued pursuant to clause (xi)(b) of paragraph (3) of this subdivision to ensure that the impartial hearing officer's decision is issued by the revised decision due date.

(v) The impartial hearing officer shall determine when the record is closed and notify the parties of the date the record is closed. The decision of the impartial hearing officer shall be based solely upon the record of the proceeding before the impartial hearing officer, and shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact. The impartial hearing officer shall attach to the decision a list identifying each exhibit admitted into evidence. Such list shall identify each exhibit by date, number of pages and exhibit number or letter. In addition, the decision shall include an identification of all other items the impartial hearing officer has entered into the record. The decision shall also include a statement advising the parents and the board of education of the right of any party involved in the hearing to obtain a review of such a decision by the State review officer in accordance with subdivision (k) of this section. The decision of the impartial hearing officer shall be binding upon both parties unless appealed to the State review officer.

(vi) For purposes of this section, the record shall include copies of:

(a) the due process complaint notice and any response to the complaint pursuant to paragraphs (4) and (5) of subdivision (i) of this Part;

(b) all briefs, arguments or written requests for an order filed by the parties for consideration by the impartial hearing officer;

(c) all written orders, rulings or decisions issued in the case including an order granting or denying a party's request for an order and an order granting or denying an extension of the time in which to issue a final decision in the matter;

(d) any subpoenas issued by the impartial hearing officer in the case;

(e) all written and electronic transcripts of the hearing;

(f) any and all exhibits admitted into evidence at the hearing, including documentary, photographic, audio, video, and physical exhibits;

(g) any other documentation deemed relevant and material by the impartial hearing officer; and

(h) any other documentation as may be otherwise required by this section.

(6) Withdrawal of a Due Process Complaint. A due process complaint may be withdrawn by the party requesting a hearing as follows:

(i) Prior to the commencement of the hearing, a voluntary withdrawal by the party requesting the hearing shall be without prejudice unless the parties otherwise agree. For purposes of this paragraph, the commencement of the hearing shall not mean the initial prehearing conference if one is conducted, but shall mean the first date the hearing is held after such conference.

(ii) Except for withdrawals in accordance with subparagraph (i) of this paragraph, a party seeking to withdraw a due process complaint shall immediately notify the impartial hearing officer and the other party. The impartial hearing officer shall issue an order of termination. A withdrawal shall be presumed to be without prejudice except that the impartial hearing officer may, at the request of the other party and upon notice and an opportunity for the parties to be heard, issue a written decision that the withdrawal shall be with prejudice. The decision of an impartial hearing officer that a withdrawal shall be with or without prejudice is binding upon the parties unless appealed to the State review officer.

(iii) The withdrawal of a due process complaint does not alter the timeline pursuant to paragraph (1)(i) of this section for requesting an impartial hearing.

(iv) If the party subsequently files a due process complaint within one year of the withdrawal of a complaint that is based on or includes the same or substantially similar claims as made in a prior due process complaint that was previously withdrawn by the party, the school district shall appoint the same impartial hearing officer appointed to the prior complaint unless that impartial hearing officer is no longer available to hear the re-filed due process complaint.

(v) Nothing in this section shall preclude an impartial hearing officer, in his or her discretion, from issuing a decision in the form of a consent order that resolves matters in dispute in the proceeding.

(k) *Appeal to a State review officer of the State Education Department*. (1) Any party aggrieved by the findings of fact and the decisions of an impartial hearing officer rendered in accordance with subdivision (j) of this section may appeal to a State review officer of the State Education Department. Such a review shall be initiated and conducted in accordance with the provisions of Part 279 of this Title.

(2) The State review officer must ensure that, not later than 30 days after the receipt of a request for a review, a final decision is reached and a copy of the written decision, or at the option of the parents, electronic findings of fact and the decisions, is mailed to each of the parties, except that a State review officer may grant specific extensions of time beyond the periods set out in this paragraph at the request of either party. The reason for the extension must be documented in the record.

(3) The written decision of the State review officer shall be final, provided that either party may seek judicial review by means of a proceeding pursuant to article 4 of the Civil Practice Law and Rules or 20 U.S.C. section 1415.

(l) *State complaint procedures.* (1) Filing a complaint.

(i) An organization or individual, including those from another state, may file a signed written complaint under the procedures described in this paragraph.

(ii) The complaint must include:

(a) a statement that the school district or the State Education Department has violated a Federal or State law or regulation relating to the education of students with disabilities;

(b) the facts upon which the statement is based;

(c) the signature and contact information for the complainant; and

(d) if alleging violations with respect to a specific student:

(1) the name and address of the residence of the student;

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

(3) in the case of a homeless child or youth as defined in section 200.1(hhh) of this Part, available contact information for the student, and the name of the school the student is attending;

(4) a description of the nature of the problem of the student, including facts relating to the problem; and

(5) a proposed resolution of the problem to the extent known and available to the party at the time the complaint is filed.

(iii) Limitation of time for filing a complaint.

(a) The complaint must allege a violation that occurred not more than one year prior to the date that the State complaint is received.

(iv) The original signed complaint shall be filed with the Office of Special Education, New York State Education Department, State Education Building Room 307, 89 Washington Avenue, Albany, New York, 12234.

(v) The party filing the State complaint must forward a copy of the State complaint to the school district or public agency serving the student at the same time the party files the State complaint with the State Education Department.

(vi) The school district, or public agency when appropriate, must provide a procedural safeguards notice to the parent filing the State complaint upon receipt of the parent's first State complaint in a school year.

(2) Complaint process. Upon receipt of a complaint the State Education Department:

(i) shall provide complainant written notice of receipt of the complaint and the complainant's right to submit additional information, either orally or in writing, regarding the allegations in the complaint;

(ii) may require a school district or other public agency to submit a written reply to the complaint which could include, at the discretion of the school district or other public agency, a proposal to resolve the complaint or notification to the Department that the parent who has filed the State complaint and the school district or other public agency have agreed to voluntarily engage in mediation;

(iii) may conduct an on-site investigation where the department determines such investigation is necessary;

(iv) shall review all relevant information; and

(v) shall issue a written final decision that:

(a) addresses each allegation in the complaint;

(b) contains findings of fact and conclusions;

(c) sets forth the reasons for the final decision;

(d) upon a finding of a violation of a Federal or State law or regulation relating to the education of students with disabilities, includes, if necessary for implementation of the decision:

(1) technical assistance activities;

(2) negotiations; and

(3) corrective actions to achieve compliance;

(e) upon a finding of failure to provide appropriate services to an individual student with a disability, includes:

(1) remediation of the denial of services, including, as appropriate, the awarding of monetary reimbursement or other corrective action appropriate to the needs of the student; and

(2) appropriate future provision of services for all students with disabilities;

(vi) shall issue the decision in subdivision (v) of this paragraph within 60 days of receipt of the complaint except:

(a) where exceptional circumstances exist with respect to a particular complaint; or

(b) when the parent and school district or other public agency involved agree to extend the time to engage in mediation pursuant to section 200.5(h) of this Part;

(vii) shall set aside any part of the complaint that is currently being addressed in an impartial hearing held pursuant to Education Law section 4404; and

(viii) shall, where an issue raised in a complaint has been previously decided in an impartial hearing held pursuant to Education Law section 4404 involving the same parties, notify the complainant that the impartial hearing decision is binding.

(3) Nothing in this section shall abrogate the right of an individual student with a disability to due process under Education Law section 4404, including the right to initiate an impartial hearing to address issues previously raised in a complaint decided pursuant to this section.

(4) Where a complaint involves the rights of an individual student under Education Law, article 89, upon receipt of an adverse decision rendered pursuant to this section, the complainant or the school district may initiate an impartial hearing pursuant to Education Law section 4404(1) to address the issues raised in the complaint.

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

(2) If a decision of a State review officer, pursuant to subdivision (k) of this section, agrees with the student's parents that a change of placement is appropriate, that placement must be treated as an agreement between the

State or school district and the parents for purposes of pendency during any subsequent appeals pursuant to paragraph (k)(3) of this section.

(3) If the complaint involves an application for initial services as a preschool student with a disability from a child who is transitioning from early intervention to preschool special education and related services, the school district is not required to provide the early intervention services that the child had been receiving. If the child is found eligible for special education and related services as a preschool student with a disability and the parent consents to the initial provision of special education and related services consistent with section 200.16(h)(7) of this Part, then the school district must provide those special education and related services that are not in dispute between the parent and the school district.

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

(i) no parent, as defined in section 200.1(ii) of this Part, can be identified;

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

(iii) the student is a ward of the State and does not have a parent as defined in section 200.1(ii) of this Part or the rights of the parent to make educational decisions on behalf of the student have been subrogated by a judge in accordance with State law.

(2) Qualifications. Persons selected as surrogate parents:

(i) shall not be officers, employees or agents of the local school district or State Education Department or other agency involved in the education or care of the student. A school district may select as a surrogate a person who is an employee of a nonpublic agency that only provides noneducational care for the student and who meets the standards in this paragraph. A surrogate parent is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent;

(ii) shall have no other interest which could conflict with their primary allegiance to the student they would represent; and

(iii) shall have knowledge and skills that ensure adequate representation of the student.

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

(i) Any person whose work involves education or treatment of students and who knows of a student who may need special education services, and who knows that the student meets the criteria in paragraph (1) of this subdivision, may file a request for assignment of a surrogate parent to the student with the committee on special education to which the student may be appropriately referred.

(ii) The committee on special education shall send notice of the possible need for a surrogate parent to the adult in charge of the student's place of residence and to the parents at their last known address.

(iii) The committee on special education shall determine whether the student's parents can be identified or located, or whether the student is a ward of the State, consistent with paragraph (1) of this subdivision. Where the student is known to the school district to be a ward of the State, such reasonable efforts to discover the whereabouts of a parent shall include consultation with the local social services district or other agency responsible for the care of the student. The determination of the need for a surrogate parent shall be completed within a reasonable time following the receipt of a referral for an initial evaluation, reevaluation or services. If the committee on special education finds that there is a need for a surrogate parent, a surrogate parent who meets the qualifications identified in paragraph (2) of this subdivision shall be selected from the list approved by the board of education, except as otherwise provided in subparagraph (v) through (vii) of this paragraph, within 10 business days of the date of the determination by the committee of the need for the surrogate parent.

(iv) A surrogate parent shall be assigned to represent the student in all matters relating to the identification, evaluation, and educational placement of the student and the provision of a free appropriate public education to the student for as long as a surrogate parent is required under this Part.

(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) he 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; provided that the approved reimbursement methodology, developed by the commissioner and approved by the Director of the Budget, may adjust this billable time threshold. 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 based on the number of half hour units delivered, provided that the total number of units delivered shall not exceed the recommendations for such services in 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 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' disabilities;

(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 74 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 evaluation of the child, the committee may exercise its discretion to obtain an evaluation of the child from another approved evaluator. If the committee recommends placing a child in an approved program that also conducted an evaluation of the child, it shall indicate in writing that the placement is appropriate for the child and shall provide written notice to the commissioner of such recommendation on a form prescribed by the commissioner.

(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. Such recommendation shall identify the setting where such services would be delivered; specify the frequency, duration, intensity and location of direct special education itinerant services; and, for students who attend a regular early childhood program, specify, if any, the frequency, duration and location for the provision of indirect special education itinerant services as such term is defined in this subparagraph;

(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; and

(d) consistent with the requirements of section 200.20(a)(9) of this Part, the special class shall include instructional services and related services, as specified in the student's individualized education program.

(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.

(i) The Commissioner shall review the final audit report, which shall be used to establish tuition rates based on audit to the extent the Commissioner determines that the audit findings and recommended disallowances contained therein are warranted and consistent with the Individuals with Disabilities Education Act (20 U.S.C. sections 1400 *et seq.*), Articles 81 and 89 of the Education Law, Parts 100 and 200 of the Commissioner's regulations and the Department's tuition reimbursement guidelines and requirements.

(ii) After consideration of the final audit by the Commissioner pursuant to subparagraph (i) of this paragraph, tuition rates based on audit shall then be established by the Commissioner and become final after certification by the Director of 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.

(3) Each approved preschool program shall ensure that:

(i) the executive director or person assigned to perform the duties of a chief executive officer hired or assigned on or after April 17, 2014, shall have earned a bachelor's degree or higher from an accredited or approved college or university in a field related to business, administration and/or education and/or shall hold a New York State certification or license to provide an evaluation of and/or a related service to a student with a disability as such term is defined in section 200.1(qq) of this Part. In addition, the executive director, or person assigned to perform the duties of a chief

executive officer, shall, at a minimum, have the following qualifications:

(a) knowledge of the program and supervisory requirements for providing appropriate evaluations and/or special education services to preschool students with disabilities;

(b) knowledge of and ability to comply with applicable laws and regulations;

(c) ability to maintain or supervise the maintenance of financial and other records;

(d) ability to establish the approved program's policy, program and budget; and

(e) ability to recruit, employ, train, direct and evaluate qualified staff.

(ii) the executive director or person assigned to perform the duties of a chief executive officer shall reside within a reasonable geographic distance from the program's administrative, instructional and/or evaluation sites to ensure appropriate oversight of the program; and

(iii) if paid as a full time executive director, the executive director shall be employed in a full-time, full-year position and shall not engage in activity that would interfere with or impair the executive director's ability to carry out and perform his or her duties, responsibilities and obligations.

(4) Each program approved to provide special education itinerant services shall ensure that such service is provided, consistent with the recommendations in the students' individualized education programs, as an itinerant service to the preschool student at a regular early childhood program or the student's home or other child care location identified by the parent, consistent with the requirements of section 200.16(i)(3)(ii) of this Part.

(5) Each approved preschool program shall ensure that the educational director, if hired on or after September 1, 2016, shall possess a NYS teaching certificate pursuant to section 80-3.3 of this Title valid for classroom teaching services to students with disabilities, birth-grade 2, or certification in early childhood education, or possesses New York State certification or licensure in speech-language pathology, psychology, occupational or physical therapy or another related services

field as such term is defined in section 200.1(qq) of this Part; and, consistent with the requirements of section 80-3.10 of this Title, shall hold New York State certification as a School Building Leader or School District Leader or School Administrator/Supervisor. Nothing in this paragraph shall require that an approved preschool program hire an educational director in addition to the executive director, when the executive director otherwise provides the on-site direction of the program.

(6) Make-up of missed services. Each preschool provider shall, consistent with Department guidelines, ensure the make-up of missed services occurs, consistent with the duration and location specified in the IEP, within 30 days of the missed session unless there is a documented child-specific reason why the make-up session could not be provided within 30 days.

(7) Program standards for instruction of preschool students with disabilities. Each approved provider shall, as applicable, ensure that preschool students with disabilities receive instruction and positive behavioral supports that are based on peer reviewed or evidence-based practices and consistent with the standards in this paragraph.

(i) Instructional standards for approved preschool special class programs.

(a) By not later than September 1, 2017, providers shall adopt and implement curricula aligned with the New York State Prekindergarten Learning Standards, which ensures continuity with instruction in the early elementary grades; and shall provide early literacy and emergent reading programs based on developmentally appropriate, effective and evidence-based instructional practices.

(b) The instructional program for preschool students with disabilities shall be based on the ages, interests, strengths and needs of the children.

(c) Procedures shall be implemented to promote the active engagement of parents and/or guardians in the education of their children. Such procedures shall include support to children and their families for a successful transition into kindergarten.

(ii) Program standards for positive behavioral supports for approved preschool special class programs.

(a) By not later than September 1, 2017, providers shall establish and implement a program-wide system of positive evidence-based practices to support social-emotional competence and teach social-emotional skills to preschool students, which shall include:

(1) universal supports for all children through nurturing and responsive relationships and high quality environments;

(2) practices that are targeted social-emotional strategies to prevent problem behaviors; and

(3) practices related to individualized intensive interventions.

(b) Except as provided pursuant to section 201.8 of this Title, no preschool student with a disability may be suspended, expelled or otherwise removed by the provider from an approved preschool special education program or service because of the student's behavior prior to the transfer of the student to another approved program recommended by the committee on preschool special education.

(iii) Progress Monitoring. Approved preschool special education programs shall conduct regular progress monitoring of student achievement data over time to adjust, as appropriate, the student's instructional program and, as necessary, to request meetings of the CPSE to consider changes to the student's individualized education program. The program shall provide regular written reports of student progress to the student's parent and committee on preschool special education, consistent with frequency or timetable for such periodic reports on the progress the student is making toward the annual goals as identified in the student's individualized education program.

(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.